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Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved From Extinction?

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Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved From Extinction?

Cover Page Footnote

*Associate Professor of Law, Indiana University School of Law-Indianapolis; B.A. 1969, Smith College; J.D. 1976, Indiana University School of Law. I wish to express my gratitude to Professor Lawrence Wilkins for his comments on a draft of this Article and to James Utterback for his research assistance.

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VOLUME LV | OCTOBER 1986 | NUMBER 1

CONTENTS

ARTICLES

EVOLUTION OF THE "SPECIES OF TORT LIABILITY" CREATED BY 42 U.S.C. § 1983: CAN CONSTITUTIONAL TORT BE SAVED FROM EXTINCTION? .... *Susanah M. Mead* 1

GETTING A FULL BITE OF THE APPLE: WHEN SHOULD THE DOCTRINE OF ISSUE PRECLUSION MAKE AN ADMINISTRATIVE OR ARBITRAL DETERMINATION BINDING IN A COURT OF LAW? .... *Jay Carlisle* 63

NOTE

A NARROW ELEVENTH AMENDMENT IMMUNITY FOR POLITICAL SUBDIVISIONS: RECONCILING THE ARM OF THE STATE DOCTRINE WITH FEDERALISM PRINCIPLES 101

FORDHAM LAW REVIEW

VOLUME LV NOVEMBER 1986 NUMBER 2

CONTENTS

ARTICLES

WHEN DOES THE "FAT LADY" SING?: AN ANALYSIS OF "AGREEMENTS IN PRINCIPLE" IN CORPORATE ACQUISITIONS .... *Harvey L. Temkin* 125

AN INVITATION TO COMMIT FRAUD: SECRET DESTRUCTION OF JOINT TENANT SURVIVORSHIP RIGHTS .... *Samuel M. Fetters* 173

NOTES

SECONDARY PICKETING IN RAILWAY LABOR DISPUTES: A RIGHT PRESERVED UNDER THE NORRIS-LAGUARDIA ACT 203

PUBLIC FORUM ANALYSIS AND STATE OWNED PUBLICATIONS: BEYOND *KUHLMEIER V. HAZELWOOD SCHOOL DISTRICT* 241

FORDHAM LAW REVIEW

VOLUME LV | DECEMBER 1986 | NUMBER 3

CONTENTS

ARTICLES

THE SUPREME COURT AND FREEDOM OF EXPRESSION FROM 1791 TO 1917 .... *Michael T. Gibson* 263

CHURCH PROPERTY DISPUTES: CHURCHES AS SECULAR AND ALIEN INSTITUTIONS .... *Louis J. Sirico, Jr.* 335

NOTE

WILSON V. GARCIA AND STATUTES OF LIMITATIONS IN SECTION 1983 ACTIONS: RETROACTIVE OR PROSPECTIVE APPLICATION? 363

FORDHAM LAW REVIEW

VOLUME LV MARCH 1987 NUMBER 4

CONTENTS

ARTICLES

EQUITY, EFFICIENCY, AND THE TAX REFORM ACT OF 1986 .... *Edward Yorio* 395

THE SIGNAL CABLE SENDS, PART II—INTERFERENCE FROM THE INDECENCY CASES? .... *Laurence H. Winer* 459

NOTES

STATUTES OF LIMITATIONS IN CIVIL RICO ACTIONS AFTER *WILSON V. GARCIA* 529

THE UNITARINESS FINDING AND ITS EFFECT ON MANDATORY DESEGREGATION INJUNCTIONS 551

JUDICIAL REVIEW OF ALLEGEDLY *ULTRA VIRES* ACTIONS OF THE VETERANS' ADMINISTRATION: DOES 38 U.S.C. § 211(a) PRECLUDE REVIEW? 579

IMMUNITY DOCTRINES AND EMPLOYMENT DECISIONS OF JUDGES 621

THE PRECLUSIVE EFFECT OF ARBITRAL DETERMINATIONS IN SUBSEQUENT FEDERAL SECURITIES LITIGATION 655

FORDHAM LAW REVIEW

VOLUME LV | APRIL 1987 | NUMBER 5

CONTENTS

ARTICLE

CONTRACT INTERPRETATION: THE PLAIN MEANING RULE IN LABOR ARBITRATION .... *Carlton J. Snow* 681

NOTES

EQUITABLE ESTOPPEL OF THE FEDERAL GOVERNMENT: AN APPLICATION OF THE PROPRIETARY FUNCTION EXCEPTION TO THE TRADITIONAL RULE 707

RULE 10b-5 AND THE CORPORATION'S DUTY TO DISCLOSE MERGER NEGOTIATIONS: A PROPOSAL FOR A SAFE HARBOR FROM THE STORM OF UNCERTAINTY 731

PRIOR CONSISTENT STATEMENTS: TEMPORAL ADMISSIBILITY STANDARD UNDER FEDERAL RULE OF EVIDENCE 801(d)(1)(B) 759

IMMEDIATE APPEAL OF PRETRIAL COMMITMENT ORDERS: "IT'S NOW OR NEVER" 785

NOTICE PROBLEMS IN THE DOUBLE-PLEDGE SITUATION: CAN A JUNIOR PLEDGEE GIVE NOTICE OF A SECURITY INTEREST TO A PLEDGEE-BAILEE UNDER SECTION 9-305 OF THE UNIFORM COMMERICAL CODE? 809

THE APPLICATION OF ANTIDISCRIMINATION STATUTES TO SHAREHOLDERS OF PROFESSIONAL CORPORATIONS: FORCING FELLOW SHAREHOLDERS OUT OF THE CLUB 839

POST-SUBMISSION SUBSTITUTION OF ALTERNATE JURORS IN FEDERAL CRIMINAL CASES: EFFECTS OF VIOLATIONS OF FEDERAL RULES OF CRIMINAL PROCEDURE 23(b) AND 24(c) 861

FORDHAM LAW REVIEW

VOLUME LV MAY 1987 NUMBER 6

CONTENTS

ARTICLES

THE TAX REFORM ACT OF 1986: A RESPONSE TO PROFESSOR YORIO AND HIS VISION OF THE FUTURE OF THE INTERNAL REVENUE CODE .... *Edward A. Zelinsky* 885

THE FUTURE OF TAX REFORM: A REJOINDER TO PROFESSOR ZELINSKY..... *Edward Yorio* 899

NOTES

THE PERSONAL LIABILITY OF CORPORATE OFFICERS IN PRIVATE ACTIONS UNDER THE SHERMAN ACT: *MURPHY TUGBOAT* IN DISTRESS 909

THE WRITTEN STATEMENT REQUIREMENT OF *WOLFF V. MCDONNELL*: AN ARGUMENT FOR FACTUAL SPECIFICITY 943

CONSTRUCTIVE DISCHARGE UNDER THE ADEA: AN ARGUMENT FOR THE INTENT STANDARD 963

TORTFEASOR LIABILITY FOR DISASTER RESPONSE COSTS: ACCOUNTING FOR THE TRUE COST OF ACCIDENTS 1001

ANTITRUST STANDING OF TARGET CORPORATIONS TO ENJOIN HOSTILE TAKEOVERS UNDER SECTION 16 OF THE CLAYTON ACT 1039

THE STANDARD OF PROOF NECESSARY TO ESTABLISH THAT A DEFENDANT HAS MATERIALLY BREACHED A PLEA AGREEMENT........................... 1059

THE PRESUMPTION OF CORRECTNESS: SHOULD THE COMMISSIONER BE REQUIRED TO CARRY THE INITIAL BURDEN OF PRODUCTION 1087

AN EXTENSION OF THE RIGHT OF ACCESS: THE PRO SE LITIGANT'S RIGHT TO NOTIFICATION OF THE REQUIREMENTS OF THE SUMMARY JUDGMENT RULE 1109

NONCOMMERCIAL DOOR-TO-DOOR SOLICITATION AND THE PROPER STANDARD OF REVIEW FOR MUNICIPAL TIME, PLACE, AND MANNER RESTRICTIONS 1139

CONTROLLING AND DETERRING FRIVOLOUS IN FORMA PAUPERIS COMPLAINTS 1165

Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements 1191

The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment 1221

EVOLUTION OF THE "SPECIES OF TORT LIABILITY" CREATED BY 42 U.S.C. § 1983: CAN CONSTITUTIONAL TORT BE SAVED FROM EXTINCTION?

SUSANAH M. MEAD *

INTRODUCTION

OVER a century ago, the Forty-Second Congress of the United States enacted section 1 of the Civil Rights Act of 1871 "to enforce the Provisions of the Fourteenth Amendment to the Constitution."[1] This section, now codified at 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[2]

Although the cause of action thus created is by definition a creature of statute, its filiation to the common law of tort is readily apparent. The section provides for injunctive relief or damages for injuries resulting from the described invasions of legally protected interests—functions typically served by tort liability. The goals of the section 1983 remedies articulated by the United States Supreme Court—compensation, vindication of rights, deterrence, and loss-spreading[3]—parallel the goals to be achieved by common law tort remedies.[4] The Supreme Court in interpreting the scope of protection provided by section 1983 has consistently noted its kinship with the law of torts.[5] The Court has instructed that

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1. Civil Rights Act of 1871, Ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1982)). Congress enacted this provision on April 20, 1871, and entitled it "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes."

2. 42 U.S.C. § 1983 (1982).

3. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496, 503 (1982) (vindication of rights); Gomez v. Toledo, 446 U.S. 635, 639 (1980) (same); Owen v. City of Independence, 445 U.S. 622, 650-56 (1980) (compensation, deterrence and loss-spreading); Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978) (compensation and deterrence).

4. *See* 2 F. Harper, F. James, & O. Gray, The Law of Torts, § 11.5 (2d ed. 1986) [hereinafter *Harper & James*]; W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on the Law of Torts, § 1 at 5-7, § 4 (5th ed. 1984) [hereinafter *Prosser & Keeton*].

5. In Monroe v. Pape, 365 U.S. 167 (1961), Justice Douglas compared the language of what is now § 1983 [previously § 1979] to its criminal counterpart at issue in Screws v.

section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"[6] and has specifically acknowledged that the statute "creates a species of tort liability."[7]

Its relationship to common law tort notwithstanding, the section 1983 species of tort liability has unique attributes. These attributes make it particularly suited to its intended purpose of redressing violations of constitutional rights by state actors. This Article identifies the characteristics of the species of tort liability created by section 1983, popularly known as "constitutional tort."[8] It concludes that, in tort terminology, the right of action Congress devised in section 1983 must be characterized as a strict liability variety.[9] Courts, however, have engrafted on the statutory cause of action state of mind or culpability requirements drawn from the common law of torts.[10] The position taken here is that the species is a creation of statute, and therefore its characteristics are identifiable through examination of the statute itself. To attribute to it characteristics that cannot be observed in the statutory language, or identified through legitimate statutory construction, creates a risk of misidentification and hence misapplication. The resulting confusion and lack of uniformity frustrates the purposes of section 1983 and dissipates the usefulness of constitutional tort as a watchdog of individual liberties.

An examination of Supreme Court case law interpreting the statute since 1961, when the Court in *Monroe v. Pape*[11] first recognized the

United States, 325 U.S. 91 (1945), and found that § 1983 did not require a "wilful" state of mind but rather that the statute "should be read against the background of tort liability." 365 U.S. at 187. Since then the kinship with the law of torts has been noted in many succeeding cases. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 635 (1980); Carey v. Piphus, 435 U.S. 247, 253 (1978).

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

7. Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

8. The term "constitutional tort" was coined by Professor Marshall Shapo in his article, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 Nw. U.L. Rev. 277, 323-24 (1965). It has been adopted by the Supreme Court as the descriptive term for cases brought under § 1983. *See, e.g.*, Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978).

9. Strict liability may be defined as: "liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence." *Prosser & Keeton*, *supra* note 4, at 534. It is clear from the legislative history, in particular the extensive debates that took place at the time the Civil Rights Act was under consideration, that Congress intended to create in § 1983 an action with the broadest possible remedial potential for redressing invasions of federal rights under color of state law. *See infra* notes 86-87. Therefore, the failure to include a fault or state of mind requirement in the statute could not have been an oversight. The imposition of a fault or state of mind requirement would have added significantly to the plaintiff's burden of proof. The clear inference to be drawn from the absence of such a requirement is that the drafters simply did not intend § 1983 plaintiffs to bear the burden of establishing fault. It is this absence of any fault requirement that gives § 1983 its strict liability character.

10. *See infra* note 22.

11. 365 U.S. 167 (1961).

broad scope of section 1983 protection, reveals the way that this species of tort liability has evolved. In this evolution the Supreme Court has performed dual roles with respect to section 1983. First, it has performed the taxonomic function of identifying the characteristics of the species of tort liability created by Congress in section 1983. In this capacity the Court's role has been limited to examining the statute itself and its legislative history to determine legislative intent.[12] Through its second function as interpreter of the Constitution, however, the Court has participated actively in the evolutionary process of constitutional tort. In this capacity, the Court has shaped the characteristics of the species.[13]

The thesis of this Article is that the Supreme Court, functioning as taxonomist, has implicitly identified the section 1983 species of tort as a strict liability variety.[14] The Court has grounded the prima facie case firmly in the statutory language, requiring only a showing of a constitutional deprivation under color of state law without reference to the culpability or state of mind of the tort-feasor.[15] In its role as interpreter of the Constitution, however, the Court has recently stated that the degree of culpability of the tort-feasor may be vital to establishing a constitutional violation.[16] In turn, because a constitutional violation is a requirement of the section 1983 prima facie case, the issue of the state actor's state of mind or degree of culpability may be determinative in a given case.[17] Thus, it cannot be said that state of mind plays no part in a constitutional tort case.[18] The Supreme Court cases illustrate that, apart from what

12. The Court's approach to § 1983 in Monroe v. Pape, 365 U.S. 167 (1961) and Monell v. Department of Social Servs., 436 U.S. 658 (1978), illustrates this aspect of the Court's role. In each case, the Court painstakingly examined and analyzed legislative history to reach its conclusions with respect to the proper interpretation of the statute. In *Monroe*, it concluded that Congress did not intend municipalities to fall within the meaning of "persons" liable for constitutional deprivations. Seventeen years later, a careful reexamination of the legislative history in *Monell* led the Court to change its mind on this issue.

13. A basic prerequisite to § 1983 liability is a constitutional violation. Therefore, the Court's approach to what is required to establish a constitutional violation is directly related to what kind of conduct will result in a constitutional tort.

While § 1983 has been interpreted to encompass claims based on violations of federal statutes, *see* Maine v. Thiboutot, 448 U.S. 1, 4 (1980), this Article will address only constitutional claims.

14. The Court's recognition that the statute contains no state of mind requirement has the effect of making § 1983 a strict liability action. The Court, however, has never explicitly identified it as such. Only the dissent in Owen v. City of Independence, 445 U.S. 622, 665 (1980) (Powell, J., dissenting) actually applied the term "strict liability" to § 1983.

15. *See infra* notes 128-29 and accompanying text.

16. *See infra* notes 171-77 and accompanying text.

17. Thus, a plaintiff who must establish a high degree of culpability to show the constitutional violation element of § 1983 gains little from a strict liability approach to the statute.

18. In addition to being relevant to the question of whether a constitutional violation has occurred, the state of mind issue is also important in the area of defenses and immunities to § 1983. The Supreme Court has concluded that the drafters of § 1983 did not

may be necessary to establish a constitutional deprivation, the state of mind or degree of culpability of the state actor is irrelevant to the prima facie section 1983 case. A recognition that section 1983 contains no *independent* state of mind requirement is essential to the conclusions reached here: section 1983 is a strict liability species of tort and the Supreme Court should explicitly classify it as such to ensure the continued evolution of the constitutional tort species.

Part I of this Article identifies the special problems of classification that have often impeded the evolution of the unique creature created by section 1983. It focuses on the need to distinguish among various fact situations in section 1983, the need to separate current concerns about section 1983 litigation from the elements of constitutional tort, and the need to recognize the dual roles of the Supreme Court in identifying and creating constitutional tort.

Part II traces the historical development of the section 1983 action with an emphasis on the taxonomic and creative functions of the Supreme Court. It demonstrates the impact of the considerations raised in Part I on the recent evolutionary process and interprets Supreme Court cases addressing the state of mind issue as it relates to (1) the section 1983 prima facie case, (2) the determination of whether there has been a constitutional violation, and (3) the special difficulties with cases involving municipal and supervisory liability. Further, Part II attempts to resolve apparent inconsistencies in the cases and extracts from them evidence that the Court has recognized the strict liability nature of the statutory action.

Part III identifies the nature of the section 1983 beast and proposes the use of a risk analysis approach in all section 1983 cases that is consistent with the strict liability nature of section 1983. Finally, the Conclusion warns that the survival of the species of tort liability created by section 1983 depends upon a recognition of its strict liability characteristics.

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intend to eliminate common law immunities. *See* Pierson v. Ray, 386 U.S. 547, 554 (1967). Therefore issues of good faith and reasonableness may be important in determing whether a defendant can claim a qualified immunity in § 1983 litigation. *See* Gomez v. Toledo, 446 U.S. 635 (1980) (good faith immunity for police superintendent); Procunier v. Navarette, 434 U.S. 555 (1978) (immunity for prison officials). *But see* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (eliminating the subjective part of the qualified immunity test). The Court, however, has clearly established that these are matters of defense and that the burden of pleading and proving them is on the defendant. Therefore, although certainly important in a given case, the role of state of mind in defenses is tangential to the focus in this Article on the characteristics of the § 1983 species itself and the role state of mind plays in the prima facie case. For discussions of the role state of mind plays in the defenses, see S. Nahmod, Civil Rights and Civil Liberties Litigation, A Guide to § 1983, § 8.12, at 258 (1978) [hereinafter S. Nahmod, *Civil Rights*]; Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 26-30 (1974); Note, *Basis of Liability in a Section 1983 Suit: When is the State-of-Mind Analysis Relevant?*, 57 Ind. L.J. 459, 465-73 (1982).

I. Problems in Classifying the Section 1983 Species Of Tort Liability

A. *Failure to Differentiate Among Subspecies*

The Supreme Court has consistently held that the section 1983 cause of action requires only a showing that an action taken under color of state law has resulted in a deprivation of a constitutionally protected right, privilege or immunity.[19] The plaintiff must establish (1) the status of the defendant as a representative of state government, (2) the existence of the right, privilege or immunity and deprivation thereof, and (3) causation.[20] The statute does not require the plaintiff to plead or prove the defendant's state of mind at the time of the deprivation. If tort classification is used, it is apparent that the statutory language imposes strict liability on one acting under color of state law who deprives another of a constitutional right.[21]

Courts have had a difficult time accepting the proposition that state of mind or culpability is not a relevant factor in the statement of a plaintiff's section 1983 case,[22] thereby impeding the identification of section

19. *See* Daniels v. Williams, 106 S. Ct. 662, 664 (1986); Parratt v. Taylor, 451 U.S. 527, 534-39 (1981); Gomez v. Toledo, 446 U.S. 635, 640 (1980); Monroe v. Pape, 365 U.S. 167, 171 (1961).

20. *See* City of Oklahoma City v. Tuttle, 105 S.Ct. 2427, 2439 (1985) (Brennan, J., concurring).

21. *See supra* note 9.

22. Lower courts have applied a variety of standards requiring plaintiffs to show something "extra" in the conduct of state actors to establish § 1983 liability. *See* Davidson v. O'Lone, 752 F.2d 817, 828 (3d Cir. 1984) (negligent failure to protect prison inmate from attack does not give rise to § 1983 claim even though no state remedy), *aff'd sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986); Clark v. Taylor, 710 F.2d 4, 9 (1st Cir. 1983) (prison official cannot be liable for negligent failure to act but may be liable for a failure to act that reflects a reckless or callous indifference to the rights and safety of prisoners); Morrison v. Washington County, 700 F.2d 678, 682 (11th Cir.) (hospital policies may violate duty of care and so constitute a violation of § 1983), *cert. denied*, 464 U.S. 864 (1983); Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982) (negligent failure to maintain railroad crossing not "sufficiently egregious" to be constitutionally tortious); Hirst v. Gertzen, 676 F.2d 1252, 1263 (9th Cir. 1982) (negligence in hiring and supervising deputy in charge of prisoners, resulting in death of a prisoner, states a § 1983 claim); Doe v. New York City Dep't of Social Servs., 649 F.2d 134, 141 (2d Cir. 1981) (to establish a § 1983 claim, plaintiff must show social agency's failure to detect foster father's sexual and physical abuse was the result of deliberate indifference); Williams v. Kelley, 624 F.2d 695, 697-98 (5th Cir. 1980) (plaintiff must show that jailor's conduct causing prisoner's death by choking was "sufficiently egregious" to be cognizable under § 1983), *cert. denied*, 451 U.S. 1019 (1981); Fulton Mkt. Cold Storage Co. v. Cullerton, 582 F.2d 1071, 1080 (7th Cir. 1978) (state or county tax official not liable under § 1983 unless violation of plaintiff's rights is negligent or with reckless disregard), *cert. denied*, 439 U.S. 1121 (1979); Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976) (en banc) (prison guards' negligence in permitting transcript to be lost "was not of sufficient magnitude to constitute a deprivation of rights under Section 1983"), *cert. denied*, 435 U.S. 932 (1978); Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975) (per curiam) (guards' negligence in leaving prisoner's personal property in a place exposed to thieves sufficient to state a § 1983 claim); Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.) (requiring more for a § 1983 claim by a prisoner against a guard than is required for common law battery), *cert. denied*, 414 U.S. 1033 (1973); McCray v. Maryland, 456 F.2d 1, 5 (4th Cir. 1972)

1983 as a strict liability cause of action. One reason for this is a frequent failure to recognize the distinctions among the various fact patterns that may give rise to section 1983 liability and to consider how the requirements of the statute function in each instance. Courts are particularly likely to interject a state of mind or reasonableness inquiry when a subordinate employee causes the constitutional injury and relief is sought from a supervisor or municipality.

Three-party cases[23] of this kind are of fairly recent origin because the Supreme Court's conclusion in *Monroe v. Pape* that "Congress did not undertake to bring municipal corporations within the ambit of [section 1983]"[24] effectively eliminated local governments as defendants. In addition, the Court's rather obscure discussion of supervisor liability in *Rizzo v. Goode*[25] may have discouraged claims against supervisors.[26] The Court reversed its position, in *Monell v. Department of Social Services*,[27] holding that municipalities are "person[s]" within the meaning of section 1983.[28] As a result, suits against parties other than the one actually violating the constitutional right have arisen frequently because municipalities and supervisors tend to be more attractive defendants than the individual actor.[29] A typical section 1983 case now often includes as de-

(clerk's negligence in processing plaintiff's appeal petition sufficient for § 1983 claim); Madison v. Manter, 441 F.2d 537, 538 (1st Cir. 1971) (police officer's negligent illegal search was not sufficient for § 1983 claim); Whirl v. Kern, 407 F.2d 781, 787-89 (5th Cir. 1968) (prisoner not required to show "improper motive" on part of sheriff in false imprisonment action under § 1983), *cert. denied*, 396 U.S. 901 (1969); Striker v. Pancher, 317 F.2d 780, 784 (6th Cir. 1963) (sheriff's advice to prisoner to forego right to counsel and to plead guilty was not sufficiently "reprehensible" to support a § 1983 claim).

23. Cases involving claims against municipalities or supervisors will be referred to in this Article as "three-party cases" although more than three parties may be involved.

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

25. 423 U.S. 362 (1976).

26. For a discussion of *Rizzo*, see *infra* notes 189-210 and accompanying text.

27. 436 U.S. 658 (1978).

28. The Supreme Court specifically overruled that portion of *Monroe* holding that local governments are wholly immune from liability under § 1983. Thus, for the first time municipalities were brought within the definition of "persons" who may be sued under § 1983 for violations of protected rights under color of state law. *See id.* at 690-91.

29. From a practical point of view, municipalities often have deeper pockets than the individuals who directly inflicted the harm. *See* Jaron, *The Threat of Personal Liability under the Federal Civil Rights Act: Does it Interfere with the Performance of State and Local Government?*, 13 Urb. Law. 1, 24 (1981). From a psychological point of view, a plaintiff constitutionally wronged by oppressive governmental action may better satisfy an emotional need for vindication through a suit against a high-level employee or the governmental unit itself than through a suit against a low-level employee. Moreover, after the Court's decision in Owen v. City of Independence, 445 U.S. 622 (1980), municipalities are particularly attractive defendants because they cannot claim the immunities that so often relieve individual defendants of liability. Finally, the eleventh amendment exempts the State, as an entity, from suit brought by citizens for damages or injunctive relief. *See* Quern v. Jordan, 440 U.S. 332, 339-41 (1979); Edelman v. Jordan, 415 U.S. 651, 675-77 (1974). Because § 1983 affords no relief against the state, the plaintiff must resort to suit against other actors who individually or collectively may have either deeper pockets for the recovery of damages or a broader decision-making role that is subject to injunctive relief.

fendants those who directly perpetrated the constitutional harm, the perpetrator's supervisor (perhaps the mayor) and often the city.[30]

The shift in plaintiffs' attention from the individual directly causing harm to the third party who may be responsible for the individual's actions has changed the focus of section 1983 litigation from individual responsibility for constitutional injuries to the far greater problem of institutional responsibility for constitutional harm.[31] Such a shift could greatly increase the effectiveness of section 1983 as a weapon against abuses of governmental power.[32] Instead, the result has been to further confound courts on what is required to establish liability.

The quandary courts face is whether the section 1983 case against the individuals whose acts directly caused the constitutional injury differs from the section 1983 case against the supervisory personnel and the city. The Supreme Court in *Monell* eliminated the most obvious way of approaching the problem when it concluded that municipalities cannot be held liable under section 1983 for the torts of municipal employees based on respondeat superior.[33] Without respondeat superior as a theory of

30. *See, e.g.*, City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985) (a city police officer and Oklahoma City were named as defendants); Brandon v. Holt, 469 U.S. 464 (1985) (suit against director of police; Court permitted amendment of complaint to include city as defendant); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (the Department and its Commissioner, the Board of Education and its Chancellor, and the City of New York and its Mayor were included as defendants); Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1374 (1986) (suit against police officers and the city).

31. *See* Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 33 n.144, 49-50 (1980) (arguing that institutional responsibility is a more pervasive problem than individual deprivations); Note, *A Theory of Negligence for Constitutional Torts*, 92 Yale L.J. 683, 697-98 (1983) (same) [hereinafter *A Theory of Negligence*].

32. *See* Owen v. City of Independence, 445 U.S. 622, 652 & n.36 (1980) (Threat of municipal § 1983 liability "may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights" and "increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates.").

33. Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978). The question of whether the Court was correct in rejecting vicarious liability based on respondeat superior for three-party cases has been the source of continuing debate. The *Monell* Court's interpretation of legislative intent on the question of basis of liability in § 1983 municipal liability cases has been sharply criticized. *See* Blum, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal Courts*, 51 Temp. L.Q. 409, 413 n.15 (1978) (suggesting that the Court's reliance on the Sherman amendment debate to support its view is unpersuasive; "a sounder conclusion would be that Congress simply did not consider respondeat superior liability when the Sherman amendment was debated"); Schnapper, *Civil Rights Litigation After* Monell, 79 Colum. L. Rev. 213, 215 n.15 (1979) (criticizing Court's grounds for rejecting respondeat superior); Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. Chi. L. Rev. 935, 936 (1979) (criticizing application of the Court's logic in the analogous area of immunity for executive officials); Note, Monell v. Department of Social Services: *One Step Forward and a Half Step Back for Municipal Liability Under Section 1983*, 7 Hofstra L. Rev. 893, 921 (1979) (in light of statute's legislative history and language, the Court's "dicta in that decision is, at best, poorly reasoned authority"). At least one member of the Supreme Court apparently favors reconsideration of the basis of liability issue in § 1983 municipal liability cases. *See* Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1303 (1986) (Stevens,

liability, courts have puzzled over how to approach a claim against a municipality or supervisor.[34] Unfortunately, the Supreme Court has for the most part failed to clearly identify and resolve the various problems that arise in three-party section 1983 litigation.[35]

Without clear guidance from the Court, approaches by the lower courts to three-party cases have been inconsistent.[36] Courts have fallen back on familiar concepts of tort law to determine the liability of a municipality or supervisor for the actions of a subordinate.[37] Courts faced with determining whether third party conduct has contributed to consti-

J., concurring in part and concurring in the judgment); City of Oklahoma v. Tuttle, 105 S. Ct. 2427, 2441 n.8 (1985) (Stevens, J., dissenting). The Court appears unlikely, however, to reexamine the basis of liability issue in § 1983 municipal liability cases. *See Tuttle*, 105 S. Ct. at 2434 n.5. Therefore, this Article proceeds on the assumption that any approach to constitutional tort must take account of the fact that vicarious liability has been eliminated as a basis of liability in three-party cases.

34. *See* cases collected *infra* note 36.

35. For a discussion of the Supreme Court's approach to three-party cases, see *infra* Part II C.1.

36. *See, e.g.*, Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985) (city jail supervisor liable under prisoner's § 1983 claim for his failure to train subordinates and establish procedures to protect constitutional rights even though he had no personal involvement in the acts of his employees); Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) (municipality liable for failure to adequately train a police officer when the conduct constitutes gross negligence amounting to conscious indifference; municipality not liable for a subordinate official's negligent or grossly negligent failure to train an officer in the absence of a pattern of similar incidents, but will be liable for the intentional conduct of its governing body even when not pursuant to an overall custom or policy), *cert. denied*, 467 U.S. 1215 (1984); Hull v. City of Duncanville, 678 F.2d 582 (5th Cir. 1982) (city's failure to enforce municipal train speed limits and maintain train crossings might give rise to a state tort claim, but the conduct was not sufficiently egregrious as to be constitutionally tortious); Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981) (board of health physicians recommended and performed sterilization after misdiagnosing sickle cell anemia trait; the court held that liability exists for official policy based on affirmative acts or omissions but that supervisor liability does not exist if the action is based on an isolated incident).

37. An example of this approach can be found in Hirst v. Gertzen, 676 F.2d 1252 (9th Cir. 1982). Clayton Hirst was found dead in his jail cell, hanged by his belt. His heirs instituted a § 1983 action alleging that the City and County, including various officials, had been grossly negligent in leaving the prisoner in the sole custody of a deputy who had a history of violent behavior toward prisoners, and had been negligent in hiring this deputy and allowing him to remain employed after prior incidents of violence towards prisoners had been disclosed. *Id.* at 1255. The district court dismissed the action ruling "that the proposed evidence did not establish a *prima facie* case of gross negligence." *Id.* at 1256. The Ninth Circuit responded: "Subsequent to the time that the district court's ruling was handed down, the Supreme Court decided the case of *Parratt v. Taylor*. In *Parratt*, the Supreme Court held that negligent conduct by persons acting under color of state law may be actionable under 42 U.S.C. § 1983." *Id.* at 1263 (citation omitted). In addressing the issue of liability the court stated:

> [The defendants'] duty to protect Hirst from unreasonable risks of harm was uncontroverted. [The heirs'] offer of proof, in our view, was sufficient to allege a triable issue that the county defendants' conduct in hiring and supervising their deputies was negligent and created a foreseeable risk that a violation of Hirst's civil rights would occur, and in fact proximately caused his death.

Id.

tutional injury have tended to ignore the statutory language, focusing instead on the nature of the defendant's conduct.[38] Given the breadth of the common law of torts and that it applies to all kinds of conduct—intentional, negligent and, in some circumstances, without fault—causing many kinds of invasions of legally protected interests—including property, reputation, relationships and others—it is hardly surprising that the approaches and conclusions in section 1983 cases have been inconsistent. The extensive vocabulary of common law tort is far too varied and imprecise to be transplanted to the particularized statutory cause of action created by section 1983. Many of the cases involve police or prison guard misconduct, raising questions about inadequate supervision or training[39] and leading some lower courts to the erroneous conclusion that an additional element of culpability by the city or supervisor must be established.[40] If section 1983 imposes strict liability on persons who under color of state law deprive others of constitutional rights, it is irrelevant whether the "person" is a prison guard, police officer, police chief, mayor, or city. To provide guidance to the courts, the Supreme Court must clarify the distinctions among the various factual situations and show how the statute applies in each.

B. *Resistance to Section 1983 Actions*

To suggest that section 1983 is a strict liability species of tort will no doubt trouble those who have expressed concerns over the expansion of section 1983 litigation since *Monroe v. Pape*. Much of the recent judicial and scholarly comment on section 1983 emphasizes the need to reclassify the species in a way that reduces the constitutional tort population.[41]

Perhaps the most widely voiced complaint is that federal courts are overwhelmed by the vast increase in section 1983 cases. In the two decades following *Monroe*, section 1983 suits increased over a hundred-

38. *See* Avery v. County of Burke, 660 F.2d 111, 115 (4th Cir. 1981) (proof of conduct essential element to § 1983 action); *see also* Whitman, *supra* note 31, at 18 (judges look to tort concepts to establish responsibility in § 1983 actions).

39. *See, e.g.*, Goodson v. City of Atlanta, 763 F.2d 1381, 1389 (11th Cir. 1985); Voutour v. Vitale, 761 F.2d 812, 815 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986); Smith v. Rose, 760 F.2d 102, 103-04 (6th Cir. 1985); Matzker v. Herr, 748 F.2d 1142, 1145 (6th Cir. 1984); Bell v. City of Milwaukee, 746 F.2d 1205, 1214 (7th Cir. 1984).

40. *See, e.g.*, Languirand v. Hayden, 717 F.2d 220, 227 (5th Cir. 1983) (for municipality to be liable for failure to adequately train a police officer the conduct "must constitute gross negligence amounting to conscious indifference" and must represent policy or custom), *cert. denied*, 467 U.S. 1215 (1984); Clark v. Taylor, 710 F.2d 4, 9 (1st Cir. 1983) (municipality liable for affirmative act or omission when there is a reckless or callous disregard for the plaintiff's rights); Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982) (conduct of a municipality "must be sufficiently egregious as to be 'constitutionally' tortious"); Avery v. County of Burke, 660 F.2d 111, 114-15 (4th Cir. 1981) (in addition to showing a deprivation by a state actor, the third party's failure to supervise must constitute deliberate indifference).

41. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 544 (1981); Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 Law & Soc. Ord. 557, 574-81 (1973).

fold.[42] Some legal scholars and jurists have viewed this rapid proliferation with alarm.[43] Despite the increase in cases filed under section 1983, a recent study indicates that the number of these cases have not burdened the federal court system unduly.[44] More importantly, denying legitimate claims simply because there are too many is indefensible. If an interest is entitled to legal protection, it is the responsibility of courts to provide a forum for its redress.[45]

A related argument asserts that the increased number of section 1983 cases filed in federal court threatens federalism.[46] The Supreme Court has been particularly concerned about the federal judiciary's use of its equitable power to interfere with state interests.[47] Section 1983's guaran-

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42. In his 1973 Article, Judge (now Chief Judge) Ruggero J. Aldisert of the Court of Appeals for the Third Circuit wrote:

> In fiscal 1960 there were 280 cases brought under section 1983; in fiscal 1970, 3586. Thus, between 1960 and 1970 there has been a rise of 1,100 percent compared to a rise in the same decade of 45 percent in civil cases generally. There was another significant increase in fiscal 1971, when 4,609 section 1983 cases were brought, 1,023 more than the previous year.

Aldisert, *supra* note 41, at 563 (footnote omitted). These statistics were updated and referred to with some concern by Justice Powell in his dissent in Patsy v. Board of Regents:

> There has been a year-by-year increase in [§ 1983] suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1980 was some 26%, resulting in a total of 15,639 such suits filed in 1981 as compared with 12,397 in 1980. The 1981 total constituted over 8.6% of the total federal district court civil docket.

457 U.S. 496, 534 (1982) (Powell, J., dissenting).

43. *See* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 522-23 & nn.167-73 (1982) (collecting expressions of concern by commentators and judges).

44. *See* Eisenberg, *supra* note 43, at 522-49 (empirical study of burdens imposed on federal courts by § 1983 litigation; concluding that burden is exaggerated in the face of more important underlying issue of constitutional remedy).

45. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

46. Federalism has been described by the Court as,

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971). Some perceive in the growth of § 1983 litigation a threat to this system. *See* Patsy v. Board of Regents, 457 U.S. 496, 532-33 (1982) (Powell, J., dissenting); Monroe v. Pape, 365 U.S. 167, 237-40 (1961) (Frankfurter, J., dissenting); *see also Aldisert, supra* note 41, at 561-63 (arguing that increased § 1983 litigation undermines state responsibility); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 Va. L. Rev. 1, 1 (1974) (suggesting that the "[§ 1983] deluge is changing the nature of the federal system"); Note, *Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. Pitt. L. Rev. 1035, 1048 (1982) (discussing view that federal court adjudication of § 1983 cases involving tort-like claims disrupts state administration and pre-empts the state's role in establishing tort law) [hereinafter *Civil Rights Docket*].

47. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

tee of a federal forum and provision for equitable relief from state invasions of federal rights obviously increases the potential for this very kind of interference.[48] Although the delicate balance between the states and the federal government is a matter of legitimate concern,[49] the drafters and ratifiers of the Civil Rights Act of 1871 clearly recognized that the creation of a federal cause of action for invasions of constitutional rights by state officials might upset the balance.[50] Despite the concern, Congress determined that when state officials invade constitutional rights, the federal government is the most effective source of protection and redress.[51] Moreover, claims that section 1983 may deleteriously affect federalism have a certain irony. To the extent that federalism is based on a notion of reducing the potential for abusive government action by diffusing government power among the states,[52] it has much in common with the purpose of section 1983.[53]

Another concern is that section 1983 does not take sufficient account of competing governmental and public interests.[54] Undeniably, constitutional tort litigation may interfere with other important social interests.

48. *See* Rizzo v. Goode, 423 U.S. 362, 377-80 (1976); Younger v. Harris, 401 U.S. 37, 44-45 (1971); *see also Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1274-1330 (1977)[hereinafter *Section 1983 and Federalism*]. *But see* Whitman, *supra* note 31, at 42-57 (arguing for expanded use of equitable relief under § 1983 rather than damages).

49. The key question is what branch of government should make the determinations as to the proper balance between state and federal roles. One view is that the determination is properly one for Congress, and that the states' political role in the federal system assures that their interests will be protected. *See* Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552 (1977); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 558-60 (1954).

50. *See* Cong. Globe, 42nd Cong., 1st Sess., App. at 67 (1871) (speech of Rep. Shellabarger, Sponsor of the civil rights measure) [hereinafter *Globe* or *Globe App.*]; *see also* Patsy v. Board of Regents, 457 U.S. 496, 504 n.6 (1982) (remarks by opponents of the 1871 bill that it would "usurp the States' power, centralize the government, and perhaps ultimately destroy the States" indicated that Congress was aware of federalism issue); Mitchum v. Foster, 407 U.S. 225, 241-42 (1972) (Congress was clearly aware that it was changing the relationship between the federal government and the states in passing the predecessor statute to § 1983.).

51. In Mitchum v. Foster, 407 U.S. 225 (1972) the Court stated:

> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."

Id. at 242 (quoting in part *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

52. *See* The Federalist No. 51, at 325-27 (J. Madison) (Lodge ed. 1899); *Section 1983 and Federalism*, *supra* note 48, at 1135.

53. Obviously there are distinctions, because § 1983 focuses on *state* action, but the underlying problem addressed by each is the same.

54. *See* Owen v. City of Independence, 445 U.S. 622, 667-70 (1980) (Powell, J., dissenting) (discussing the competing interests in an employee discharge case); *see also* Imbler v. Pachtman, 424 U.S. 409, 424-28 (1976) (discussing argument for prosecutorial immunity); Pierson v. Ray, 386 U.S. 547, 554 (1967) (discussing need for judicial immu-

For instance, state officials threatened with potential personal liability under section 1983 may feel constrained in the vigorous performance of their duties.[55] In addition, the Supreme Court has recognized that the public interest in attracting and retaining good employees might be undermined by the threat of section 1983 litigation.[56] The Court has addressed these problems and has resolved the conflicts through a framework of defenses and immunities that state actors may employ to avoid liability.[57] Thus, it has avoided modifying the nature of the section 1983 action by imposing the burden of establishing a valid immunity or defense on the defendant.[58]

Finally, there is a sense that the character of much of today's section 1983 litigation trivializes the concept of constitutional redress and subverts the noble purposes of the statute.[59] Plaintiffs using the due process clause of the fourteenth amendment as a vehicle for maintaining an action in federal court with all the attributes of common law tort and few attributes of constitutional dimension have raised fears that the fourteenth amendment would become a "font of [federal] tort law."[60] Because the jurisdictional counterpart to section 1983 requires no minimum amount in controversy,[61] many apparently inconsequential cases have reached the federal courts. The greatest concern and frustration has been caused by prisoner property deprivation cases.[62] Prisoners have

nity); Tenney v. Brandhove, 341 U.S. 367, 376-77 (1951) (discussing legislators' need for immunity).

55. *See* Briscoe v. LaHue, 460 U.S. 325, 343-44 (1983); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); *see also* Jaron, *supra* note 29, at 3 & nn. 11-14 (collecting literature and conferences discussing liability fears of state and local officials). *But see* Jaron, *supra* note 29, at 25-26 (arguing that fears that liability will impede performance of public duties are exaggerated).

56. *See* Wood v. Strickland, 420 U.S. 308, 320 (1975).

57. *See, e.g.*, Gomez v. Toledo, 446 U.S. 635 (1980) (police superintendent entitled to good faith immunity but must raise it as an affirmative defense); Procunier v. Navarette, 434 U.S. 555 (1978) (immunity for prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (immunity for state hospital superintendent); Wood v. Strickland, 420 U.S. 308 (1975) (immunity for school board members); Scheuer v. Rhodes, 416 U.S. 232 (1974) (immunity for Governor and other state officers).

58. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

59. A comparison of the situation in *Monroe v. Pape*, 365 U.S. 167 (1961), with the situation in *Parratt v. Taylor*, 451 U.S. 527 (1981), illustrates this concern. In *Monroe*, thirteen Chicago police officers broke into the Monroe home in the middle of the night without a warrant, forced the couple to stand naked in the living room with their children, and ransacked the house. Mr. Monroe was then arrested and held for several hours on an "open charge" and was never informed of the reasons for his arrest. *Monroe*, 365 U.S. at 169. *Parratt* involved the claim of a state prison inmate in Nebraska. The inmate, Taylor, was confined to administrative segregation when a $23.50 hobby package that he had ordered arrived at the prison. Taylor was not allowed to receive the package while in segregation and it was subsequently lost. Taylor brought suit in federal district court against the warden and hobby director for their negligence in setting the policies that resulted in the loss of his hobby kit. *Parratt*, 451 U.S. at 529-30.

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

61. 28 U.S.C. § 1343 (3) (1982).

62. *See* Aldisert, *supra* note 41, at 566-67; Note, *Prisoner Property Deprivations: Section 1983 and the Fourteenth Amendment*, 52 Ind. L.J. 257, 258-60 (1976).

made constitutional due process claims in federal court for the loss of civilian shoes,[63] tennis shoes,[64] cigarettes,[65] and toothpaste.[66] It is not surprising that the federal judiciary has strongly objected to devoting its time to these claims.[67] The difficult issue is how to avoid trivializing the concepts of constitutional protection inherent in section 1983 without seriously impairing its utility as a method for protecting essential liberties.

In the past few years, these concerns have led to a judicial habitat less hospitable to the species of tort liability created in section 1983.[68] It appears that lower federal courts have been addressing section 1983 concerns by superimposing a state of mind or culpability requirement on the statutory action.[69] Although this may be an effective method for reducing the number of section 1983 cases, it is an illegitimate one. Not only does it seek to reclassify a statutorily created strict liability species of tort as one requiring proof of fault, it seeks to change the statutory requirements to accomplish aims unrelated to its purpose. The constitutional tort species cannot survive this kind of assault. Its continued vitality depends upon a recognition of its strict liability character.

C. *Failure to Recognize the Dual Role of the Supreme Court*

The Supreme Court has employed techniques that effectively limit the reach of section 1983,[70] but it has never condoned imposing a state of mind or fault requirement as a part of the prima facie section 1983 case.[71] Rather, it has dealt with the perceived problems in section 1983 litigation in ways that eliminate many federal causes of action without imposing on the statute extraneous tort concepts like state of mind.[72] This accords with the Supreme Court's dual functions in the area of constitutional

63. *See* Howard v. Swenson, 426 F.2d 277 (8th Cir.) (per curiam), *cert. denied*, 400 U.S. 948 (1970).

64. *See* Almond v. Kent, 321 F.Supp. 1225, 1228 (W.D. Va. 1970), *rev'd on other grounds*, 459 F.2d 200 (4th Cir. 1972).

65. *See* Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973).

66. *See* Weddle v. Director, Patuxent Inst., 436 F.2d 342 (4th Cir. 1970), *vacated*, 405 U.S. 1036 (1972).

67. *See* Eisenberg, *supra* note 43, at 536 nn.240-41 (summarizing objections by jurists and commentators to trivial § 1983 cases). *But see id.* at 538 (concluding that most prisoner plaintiffs do not bring trivial cases).

68. *See, e.g.*, Aldisert, *supra* note 41, at 563-582; Eisenberg, *supra* note 43, at 521-22; *A Theory of Negligence*, *supra* note 31, at 696.

69. *See supra* notes 39-40; *see also* Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984), *aff'd sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986); Mills v. Smith, 656 F.2d 337 (8th Cir. 1981); Gager v. "Bob Seidel," 300 F.2d 727 (D.C. Cir.), *cert. denied*, 370 U.S. 959 (1962).

70. *See* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1 (1985) (discussing narrow construction of § 1983 in recent Supreme Court cases); *Civil Rights Docket*, *supra* note 46, at 1037 & n.10 (enumerating ways the Court has restricted § 1983 actions).

71. *See infra* notes 127-43 and accompanying text.

72. Notably, the Court has limited constitutional tort through its restrictive interpretation of the Constitution. *See infra* notes 152-77 and accompanying text.

tort.[73] On the one hand, as an interpreter of the statute, the Court has a limited role as an examiner and classifier of the species of tort liability created by Congress in section 1983.[74] On the other hand, as interpreter of the Constitution, the Court has the power to shape the future evolutionary course of the constitutional tort species through the creation of constitutional doctrine. In its role as statutory exponent, the Court has never deviated from its position that the statute has no independent state of mind element.[75] As constitutional interpreter, however, the Court has demonstrated that state of mind may play a vital role in the determination of whether a constitutional violation has occurred.[76] State of mind in this context makes it more difficult to establish the statutory requirement of a constitutional violation by narrowing the scope of the Constitution.

The Supreme Court's restrictive approach to the Constitution reduces significantly the number of successful section 1983 claims. Indeed, it sometimes appears that current constitutional doctrine is evolving for the sole purpose of cutting down the number of section 1983 cases.[77] If this is the sole motivation behind the Court's present approach to constitutional interpretation, its illegitimacy is patent. Certainly the current trend has the potential to limit protection of important liberties.[78]

The positive feature of the Court's approach, however, is that by limiting the state of mind inquiry to the issue of whether there has been a constitutional violation, it preserves the strict liability character of the statutory action. This approach to constitutional interpretation should have no impact on the essential elements of the section 1983 claim. The statutory action still requires only a showing of a constitutional violation caused by one acting under color of state law.

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73. *See supra* notes 11-13 and accompanying text.

In another context the Court has distinguished between its two roles as follows:

> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner.... In each case, however, the question is the nature of the legislative intent informing a specific statute.... The Constitution, on the other hand, does not "partake of the prolixity of a legal code."... One of "its important objects," is the designation of rights. And in "its great outlines," the judiciary is clearly discernible as the primary means through which these rights may be enforced.

Davis v. Passman, 442 U.S. 228, 241 (1979) (citations omitted).

74. *See* Patsy v. Board of Regents, 457 U.S. 496, 512-14 (1982).

75. *See, e.g.*, Daniels v. Williams, 106 S. Ct. 662, 663 (1986); Parratt v. Taylor, 451 U.S. 527, 534 (1981); Monroe v. Pape, 365 U.S. 167, 187 (1961).

76. *See* Daniels v. Williams, 106 S. Ct. 662, 664-65 (1986); Estelle v. Gamble, 429 U.S. 97, 106 (1976).

77. *See* Blackmun, *supra* note 70, at 2-3; Eisenberg, *supra* note 43, at 521 nn.164-65; Friedman, Parratt v. Taylor*: Opening and Closing the Door on Section 1983*, 9 Hastings Const. L.Q. 545, 553-54 (1982); Kupfer, *Restructuring the* Monroe *Doctrine: Current Litigation Under Section 1983*, 9 Hastings Const. L.Q. 463, 472-73 (1982); *Civil Rights Docket*, *supra* note 46, at 1055-56.

78. *See infra* notes 194-212 and accompanying text.

Unfortunately, the distinction between the Court's two functions in section 1983 litigation has not been clear, resulting in confusion as to the true characteristics of the constitutional species.[79] Courts and commentators are troubled by perceptions of an overwhelming number of section 1983 cases, sensitive to consequent problems in section 1983 litigation,[80] and uncertain about the continued validity of constitutional tort.[81] In the face of these concerns and lacking clear guidance from the Supreme Court, the lower courts have used their own methods to distinguish cases claiming a constitutional injury that meet section 1983's requirements from those that do not. Courts have frequently focused on whether the defendant acted with a particular state of mind in depriving the section 1983 plaintiff of a constitutional right. The results have been far from consistent and considerable conflict continues in the circuit courts with respect to the state of mind a plaintiff must allege to establish a prima facie section 1983 case.[82] Only when the federal courts recognize that a state of mind inquiry has no place in the statutory action will constitutional guarantees receive the evenhanded treatment needed to afford all citizens consistent protection of essential liberties.

II. EVOLUTION OF THE SPECIES

A. *Genealogy of the Statute*

The evolution of the species of tort liability created by section 1983 cannot be effectively traced without some understanding of the historical context of its conception. Section 1 of the Civil Rights Act of 1871,[83] then popularly known as the Ku Klux Klan Act, was enacted in response to the widespread racial violence that swept the South following the Civil War.[84] The Act's stated purpose was "to enforce the provisions of the

79. *See* Cox, *Constitutional Duty and Section 1983: A Response*, 15 Val. U.L. Rev. 453, 454-458 (1981) (arguing that the federal courts have failed to distinguish between the constitutional and statutory or common law elements of § 1982 resulting in confusion and inconsistent development of the statute).

80. *See supra* notes 41-50 and accompanying text.

81. *See supra* notes 54-56 and accompanying text.

82. *See* Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1374 (1986); Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983); Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); Hays v. Jefferson County, 668 F.2d 869 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982); Williams v. Kelley, 624 F.2d 695 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981); Beard v. Mitchell, 604 F.2d 485 (7th Cir. 1979); Fulton Mkt. Cold Storage Co. v. Cullerton, 582 F.2d 1071 (7th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979); O'Grady v. City of Montpelier, 573 F.2d 747 (2d Cir. 1978); Pitts v. Griffin, 518 F.2d 72 (8th Cir. 1975); Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973); Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd*, 409 U.S. 418 (1973); Madison v. Manter, 441 F.2d 537 (1st Cir. 1971); Howard v. Swenson, 426 F.2d 277 (8th Cir.), *cert. denied*, 400 U.S. 948 (1970); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969); Striker v. Pancher, 317 F.2d 780 (6th Cir. 1963).

83. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1982)).

84. The Act's intended impact was much broader than the popular name suggested.

fourteenth amendment to the Constitution"[85] that had recently been ratified. The extensive congressional debates indicate that the Act's chief targets were abuses by representatives of state governments under discriminatory laws and the failure of southern law officials to enforce existing laws.[86]

The Ku Klux Klan was a major source of violence in the post bellum South. The remedy that Congress created, however, was only partly aimed at the Klan. The Act attacked the Klan and other violent groups granting an action against "those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." Monroe v. Pape, 365 U.S. 167, 176 (1961) (emphasis in original); *see Section 1983 and Federalism, supra* note 48, at 1154 ("the Act was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages").

85. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1982)).

86. The Civil Rights Act of 1871, part of which is now codified in 42 U.S.C. § 1983, was a response to the organized violence that was rampant throughout the southern states after the end of the Civil War. *See Section 1983 and Federalism, supra* note 48, at 1153-56; *Civil Rights Docket, supra* note 46, at 1038. From 1866 to 1879 a significant amount of this activity was directed against the black population and the military governments established by the North in the southern states. By 1871 the federal troops had withdrawn and state governments were re-established. *See Globe App., supra* note 50, at 71 (1871) (speech of Rep. Blair of Michigan). In many areas, the whites found themselves outnumbered by blacks who aligned themselves with the radical Republicans of the North. Klan violence became widespread. The Klan acted with the support of local governments in some areas and in spite of the government in other areas. Of the southern and border states, only Virginia seemed free of organized Klan violence. While the violence and threats were directed primarily at blacks in an effort to prevent them from gaining political and economic equality, the Klan also employed violence against the loyal republicans, whites whose sympathies were with the North. *See Globe App., supra* note 50, at 277 (speech of Rep. Porter). In response to the increasing violence and the inability or unwillingness of state governments to control the situation, President Grant sent a message to Congress asking for legislation to deal with the crisis. The message read:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities, I do not doubt. That the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies, is not clear. Therefore I urgently recommmend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

Globe App., supra note 50, at 226.

Legislation was introduced by Representative Shellabarger of Ohio, "to enforce the provisions of the fourteenth amendment to the Constitution of the United States." *Globe, supra* note 50, at xxiii. On March 28, 1871, Representative Shellabarger addressed the House regarding this new civil rights legislation, "[t]he measure is one . . . which does affect the foundations of the Government itself, which goes to every part of it, and touches the liberties and the rights of all the people, and doubtless the destinies of the Union." *Globe App., supra* note 50, at 67.

Representative Shellabarger then addressed the question of interpreting the first section, now § 1983, as follows:

> I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such

Thus, the predecessor to section 1983 was born of a necessity to address a particularized crisis in the South. Importantly, however, the legislative history reveals that the drafters saw beyond the immediate problem the Act addressed and intended to create a law with tremendous potential for providing redress in federal court for those deprived of individual liberties protected by the Constitution.[87]

> statutes are liberally and beneficiently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation.

Globe App., *supra* note 50, at 68.

The opposition to many parts of H.R. 320 was intense. The opposition responses ranged from cries of partisan politics, an attempt to destroy the Democratic party in the South, to denials that Klan violence still existed or was beyond the control of the states. *See, e.g.*, *Globe App.*, *supra* note 50, at 74-77 (Speech of Representative Wood of New York including statements from southern state governors indicating that peaceful conditions had been restored). Sufficient evidence existed to show that the violence was indeed out of control. *See* S. Rep. No. 1, 42nd Cong., 1st Sess. (1871) (a detailed report of investigations into the Klan violence in the South against blacks and white Republicans).

As was clearly pointed out the victims of this organized violence found themselves with no recourse in the state courts.

> Plausibly and sophistically it is said the laws of North Carolina do not discriminate against [negroes and Union sympathizers]; that the provisions in favor of rights and liberties are general; that the courts are open to all; that juries, grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment.
>
> But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. . . . [The laws] only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples. Frightful murders, whippings, and robberies may occur where these are the subjects; and the arm of justice is paralyzed.

Globe, *supra* note 50, at 505 (speech of Sen. Pratt of Indiana).

After a tremendous amount of debate the bill was passed. It was sent to the Senate where, again, there was much debate. The bill was amended and passed by the Senate. A conference report was rejected by the House and a second conference was required before both Houses finally approved the legislation.

87. For example, Representative Shellabarger in explaining the function of § 1 of the Act stated:

> [Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to *all people* where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

Globe App., *supra* note 50, at 68 (emphasis added); *see also*, Mitchum v. Foster, 407 U.S. 225, 239 (1972) ("Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.").

While the sponsor of the original bill, Representative Shellabarger, made no reference to a state of mind requirement for § 1, the concern about liability without fault was alluded to by at least two opponents of the bill in the House.

Representative Whitthorne, of Tennesse, warned of what he considered the dangers of this section to a state employee who acts without fault:

> It will be noted that by the first section suits may be instituted without regard to amount or character of claim by any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution of the United States, under color of any law, statute, ordinance, regulation, custom, or usage of any State. That is to

Although the statute was sufficiently broad to carry out the drafters' noble purposes, the breadth of its language also invited interpretations that narrowed its scope.[88] Courts remained cautious about expansion of the federal government's powers and were often hostile to Reconstruction legislation.[89] One major blow to the effectiveness of the Act was an early determination that unauthorized conduct of state officers was not "state action."[90] This conclusion effectively precluded the federal courts

> say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with loaded pistol flourishing it, . . . and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution, and such suit brought in distant and expensive tribunals.

Globe, *supra* note 50, at 337.

Representative Arthur of Kentucky expressed these concerns even more clearly.

> [I]f the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, they are liable, and most certain, at the suit of any knave, plain or colored, under the pretext of the deprivation of his rights, privileges, and immunities as a citizen, *par excellence*, of the United States, to be summarily stripped of official authority, dragged to the bar of a distant and unfriendly court, and there placed in the pillory of vexations, expensive, and protracted litigation, and heavy damages and amercements, destructive of health and exhaustive of means, for the benefit of unscrupulous adventurers of venal minions of power.

Globe, *supra* note 50, at 365.

In spite of these concerns that state actors could be held liable for any act under color of state law violative of a consititutional right, the House and Senate passed § 1 without inserting a state of mind requirement.

88. *See* D. Currie, Federal Courts 490 (3d ed. 1982); Eisenberg, *supra* note 43, at 492; Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1342-43 (1952).

89. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E.C. Knight Co., 156 U.S. 1 (1895); *see also Section 1983 and Federalism*, *supra* note 48, at 1156-67.

90. Barney v. City of New York, 193 U.S. 430, 438-39 (1904); *see Section 1983 and Federalism*, *supra* note 48, at 1159-60. There is some question of whether the Court ever really "held" that the action of state officers in violation of state law could not constitute the state action required under the fourteenth amendment. In *Barney*, for example, the Court only implied that conduct in violation of state law could not be "state action." The opinion read:

> [The complaint] proceeded on the theory that the construction . . . was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment . . . Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law.

193 U.S. at 437-38 (citations omitted).

Despite the lack of a conclusive decision of the applicability of the fourteenth amendment to state officer action, it was simply assumed that state officer action in violation of state law could not be state action. *See* Monroe v. Pape, 365 U.S. 167, 212-17 nn.19-22 (1961) (Frankfurter, J., dissenting in part) (discussing prior cases).

from addressing cases involving the most abusive behavior of state officials. In addition, in the *Slaughter-House Cases,*[91] the Supreme Court interpreted the fourteenth amendment's "rights, privileges and immunities" clause to include only those rights correlative to the existence of national government,[92] thereby eliminating most civil rights from its purview.[93] This construction of "rights, privileges and immunities" limited the effectiveness of section 1983 because it contained identical language.[94] These early restrictive interpretations rendered section 1983 an ineffective tool for the vindication of constitutional rights. As a result, only a handful of cases were brought under the statute in the first five decades following its enactment.[95]

In the early part of the twentieth century, Jim Crow laws[96] in the southern states were attacked through section 1983 cases to redress violations of black voting rights.[97] These cases involved action taken pursuant to state statutes, so the "under color of state law" requirement was clearly satisfied.[98] For most violations of civil rights, however, the earlier conclusion that acts of state officials that went beyond their representative authority was not "under color of state law" continued to prevent full implementation of section 1983.[99] Thus, for nearly a century, the broad guarantees of personal liberty expressed in the fourteenth amendment remained largely unenforced by section 1983.

B. *The Species Takes a Tort Shape*—Monroe v. Pape

It was not until 1961, nine decades after the passage of the Civil Rights Act, that the Supreme Court laid the groundwork for a broad application of the remedies provided in section 1983 for constitutional deprivations.

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91. 83 U.S.(16 Wall.)36 (1873). The Louisiana legislature had passed an act that granted a corporation the exclusive right to maintain slaughter-houses. Independent butchers attacked the statutory monopoly, arguing that it violated the thirteenth and fourteenth amendments. The Court upheld this statute as a proper use of a state's police powers, and found no violation of the thirteenth or fourteenth amendments.

92. *Id.* at 78-80.

93. *See* Gressman, *supra* note 88, at 1337-38.

94. *Cf.* United States v. Cruikshank, 92 U.S. 542 (1875) (interpreting the criminal counterpart of 42 U.S.C. § 1983).

95. *See Section 1983 and Federalism, supra* note 48, at 1161 n.139 (Between 1871 and 1920, only 21 cases were brought under § 1983).

96. "Jim Crow" laws were enacted to prevent blacks from voting. These laws imposed certain criteria, such as literacy tests, as voting requirements. The effect was to exclude from the right of suffrage as many black persons as possible without excluding many whites. *See Section 1983 and Federalism, supra* note 48, at 1161. For a contemporary discussion of such laws, see Monnet, *The Latest Phase of Negro Disfranchisement,* 26 Harv. L. Rev. 42 (1912).

97. *E.g.,* Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); Guinn v. United States, 238 U.S. 347 (1915); Giles v. Harris, 189 U.S. 475 (1903).

98. *See* Lane v. Wilson, 307 U.S. 268, 274 (1939); Nixon v. Herndon, 273 U.S. 536, 541 (1927).

99. *See* Gressman, *supra* note 88, at 1337-38; *Section 1983 and Federalism, supra* note 48, at 1161.

In *Monroe v. Pape*[100] the Supreme Court analyzed the creature that Congress had created in section 1983 and revealed its tort characteristics. The horror story of terror, outrage and humiliation at the hands of the police that gave rise to the *Monroe* decision was remarkably reminiscent of the abusive treatment of blacks after the Civil War that had originally prompted passage of the Civil Rights Act.[101] The case thereby provided a uniquely appropriate opportunity to test the operation of the statute in circumstances outside the particular crisis that had impelled its enactment.

Justice Douglas, writing for the majority in *Monroe*, sought to determine the proper reach of section 1983 through an extensive investigation of the legislative history of the statute.[102] The Court reanalyzed the "under color of state law" requirement and rejected the claim that plaintiffs had not stated a cause of action under section 1983 because no law had authorized defendants' conduct.[103] Relying on previous interpretations of the phrase in the parallel criminal statute,[104] Justice Douglas adopted the view that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[105] In addition, the Court established that the federal remedy provided by section 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[106] With these two conclusions, the Court swept away judicial reservations that had prevented section 1983 from developing into a major species of tort liability for invasions of constitutional rights.

The *Monroe* majority went on to consider the state of mind issue.[107] Although the language of section 1983 contains no state of mind requirement, early applications of the statute had left in doubt whether a plaintiff had to establish some kind of intent to deprive him of a constitutional right.[108] The *Monroe* majority distinguished section 1983 from its criminal counterpart, noting that the word "wilfully" does not appear in section 1983.[109] The Court further distinguished between a criminal statute requiring a showing of "specific intent" and a statute providing a civil

100. 365 U.S. 167 (1961).

101. *See supra* note 86 (discussing the historical impetus to § 1983); *see also supra* note 59 (setting forth the facts of *Monroe*).

102. Monroe v. Pape, 365 U.S. 167, 171-83 (1961).

103. *Id.* at 184-85.

104. Civil Rights Act of 1866, § 2, 14 Stat. 27 (current version at 18 U.S.C. § 242 (1982)).

105. *Monroe*, 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

106. *Monroe*, 365 U.S. at 183.

107. *Id.* at 187.

108. *See, e.g.*, Deloach v. Rogers, 268 F.2d 928 (5th Cir. 1959); Agnew v. City of Compton, 239 F.2d 226 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957); Lyons v. Weltmer, 174 F.2d 473 (4th Cir.), *cert. denied*, 338 U.S. 850 (1949).

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

remedy.[110] As an extension of this analysis, the Court stated that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[111] With this directive, Justice Douglas conclusively identified section 1983, with its provisions for civil remedies, as a tort-like creature. Unfortunately, he failed to explain how the "background of tort liability" should be used in section 1983 litigation or the limitations, if any, "natural consequences" puts on the section 1983 action.

This broad language with its inherent ambiguities has had a tremendous impact on the course of section 1983 litigation since *Monroe*.[112] The "background of tort" language, read in conjunction with the Court's statement that the statute was passed to provide a federal remedy "because, by reason of prejudice, passion, neglect, intolerance *or otherwise*, state laws might not be enforced,"[113] suggests that intent or state of mind is simply not relevant and that section 1983 is a strict liability species of the tort genus.[114] At first glance the phrase "natural consequences of his

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110. *Id.*

111. *Id.*

112. For a discussion of how the courts have interpreted this language, see Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 Iowa L. Rev. 1 (1982) [hereinafter Nahmod, *Constitutional Accountability*]; *Section 1983 and Federalism*, *supra* note 48, at 1204-17; Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 U. Cin. L. Rev. 45 (1977). The courts have considered a myriad of state of mind requirements for § 1983. Some courts have required a certain degree of culpability and bad intent, *see e.g.*, Gager v. "Bob Seidel," 300 F.2d 727, 732 (D.C. Cir.), *cert. denied*, 370 U.S. 959 (1962), while others have wrestled with the question of whether simple negligence was actionable. *E.g.*, Jenkins v. Averett, 424 F.2d 1228, 1231-32 (4th Cir. 1970). The issue was finally addressed by the Supreme Court in 1981 when it determined that negligence is actionable under § 1983. *See* Parratt v. Taylor, 451 U.S. 527, 532-35 (1981). *Compare* Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976) (negligence is insufficient to satisfy § 1983), *cert. denied*, 435 U.S. 932 (1978) *with* Whirl v. Kern, 407 F.2d 781, 786-88 (5th Cir. 1968) (negligence is sufficient to satisfy § 1983; statute was enacted to deal with violations of right due to official neglect), *cert. denied*, 396 U.S. 901 (1969). Some courts have taken an intermediate position, holding that gross negligence is sufficient. However, the debate continues. Commentators indicate that *Parratt* failed to clearly resolve the previous confusion. *See* Note, *Due Process: Application of the* Parratt *Doctrine to Random and Unauthorized Deprivations of Life and Liberty*, 52 Fordham L. Rev. 887, 889-90 (1984) (discussing inconsistent applications of Parratt by the lower courts) [hereinafter *Parratt Life and Liberty Interests*]; Note, Parratt v. Taylor: *Limitations on the* Parratt *Analysis in Section 1983 Actions*, 59 Notre Dame L. Rev. 1388, 1402-08 (1984) (discussing confusion in Courts of Appeals) [hereinafter *Limitations on the Parratt Analysis*].

113. Monroe v. Pape, 365 U.S. 167, 180 (1961) (emphasis added).

114. The actions of the police officers in *Monroe* were clearly intentional; therefore it was not necessary for the Court to specifically address the issue of strict liability. Justice Douglas's opinion discusses the interpretation of "under color of law" that was adopted by the Court in *Classic* and *Screws*. The opinion then differentiates *Screws* from *Monroe*:

> In the *Screws* case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. . . . We do not think that gloss should be placed on [§ 1983] which we have here. . . . Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

Id. at 187. Thus, while it was unnecessary to distinguish between the intentional conduct

actions" sounds like a "proximate cause" limitation on the extent of liability familiar in the law of torts.[115] Understood in context, the language refers only to the results of official conduct rather than to the nature or character of the conduct that produces those results, so it cannot be read to impose any state of mind requirement.

Because the language of the *Monroe* opinion is susceptible to varying interpretations, the section 1983 action has been left without a clear analytical framework. Rather than clarifying the state of mind issue, the result of Douglas's language has been to create confusion with regard to the state of mind requirement that has reigned in section 1983 litigation ever since.

C. *Further Taxonomic Endeavors*

In the quarter century since the *Monroe* decision, the Supreme Court and lower federal courts have explored a great variety of issues arising in section 1983 litigation. There has been ample opportunity for this exploration because the potential for vindicating important rights through section 1983 became widely recognized.[116] As the climate in the federal courts became more favorable, the evolutionary process gained momentum. Courts recognized that the remedial purposes of section 1983 extended to most of the personal liberties in the Bill of Rights made applicable to the states through the fourteenth amendment,[117] as well as to the rights guaranteed by the fourteenth amendment itself.[118]

Not only did the variety of section 1983 cases filed in federal courts expand, but also the number of cases increased at what many have considered an alarming rate.[119] The concern over this increase has led to what can only be characterized as a period of devolution of the constitu-

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in *Screws* and *Monroe*, that Justice Douglas did so leads to the conclusion that no state of mind requirement was intended.

115. In common law tort actions, courts have said that the defendant is liable only if the harm suffered is the "natural and probable" consequence of the defendant's act. *E.g.* Milwaukee & St. Paul Ry. v. Kellogg, 94 U.S. 469, 475 (1877). *See generally Prosser & Keeton, supra* note 4, § 43, at 280-82 (comparing different standards for limiting liability for the consequences of acts). For a discussion of the inappropriateness of proximate cause limitations in constitutional tort, see *infra* text accompanying notes 336-53.

116. *See* Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring).

117. *See, e.g.*, Trujillo v. Board of County Comm'rs, 768 F.2d 1186 (10th Cir. 1985) (mother and sister of man who died in jail had protected first amendment interest in relationship, but complaint failed to state a claim for failure to allege intent); Spanish Action Comm. v. City of Chicago, 766 F.2d 315 (7th Cir. 1985) (first amendment and fourteenth amendment rights violated by infiltration of police intelligence group); McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984) (civil rights claim under § 1983 for false imprisonment raising fourth amendment claim); *see also* Whitman, *supra* note 31, at 20-21 & n.97 (discussing expansion of § 1983 following the incorporation of Bill of Rights into the fourteenth amendment).

118. *See* Baker v. McCollan, 443 U.S. 137, 142-43 (1979) (Section 1983 includes fourth amendment incorporated into fourteenth amendment); Carey v. Piphus, 435 U.S. 247, 259-64 (1978) (discussing procedural due process rights protected by § 1983).

119. *See supra* note 42 and accompanying text.

tional tort species.[120] During this retrenchment, the Supreme Court has attempted to demonstrate the limits of the constitutional tort action. The Court's forays into three areas are of particular significance to the recognition of the strict liability character of section 1983 and its future as a viable species: the state actor's state of mind or degree of blameworthiness; due process claims based on negligent deprivations by state actors; and the requirements for liability of supervisory personnel and municipalities.

1. State of Mind and the Section 1983 Claim

Despite the broad language in *Monroe v. Pape* that could be read as eliminating any requirement of intent or particular state of mind and limiting liability only by the "natural consequences" language, lower court interpretations of *Monroe* varied considerably as to whether a state of mind requirement existed in section 1983 claims. The circuit courts were widely split on the question of whether negligent conduct was sufficient to state a claim under section 1983 or whether more egregious behavior was required.[121] Impetus to stem the flow of cases and the confusion still existing after *Monroe* led some courts to impose a state of mind requirement on the statute.[122]

Against this background of controversy over constitutional tort generally, and the state of mind issue in particular, the Supreme Court has thrice in the past decade heard cases for the specific purpose of addressing the state of mind issue in section 1983.[123] In each case, the particular question presented was whether negligent conduct resulting in a constitutional violation states a section 1983 claim. The Court decided the first two cases on other grounds,[124] and it was not until two decades after the *Monroe* decision that the Court attempted once again in *Parratt v. Tay-*

120. *See* Blackmun, *supra* note 70, at 19; Whitman, *supra* note 31, at 8; *Civil Rights Docket*, *supra* note 46, at 1036.

121. For cases representing the diversity of approaches taken on the question of whether mere negligence supports a claim for relief under § 1983, *see, e.g.*, Williams v. Kelly, 624 F.2d 695, 698 (5th Cir. 1980) (mere negligence insufficient), *cert. denied*, 451 U.S. 1019 (1981); Beard v. Mitchell, 604 F.2d 485, 494 (7th Cir. 1979) (negligence not sufficient but recklessness would be sufficient); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1081 (3d Cir. 1976) (plaintiff must show that acts were intentional or "deliberately indifferent"); McCray v. Maryland, 456 F.2d 1, 5 (4th Cir. 1972) (negligence sufficient); Madison v. Manter, 441 F.2d 537 (1st Cir. 1971) (negligence insufficient). For a commentator's view, see Shapo, *supra* note 8, at 327-28 (suggesting that a § 1983 claim should only succeed if the defendant's conduct is particularly outrageous, indicating that a "bad state of mind" must exist).

122. *See* cases cited *supra* notes 39-40.

123. *See* Parratt v. Taylor, 451 U.S. 527 (1981) (finding that negligence is sufficient to state a claim but that Taylor's procedural due process was satisfied by Nebraska's post-deprivation remedy); Baker v. McCollan, 443 U.S. 137 (1979) (deciding that no deprivation of rights or privileges had occurred thus avoiding the negligence issue); Procunier v. Navarette, 434 U.S. 555 (1978) (avoiding the state of mind issue by finding that the defendants were protected by immunity).

124. *See supra* note 123.

lor[125] to "put [its] shoulder to the wheel hoping to be of greater assistance to courts"[126] on the issue of section 1983 state of mind.

In *Parratt* the plaintiff prisoner claimed that his loss of a hobby kit through the negligent conduct of prison officials constituted a fourteenth amendment deprivation of property without due process of law.[127] In addressing the state of mind issue, the Court noted that "[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights" and that the statute "has never been found by this Court to contain a state-of-mind requirement."[128] The Court quoted Douglas's famous "background of tort liability" language and concluded that:

> [I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.[129]

Thus the Court in *Parratt* unequivocally reaffirmed its position that a prima facie case[130] under section 1983 requires only conduct committed under color of state law and a constitutional violation caused by that conduct.

Apparently the *Parratt* Court thought it was resolving the section 1983 state of mind issue once and for all, but critics predicted that the Court's decision would do little to settle the problem and actually could add to the confusion.[131] Circuit court cases in the five years since the *Parratt* decision indicate that these early predictions were correct and show that confusion regarding the state of mind requirement for a section 1983 claim has continued.[132] One reason for the continued uncertainty is that

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125. 451 U.S. 527 (1981).

126. *Id.* at 533-34.

127. For a brief review of the facts in *Parratt*, see *supra* note 59 comparing *Parratt* to *Monroe*.

128. Parratt v. Taylor, 451 U.S. 527, 534 (1981) (footnote omitted).

129. *Id.* at 535.

130. The Court referred to the requirements of the "initial inquiry" for a § 1983 case. The context indicates it intended this to be synonomous with prima facie case.

131. *See* Nahmod, *Constitutional Acountability*, *supra* note 112, at 4-11; *A Theory of Negligence*, *supra* note 31, at 693-95.

132. *See, e.g.*, Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (en banc) (prison officials liable under § 1983 for intentional conduct, deliberate or reckless indifference, or callous disregard; negligence insufficient), *aff'd sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986); McKinnon v. City of Berwyn, 750 F.2d 1383, 1391 (7th Cir. 1984) (liability of police chief established for negligence in selecting or supervising police officers); Bell v. City of Milwaukee, 746 F.2d 1205, 1238 (7th Cir. 1984) ("gross recklessness" sufficient to invoke § 1983 claim); Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984) (negligent use of excessive force may be grounds for § 1983 action), *rev'd en banc*, 770 F.2d 578 (6th Cir. 1985) (adequate state postdeprivation remedy satisfies due process); Languirand v. Hayden, 717 F.2d 220, 227 (5th Cir. 1983) (failure to train police officer was negligent, but for action under § 1983 that failure must constitute gross negligence amounting to conscious

the Court presented the issue as "whether mere negligence will support a claim for relief under § 1983."[133] This implies that the Court is making a distinction between negligence and intentional tort, suggesting that a showing of at least negligent behavior is necessary for a section 1983 claim. Although the Court considered *Parratt* a negligence case, the negligent character of the defendants' conduct was actually irrelevant to the conclusion reached on the state of mind requirement for section 1983.[134]

The confusion in *Parratt* is compounded because the negligent conduct of the defendants,[135] although irrelevant to the section 1983 prima facie case, was essential to the Court's determination that there was no fourteenth amendment due process violation.[136] The Court made a two-tiered state of mind determination. It held that state of mind is not relevant to stating a section 1983 prima facie case,[137] but that state of mind is a factor in determining whether a deprivation of property without due process of law occurred.[138] In other words, the defendant's state of mind is relevant to the prima facie case only because it is critical to determining whether a constitutional violation has occurred.[139] Unfortunately, the Court did not make this distinction clear because lower courts continued to have trouble distinguishing between the relevance of state of mind to the statement of the section 1983 prima facie case and the relevance of state of mind to the occurrence of a constitutional violation.[140]

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indifference), *cert. denied*, 467 U.S. 1215 (1984); Doe v. New York City Dep't of Social Servs., 709 F.2d 782 (2d Cir. 1983) (section 1983 action allowed on showing of deliberate indifference or gross negligence), *cert. denied*, 464 U.S. 864 (1984); Phelps v. Anderson, 700 F.2d 147 (4th Cir. 1983) (court in dicta states that negligence can support a § 1983 claim); Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982) (negligence alone does not rise to level of constitutional deprivation, the conduct must be "sufficiently egregious as to be 'constitutionally' tortious"); Price v. Baker, 693 F.2d 952 (10th Cir. 1982) (indicating uncertainty as to whether negligence will support a § 1983 action); Avery v. County of Burke, 660 F.2d 111, 115 (4th Cir. 1981) (in addition to deprivation under color of state law, the court required an inference of "deliberate indifference" to be drawn from the county board of health's actions in order to successfully state a claim); Mills v. Smith, 656 F.2d 337 (8th Cir. 1981) (negligent conduct does not give rise to a § 1983 action).

133. Parratt v. Taylor, 451 U.S. 527, 532 (1981).

134. *See id.* at 543. The Court's decision was instead based on the impossibility of providing pre-deprivation process and the lack of any showing that the procedures were inadequate.

135. *See id.* at 537 n.3. The Court indicated in a footnote that while no evidence was presented in the trial record indicating that the warden and hobby director were negligent, the district court evidently considered that such negligence existed. Further, the Court noted that the petitioners did not raise the absence of negligence as an issue at trial. For those reasons the Supreme Court's decision was made on the assumption that both were negligent.

136. *See id.* at 544.

137. *See id.* at 534-35.

138. *See id.* at 537.

139. In *Parratt* the random and unauthorized nature of the act made state provision of predeprivation process impossible. The court found that the inmate, Taylor, had an adequate state postdeprivation remedy available, and therefore his fourteenth amendment due process rights were not violated. *See id.* at 543-44.

140. For example, the Court of Appeals for the Third Circuit in Davidson v. O'Lone,

In another effort to clarify the state of mind issue, the Court recently "put its shoulder to the wheel" again, and this time, there can be no mistaking the Court's position with respect to the place of state of mind in the prima facie case or the effect of negligent conduct on the statement of a fourteenth amendment due process claim. In *Daniels v. Williams*,[141] the Court reaffirmed "that § 1983, unlike its criminal counterpart . . . contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right"[142] but that "depending on the right, merely negligent conduct may not be enough to state a claim."[143] Thus, the Court repeated its consistent stance that a section 1983 claim does not require that state of mind be pleaded or proven. In light of the care the Court took to separate the section 1983 requirements from state of mind as it relates to a constitutional violation, there should be no question that section 1983 has no independent state of mind requirement.

2. State of Mind and Due Process

The Court's unequivocal statement in *Daniels* that section 1983 has no independent state of mind requirement clarifies its approach in *Parratt*.

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752 F.2d 817 (3d Cir. 1984) (en banc), *aff'd sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986), linked the state of mind element to the prima facie case. The plaintiff, Robert Davidson, was an inmate in the state prison. After a disciplinary hearing, Davidson was threatened by another inmate. Davidson passed a note to a civilian member of the disciplinary board who passed it on to the assistant superintendent of the prison. The note was passed to a supervisor who failed to read it and did not post it or tell the oncoming shift about it. Davidson was attacked by the inmate two days later. The inmate inflicted numerous wounds with a fork and broke Davidson's nose. *See Davidson*, 752 F.2d at 819. Davidson sued in district court and was awarded damages of $2,000 for the negligent deprivation of his rights under § 1983. *See id.* at 820.

The Third Circuit, en banc, reversed the district court decision. The court first determined that Davidson had a constitutionally protected interest. *See id.* at 822. The court then examined the issue of whether negligence on the part of a state actor is actionable under § 1983. *See id.* at 822-26. The court concluded that the Supreme Court had not yet ruled that negligence was sufficient to maintain a § 1983 action. *See id.* at 826. The Third Circuit added:

> Of course, the absence of any conclusive Supreme Court holding that requires us to construe § 1983 as encompassing all claims for negligence does not necessarily foreclose that interpretation. However, our own court's opinions, as well as precedent from other circuits that we find persuasive, have concluded that negligence claims are not encompassed within § 1983.

Id. The court then set forth the state of mind threshhold, "[l]iability under § 1983 may be imposed . . . if there was intentional conduct, deliberate or reckless indifference to the prisoner's safety, or callous disregard on the part of prison officials." *Id.* at 828.

The court determined that the failure to act on the part of the assistant superintendent and the supervisor did not rise above negligence, *see id.* at 829, and concluded, "we hold that § 1983 retains its central role in affording remedies for victims of constitutional deprivation, but that such a role does not extend to providing a remedy for the type of negligence found in this case." *Id.* (footnote omitted). For a discussion of the Supreme Court's affirmance of this case, *see infra* notes 169-77 and accompanying text.

141. 106 S. Ct. 662 (1986).

142. *Id.* at 664.

143. *Id.* (citations omitted).

The novel and far-reaching aspect of *Daniels*, however, is the Court's holding that negligent conduct cannot result in a fourteenth amendment "deprivation" and therefore no federal inquiry into the adequacy of state remedies is necessary.[144] With this reinterpretation of the fourteenth amendment, the Court has altered the evolutionary pattern of constitutional tort and has made a fundamental distinction between the constitutional tort species and common law tort varieties. An examination of the approach taken by the Court advances an understanding of how state of mind or degree of culpability of a state actor functions in a section 1983 case based on deprivation of due process rights. Further, the decision graphically illustrates how the Supreme Court can affect the evolutionary course of constitutional tort by virtue of its function as a creator of constitutional doctrine.

The problem the Court attempted to resolve in *Daniels* and in earlier section 1983 fourteenth amendment due process cases stems from the breadth of the tort remedies provided by section 1983 and the breadth of the language of the fourteenth amendment. The *raison d'etre* of section 1983 is to enforce the provisions of the fourteenth amendment,[145] and the fourteenth amendment forbids deprivations through state action of life, liberty or property without due process of law.[146] Much of the conduct that would give rise to the state tort actions has a deleterious effect on life, liberty or property, so it is possible to cast almost any tortious injury to life, liberty or property in fourteenth amendment terms if the requisite state action exists.[147]

With section 1983 available to provide tort-like remedies for constitutional violations by state actors, and the fourteenth amendment due process clause available to provide a constitutional context for every injury to person or property, the perceived danger has been that all torts of state officials will become constitutional tort. The Court has expressed its fear that the fourteenth amendment is becoming "a font of tort law to be superimposed upon whatever systems may already be administered by the States"[148] and decried the prospect of federal courts acquiring jurisdiction over every "garden variety tort" committed by a state official.[149]

144. *See id.* at 663.

145. *See supra* notes 1, 86.

146. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

147. One commentator explained the overlap as follows:

> The reason that a substantial number of section 1983 suits resemble common law tort actions is that many of the interests protected by the Constitution—in particular, liberty and property rights secured by the fourteenth amendment's due process clause—are also protected by common law. In fact, in many instances rights have obtained their constitutional status because they were initially recognized and protected by the common law.

Civil Rights Docket, supra note 40, at 1036 n.4.

148. Parratt v. Taylor, 451 U.S. 527, 544 (1981) (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

149. The Court has stated, "the Federal Government has little or no genuine interest

Justice Rehnquist, the Court's current spokesman on section 1983 issues during this period of retrenchment,[150] has illustrated these concerns with his recurring image of an automobile accident involving state officials giving rise to a federal action for a constitutional violation.[151] In essence the Court has deplored the notion that "the species of tort" created by section 1983 should be identified as all torts committed by state actors.

In the past decade the Court has made several attempts to narrow the characterization of the constitutional tort species and to establish that the function of section 1983 is to provide tort-type remedies for constitutional violations.[152] Concentrating on cases alleging a bare fourteenth amendment due process violation rather than a claim of injury within a specific guarantee of the Bill of Rights, the Court has attempted to differentiate between conduct that only gives rise to a common law tort claim and conduct that gives rise to a constitutional tort claim under section 1983.[153]

One of the Court's approaches has been to examine the claimed injury and to deny that it is an interest protected by the fourteenth amendment.

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in the resolution of a garden variety tort case. 'Only the burdening of the federal courts and the frustration of the purposes of state tort law would be thereby served.' " Foremost Ins. Co. v. Richardson, 457 U.S. 668, 685 (1982) (quoting in part Adams v. Montana Power Co., 528 F.2d 437, 440-41 (9th Cir. 1975)).

150. Justice Rehnquist has written many of the majority and plurality opinions that have had the effect of narrowing the protection provided by § 1983. *See, e.g.*, City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985) (concern that "policy" for purposes of liability for a single use of excessive force could be inferred from City's decision to establish a police force); Parratt v. Taylor, 451 U.S. 527, 544 (1981) (no "logical stopping place" if § 1983 liability applies whenever a state actor is involved); Baker v. McCollan, 443 U.S. 137, 146 (1979) (false imprisonment is not a constitutional violation merely because the actor was a state official); Paul v. Davis, 424 U.S. 693 (1976) (constitutionally protected property interest is not implicated simply because a state actor is the tortfeasor).

151. This was specifically addressed by Justice Rehnquist:

> And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983.

Paul v. Davis, 424 U.S. 693, 698 (1976); *see also* Parratt v. Taylor, 451 U.S. 527, 544 (1981) (concern that a party involved in traffic accident with government official could allege a constitutional violation).

152. *See* City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2432 (1985); Wilson v. Garcia, 105 S. Ct. 1938, 1947 (1985); Baker v. McCollan, 443 U.S. 137, 144-46 (1979); Paul v. Davis, 424 U.S. 693, 700 (1976).

153. *See, e.g.*, Davidson v. Cannon, 106 S. Ct. 668, 670-71 (1986) (prisoner's procedural due process claim was insufficient because negligence cannot give rise to a constitutional deprivation); Daniels v. Williams, 106 S. Ct. 662, 665-66 (1986) (state official's negligence in leaving a pillow on a jail stairway did not give rise to a constitutional deprivation of prisoner's due process rights); Paul v. Davis, 424 U.S. 693, 699-701 (1976) (defamation by chief of police did not deprive plaintiff of liberty interest protected by the due process clause).

For example, in *Paul v. Davis*,[154] the Court held that injury to reputation caused by a state official is not a deprivation of liberty or property protected by the due process clause of the fourteenth amendment absent a demonstrable statutory entitlement or loss of a state-conferred status.[155] In reaching this conclusion, the Court stressed that not all torts committed by state officials rise to the level of constitutional tort.[156]

Another approach used by the Court to restrict the reach of fourteenth amendment due process has been to find the existence of a right protected by the fourteenth amendment but to conclude that due process was provided. *Ingraham v. Wright*,[157] a section 1983 case involving a fourteenth amendment due process claim challenging the use of corporal punishment in public schools, illustrates this approach. The Court recognized that the students had a constitutionally protected liberty interest in freedom from unwarranted invasions of their bodily security, but found that the availability of state remedies satisfied the due process requirement.[158] Similarly, in *Parratt v. Taylor*,[159] the Court found that the loss of plaintiff's hobby kit was a deprivation of a protected property interest, but that the state remedies available to plaintiff provided the requisite due process.[160]

In *Parratt* the Court focused for the first time on the character of the defendant's conduct as a relevant consideration in determining what process is due. Because the plaintiff's loss was a result of random and unauthorized negligent action that could not be anticipated, making predeprivation process impossible, the Court found that state postdeprivation remedies were sufficient to satisfy the fourteenth amendment due process requirement.[161] Thus, although the Court concluded that the negligent loss of property amounted to an illegal deprivation, no fourteenth amendment violation occurred because the loss was not without due process. Partly because of *Parratt*'s inherent ambiguities[162] and partly because it is a plurality decision with quite divergent views by the

154. 424 U.S. 693 (1976). The plaintiff, Davis, was pictured in a police department flyer labeled "active shoplifters" that was sent to business establishments in Louisville, Kentucky. Davis had been arrested but no judgment had been rendered. The Court rejected Davis' claim that his due process rights under the fourteenth amendment had been violated. *See id.* at 701-02.

155. *See id.* at 710-12.

156. *See id.* at 699-701.

157. 430 U.S. 651 (1977). The plaintiffs, school students who had received corporal punishment by school officials, also alleged an eighth amendment violation. The Court determined that eighth amendment claims were only available to prisoners. *See id.* at 664-68.

158. *See id.* at 682-83; *see also* Baker v. McCollan, 443 U.S. 137, 145 (1979) (three day detention over a New Year's weekend pursuant to an invalid arrest warrant did not amount to a deprivation of a liberty interest "without due process of law").

159. 451 U.S. 527 (1981).

160. *See id.* at 544.

161. *See id.* at 543.

162. *See infra* note 168.

various writing justices,[163] its effectiveness in providing useful guidelines has been limited.[164]

Justice Powell's concurring opinion in *Parratt* is particularly significant because the Court in *Daniels* adopted his view on the state of mind required for a fourteenth amendment due process claim.[165] Justice Powell took issue with the Court's conclusion that negligent conduct by a state official resulting in loss of property constitutes a deprivation of property for the purposes of the due process clause. For Justice Powell, deprivation "connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss."[166] He found this approach to deprivation more in keeping with the purposes of section 1983 "to deter real *abuses* by state officials."[167]

Confusion remaining after *Parratt*[168] and a continued sense of urgency with respect to the need to identify the limits of constitutional tort led the Court in *Daniels*[169] to issue a definitive statement on how far the reme-

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163. Justice Rehnquist wrote the opinion in Parratt v. Taylor, 451 U.S. 527, 529 (1981); Justice Stewart concurred, suggesting that a negligent deprivation of property was not within the fourteenth amendment, *see id.* at 544-45; Justices White and Blackmun concurred with reference to random and unauthorized negligent acts but implied that they would distinguish acts departing from either one of these conditions or that involved deprivations of life or liberty, *see id.* at 545-46; Justice Powell concurred, arguing that intent was required to constitute a deprivation of property, *see id.* at 546-54; and Justice Marshall concurred that a negligent deprivation was a due process violation but dissented as to the adequacy of process, *see id.* at 554-56.

164. *See* Friedman, *supra* note 77, at 566-67; *Limitations on the* Parratt *Analysis*, *supra* note 112, at 1402-08; *Parratt Life and Liberty Interests*, *supra* note 112, at 889-90 & nn.22-28.

165. Daniels v. Williams, 106 S. Ct. 662, 664-65 (1986).

166. *Parratt*, 451 U.S. at 548 (Powell, J., concurring).

167. *Id.* at 549 (Powell, J., concurring)(emphasis in original).

168. For example, the Court did not indicate whether deprivations of life and liberty would be treated differently from the property deprivation at issue in *Parratt*. *See id.* at 545 (Blackmun, J., concurring); *see also*, Moore v. East Cleveland, 431 U.S. 494, 544-547 (1976) (White, J., dissenting) (distinguishing the importance of liberty interests as compared with property interests). *But see* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (rejecting the distinction between personal liberties and property rights).

Parratt also left open the possibility that random and unauthorized intentional behavior would be treated differently than the negligent conduct addressed in the opinion. *See Parratt*, 451 U.S. at 546 (Blackmun, J., concurring). This question was later answered in Hudson v. Palmer, 468 U.S. 517 (1984). *Hudson* involved an inmate who alleged that a state prison guard had conducted an unreasonable search of his cell and intentionally destroyed the inmate's personal property during the search, violating plaintiff's fourteenth amendment right not to be deprived of property without due process of law. The Court held that a prisoner has no reasonable expectation of privacy in his cell entitling him to protection against unreasonable searches, *see id.* at 525-26, and that the *Parratt* rationale also applies to intentional deprivations of property. *See id.* at 533-36. Therefore, unauthorized intentional deprivation of an inmate's property by a state prison guard does not violate the due process clause. *See id.* Nonetheless, questions of fact as to whether the action was random or unauthorized could still arise after *Hudson*.

Finally, *Parratt* did not appear to offer much potential for significantly limiting § 1983 actions because the question of whether a particular state process was sufficient would remain an issue in many cases. *See Parratt*, 451 U.S. at 544.

169. Daniels v. Williams, 106 S. Ct. 662 (1986).

dial purposes of section 1983 extended to overlapping areas of state tort law. Through a reinterpretation of what constitutes a deprivation for due process purposes, the Court classified as common law tort a large portion of the tort population previously considered to have been a part of the constitutional tort species.[170] In *Daniels*, the plaintiff, a pre-trial detainee in a city jail, slipped and fell on a pillow negligently left on the stairs by a deputy. The plaintiff claimed a deprivation of his liberty interest in freedom from bodily injury.[171] He further asserted that his deprivation was without due process because the defendant's claim of sovereign immunity left him without an adequate state remedy.[172] The Supreme Court granted certiorari to clarify "when tortious conduct by state officials rises to the level of a constitutional tort."[173] In a decision likely to have as much impact on the future of constitutional tort as *Monroe v. Pape*, the Court overruled the due process aspect of *Parratt v. Taylor*, holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property."[174]

In accepting Justice Powell's approach to the deprivation question, the Court noted that the purpose of a due process requirement was to protect citizens from arbitrary or oppressive government power, but not from conduct by officials that was "no more than a failure to measure up to the conduct of a reasonable person."[175] Focusing on the Constitution as a document dealing with "the large concerns of the governors and the governed," the Court concluded that "it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[176] Thus the Court once again repeated its old refrain, but with a variation that has changed the tune significantly. The Court need no longer fear that the fourteenth amendment will become a "font of tort law"[177] because it has taken drastic measures to see that it will not.

The *Daniels* approach offers some seemingly attractive benefits. It removes an easily identifiable group of cases—those involving negligent

170. Prior to *Daniels* and its companion case, *Davidson*, negligent deprivations of life, liberty, or property were held actionable by several circuits. *See, e.g.*, McKinnon v. City of Berwyn, 750 F.2d 1383, 1391 (7th Cir. 1985) (police chief's negligent failure to prevent police brutality actionable under § 1983); Bond v. Asiala, 704 F.2d 309, 314 (6th Cir. 1983) (per curiam) (negligent warrantless search actionable under § 1983); Phelps v. Anderson, 700 F.2d 147, 148 (4th Cir. 1983) (negligent confiscation of prisoner's television set actionable, but state tort remedy provides due process); Hirst v. Gertzen, 676 F.2d 1252, 1263 (9th Cir. 1982) (negligent hiring and supervision of deputy sheriff leading to death of prisoner actionable under § 1983).

171. Daniels v. Williams, 106 S. Ct. 662, 663 (1986).

172. *See id.*

173. *See id.* at 664 (citation omitted).

174. *Id.* at 663 (emphasis in original).

175. *Id.* at 665.

176. *Id.* at 666.

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

state conduct not amounting to an invasion of a specific guarantee of the Bill of Rights but rather to an invasion of life, liberty or property that would give rise to a due process claim—from the fourteenth amendment and, as a result, from the protection of section 1983. This should greatly reduce the number of section 1983 claims, and prevent the inconsistent results in section 1983 cases attributable to the lack of guidelines for determining when tortious conduct by state officials rises to the level of constitutional tort. Further, it should keep many of the trivial fourteenth amendment cases out of federal court.[178]

Finally, *Daniels* made it clear that state of mind in a section 1983 case is *only* relevant to the question of whether the plaintiff has stated an invasion of a constitutional right. Lower courts will now understand that the negligence determination only pertains to the question of whether there has been a fourteenth amendment violation. In the section 1983 fourteenth amendment due process cases, this distinction is now unimportant, because something more than negligence is needed to show the constitutional violation.[179] The state of mind issue will always be a determinative factor in such cases. The Court in *Daniels*, however, indicated that its holding with respect to due process did not necessarily apply to other constitutional provisions.[180] With regard to most of the rights guaranteed by the Bill of Rights, no determination on a state of mind requirement has been made.[181] This leaves open the possibility that the Court may conclude that certain liberties are so precious that no state of mind need be shown in order to establish a violation for purposes of stating a section 1983 claim.

Although the *Daniels* approach presents a superficially appealing way

178. The Court's approach, however, does not preclude the possibility of suits for small losses where the deprivation is alleged to be intentional, reckless or grossly negligent.

179. All nine justices in *Daniels* agreed that the negligent conduct at issue did not amount to a "deprivation" within the fourteenth amendment. *See* Daniels v. Williams, 106 S. Ct. 662, 663 (1986). Justice Stevens, however, in his separate concurring opinion stated that he did not feel it "necessary . . . to repudiate the reasoning of *Parratt* . . . ." *See id.* at 677. He continued, "the only question is whether negligence by state actors can result in a deprivation. 'Deprivation,' it seems to me, identifies, not the actor's state of mind, but the victim's infringement or loss." *Id.* at 680. The majority left open the question of "what 'more' than negligence—intent, recklessness or 'gross negligence'—is required." *Id.* at 667. For a discussion of the difficulties this open question may lead to, see *infra* notes 205-12 and accompanying text.

180. *See* Daniels v. Williams, 106 S. Ct. 662, 666 (1986). Nor should the holding in *Daniels* affect statutory rights protected by § 1983. *See* Maine v. Thiboutot, 448 U.S. 1 (1980).

181. The Supreme Court has only imposed specific state of mind or culpability requirements for eighth amendment and equal protection claims. *See* Whitley v. Albers, 106 S. Ct. 1078 (1986) (in the context of prisoner uprising, prisoner must establish that defendant acted wantonly to demonstrate an eighth amendment violation); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (in medical malpractice case, prisoner must establish that defendant acted with deliberate indifference to demonstrate an eighth amendment violation); Snowden v. Hughes, 321 U.S. 1 (1944) (plaintiff must establish a discriminatory animus to demonstrate an equal protection violation).

to address concerns about section 1983 litigation, its implications for the future of constitutional protection in general and constitutional tort in particular are profoundly disturbing. The *Daniels* decision illustrates the new direction the current Supreme Court has taken with respect to constitutional interpretation.[182] The recent emphasis on state of mind or culpability as a relevant aspect in determining whether a constitutional violation has occurred demonstrates a change of focus from the constitutional right or interest itself to the type of conduct that might invade the right. The Court's approach implies that some rights are worthy of constitutional protection only if the character of the conduct invading them is seriously blameworthy.[183] After *Daniels*, a fourteenth amendment "deprivation" will not occur if the "depriver" acts negligently, but it will occur if he acts intentionally. Thus, although the word deprivation connotes a loss to the one deprived,[184] for purposes of determining whether there has been a fourteenth amendment violation it is now defined in terms of the state of mind of the depriver. The Supreme Court has assiduously endeavored to keep a tort construct with an emphasis on state of mind out of section 1983, but it has injected a state of mind inquiry into the Constitution itself.

The Court justified its approach in *Daniels* by asserting that the fourteenth amendment due process requirement was not intended to protect citizens from governmental conduct amounting only to a failure to use reasonable care.[185] This conclusion is questionable, particularly in light of the Court's recognition of the potential for abuse stemming from governmental power.[186] Further, because constitutionally guaranteed personal liberties are interests of the highest order,[187] arguably the drafters of the fourteenth amendment intended them to be protected against *all*

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182. *See supra* note 70.

183. *See* Daniels v. Williams, 106 S. Ct. 662, 667 (1986)(negligence on part of jailer does not give rise to constitutional liability); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (requiring a showing of deliberate indifference to establish an eighth amendment violation).

184. See Justice Stevens's joint concurrence in *Daniels* and *Davidson*, 106 S. Ct. at 680 (1986).

185. *See* Daniels v. Williams, 106 S. Ct. 662, 667 (1986).

186. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), in which the Court recognized that, "[a]n agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id.* at 392.

187. Justice Cardozo speaking for the Court posited that the standard for incorporating protections into the due process clause of the fourteenth amendment was "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Palko v. Connecticut, 302 U.S. 319, 328 (1937) (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).

For discussions of the history and purpose of the fourteenth amendment, see R. Berger, Government by Judiciary (1977); R. Carr, Federal Protection of Civil Rights: Quest for a Sword (1947); J. Nowak, R. Rotunda & J. Young, Treatise on Constitutional Law: Substance and Procedure §§ 19.1 & 19.2 (1986); Gressman, *supra* note 88; Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

kinds of invasions, not just invasions resulting from highly blameworthy governmental conduct.[188] That the *Daniels* approach to constitutional interpretation coincides with the Court's present concern about the volume of section 1983 actions raises further questions about its legitimacy.[189] The suggestion is strong that the insertion of fault concepts into constitutional analysis reflects the Court's desire to reduce the section 1983 case load with its attendant problems for federalism and policy.[190]

Although it is unclear how far the Court will take this fault-based approach to constitutional interpretation, it obviously bodes ill for the future protection of personal liberties. Of particular relevance here is the impact it will have on the future of constitutional tort litigation. A look at the result in *Daniels* is illustrative. Because the conduct leading to his injury was merely negligent, the plaintiff stated no deprivation of an interest protected by the fourteenth amendment.[191] That he had no adequate state remedy is irrelevant because the fourteenth amendment only requires "due process" if there is a *deprivation* of a protected interest.[192] As a result he not only had no federal remedy under section 1983, he had no remedy at all.

Although the entire Court agreed that the negligent conduct in *Daniels* did not amount to a due process deprivation,[193] the situation in a companion case, *Davidson v. Cannon*,[194] decided on the same ground, illustrates fundamental problems with the majority's rigid approach to negligent conduct and due process. Whereas the plaintiff in *Daniels* was

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188. The legislative history of the Civil Rights Act of 1871, enacted to enforce the fourteenth amendment, does not support a state of mind restriction. *See supra* notes 86-87. Justice Stevens appears to have rejected such a restriction. In Estelle v. Gamble, 429 U.S. 97 (1976), Justice Stevens's dissent was directed in part against the majority's imposition of a state of mind requirement to establish liability for failure to properly administrate medical care. He concluded, "whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Id.* at 116 (Stevens, J., dissenting) (footnote omitted).

189. *See supra* notes 41-45 and accompanying text.

190. *See supra* text accompanying notes 41-68. The decision in *Daniels* adds yet another method for limiting the reach of § 1983 to a long list of such measures the Supreme Court has compiled in recent years. *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979) (abstention); Quern v. Jordon, 440 U.S. 332 (1979) (interpretation of the eleventh amendment); Rizzo v. Goode, 423 U.S. 362 (1976) (limits of equitable relief); Warth v. Seldin, 422 U.S. 490 (1975) (standing); *see also* Eisenberg, *supra* note 43, at 521-22; Whitman, *supra* note 31, at 6-7.

191. *See* Daniels v. Williams, 106 S. Ct. 662, 663 (1986).

192. *See id.* at 666 n.1.

193. Although Justice Stevens concurred jointly in the judgments in *Daniels* and *Davidson*, his analysis demonstrated that the state of mind of the actor is not the key to determining whether a deprivation is of a constitutional nature. In both instances the plaintiffs alleged deprivations of procedural due process. Rather than examining the actor's state of mind, Justice Stevens would require a demonstration that the state procedures were inadequate to address the deprivations. *See* Davidson v. Cannon, 106 S. Ct. 668, 688 (1986) (Stevens, J., concurring).

194. Davidson v. Cannon, 106 S. Ct. 668 (1986).

injured in a fall on a pillow left on the stairway by a deputy, the plaintiff in *Davidson* was seriously injured in an attack on him by fellow prisoners.[195] He had informed a guard in a written note of threats to him; the guard passed it on to senior prison officials, but the officials negligently failed to inform those coming on duty of the threats.[196] According to Justice Blackmun, in dissent, the important difference between the two cases was that "[w]hen the State incarcerated Daniels, it left intact his own faculties for avoiding a slip and a fall . . . . But the State prevented Davidson from defending himself, and therefore assumed some responsibility to protect him from the dangers to which he was exposed."[197] Although both injuries resulted from the negligent conduct of guards, Davidson's injury was "peculiarly related to the governmental function," making even a negligent failure to protect him a deprivation of his liberty.[198] The thrust of Justice Blackmun's position is that the majority approach excluding *all* negligent conduct from the purview of the fourteenth amendment is overinclusive. Although agreeing that negligent behavior will not ordinarily amount to abuse of state power, he noted "[w]here the Court . . . errs . . . is in elevating this sensible rule of thumb to the status of inflexible constitutional dogma."[199]

What Justice Blackmun recognized is that a governmental representative's failure to measure up to the conduct of the reasonable man can under some circumstances amount to an abuse of power. The Supreme Court has acknowledged the greater potential for harm from torts caused by those cloaked with the trappings of official power.[200] This is no less true where the harm is negligently inflicted rather than intentionally inflicted. The unique coercive power associated with being a representative of government increases the risk of harm so that in certain circumstances, failure by the government to maintain standards of reasonableness can work terrible hardships. If not *all* negligent behavior by those cloaked with governmental power should implicate due process, but *some* should, it is necessary to come up with a method for distinguishing between what should and what should not. Justice Blackmun's "sensible rule of thumb" needs an articulated standard to make it workable.

An approach taking account of the potential for official abuse of power through negligent conduct would look not simply to the character of the conduct but also to the position of the one injured. The inquiry would have two aspects; whether the injured party is a member of a disadvantaged group in relation to the government representative and whether the injury can fairly be said to have occurred as a result of that disadvan-

195. *See id.* at 669.
196. *See id.*
197. *Id.* at 671 (Blackmun, J., dissenting).
198. *Id.* at 674.
199. *Id.* at 673.
200. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971); Monroe v. Pape, 365 U.S. 167, 184 (1961).

taged position. The first part of the inquiry would require an assessment of the plaintiff's status. Groups such as prisoners or state mental patients would be viewed differently from ordinary citizens.[201] The distinction would be based on such factors as the group's autonomy, ability for self protection and dependence on government representatives.

The distinction between disadvantaged groups and ordinary citizens could be used in either of two ways. The simplest approach would be to say the fourteenth amendment is not implicated if the negligent behavior injures a member of the general public, but it is implicated if the act injures a member of a disadvantaged group. This would take into account the potential for abuse where there is a disparity in power and authority between a particular class of people and the government, thereby returning to the fourteenth amendment's initial focus.[202] The drawback of this approach, if taken by itself, is that it would leave the federal courthouse door open to the purportedly trivial claims by prisoners the courts have been trying to eliminate.

The second part of the inquiry focusing on the position of the injured party would take account of the special relationship, but would not include all cases of negligent injuries to disadvantaged classes. If it is apparent that the plaintiff's loss of autonomy vis-a-vis the state has made him particularly susceptible to deprivations of life, liberty or property as a result of official negligence, and in a particular situation the injury was a result of that susceptibility, then the fourteenth amendment should be implicated. Rather than drawing the line between common law tort and conduct that constitutes a constitutional tort violation based solely on whether the conduct was negligent, this approach would take into consideration the nature and impact of the relationship between the injured plaintiff and the injurer. This seems particularly appropriate because section 1983 was created to protect those who were powerless in the face of abuses of state power.[203] If the Court had applied this approach to *Daniels* and *Davidson*, it would have found that negligent conduct deprived Davidson of his fourteenth amendment rights but did not deprive Daniels of his fourteenth amendment rights. The reason, as Justice Blackmun suggested, is that Daniels' incarceration did not affect his ablility to avoid a slip and fall, but Davidson's incarceration made him directly vulnerable to attacks by fellow prisoners.[204] To limit the reach of the fourteenth amendment and, as a result, constitutional torts in the way the Court did in *Daniels*, without regard for the relationship between the

201. It can certainly be argued that to a certain extent, *all* citizens are disadvantaged vis-a-vis the government. This was suggested by the Court in *Bivens*, 403 U.S. at 394-95. Those dependent on government for their care and well being are especially subject to abuse of governmental power.

202. *See supra* note 182.

203. *See id.*

204. *See* Davidson v. Cannon, 106 S. Ct. 668, 671 (1986) (Blackmun, J., dissenting).

government and the group, will seriously diminish the efficacy of section 1983 as a watchdog of personal liberty.

In addition to the substantive objections to *Daniels*, the opinion may be criticized for failing to provide the guidelines needed by lower courts. The Court left for another day the question of how much more than negligence a plaintiff must allege to establish a fourteenth amendment deprivation.[205] In response to the plaintiff's argument that the approach invites "artful" pleading and confusion on elusive concepts like recklessness or gross negligence, the majority replied: "[P]etitioner's observations do not carry the day. In the first place, many branches of the law abound in nice distinctions that may be troublesome. . . . More important, the difference between one end of the spectrum—negligence—and the other—intent—is abundantly clear."[206] The Court may mean that the conduct must be intentional either in the criminal sense of "wilful," in the intentional tort sense of purposeful, or with knowledge to a substantial certainty. In the alternative, the Court may require that the conduct constitute gross negligence or recklessness in the sense of indifference to consequences to be sufficient.[207] It is impossible to deduce from the majority opinion how this will be resolved.

Despite the Court's facile conclusion that "the law abound[s] in nice distinctions that may be troublesome,"[208] it is likely that the courts will be asked repeatedly to make these difficult distinctions.[209] Moreover, it is apparent that once these questions are raised in the Supreme Court, consensus will be difficult to achieve.[210]

In *Daniels*, the Supreme Court provided a good example of its willing-

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205. *See* Daniels v. Williams, 106 S. Ct. 662, 667 & n.3 (1986).

206. *Id.* at 667.

207. Intent certainly was not a required element for the action in the Court's opinion in *Monroe*. The Court made the comparison between the criminal statute applicable in *Screws* which contains the mental element of "wilful" and § 1979 (now § 1983) applicable to the civil action in *Monroe*. The Court stated, "[w]e construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right.'. . . We do not think that gloss should be placed on § 1979 which we have here." Monroe v. Pape, 365 U.S. 167, 187 (1961) (citation omitted).

208. Daniels v. Williams, 106 S. Ct. 662, 667 (1986).

209. The distinctions among negligence, recklessness and intent have never been clearly defined. *See Prosser & Keeton, supra* note 4, § 34 at 208-14. The uncertainty in the distinctions will undercut the Court's attempts to ameliorate the perceived problems with § 1983. Frivolous suits will continue to be filed, albeit artfully pleaded, to evade the *Daniels* decision. Accordingly, inconsistent results will continue. Moreover, the uncertainty will undercut the Court's stated concern with providing guidelines "so that parties can order their conduct accordingly." City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2434 n.5 (1985) (plurality opinion).

210. In his concurring opinion in *Parratt*, Justice Powell made it quite clear that, to him "[a] 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss." Parratt v. Taylor, 451 U.S. 527, 548 (1981) (Powell, J., concurring). He will no doubt conclude that fourteenth amendment deprivations require at least an "intentional" act in the traditional tort sense of the word. On the other hand, Justice Blackmun in his dissenting opinion in *Davidson* stated that, "[e]ven if negligence is deemed categorically insufficient to cause a depriva-

ness to shape constitutional tort and limit the scope of section 1983 through its interpretation of the Constitution. The holding vividly illustrates that the Court will no longer allow the remedial nature of section 1983 to be used to transform common law torts into constitutional torts. Clearly there was a need for some method to differentiate between constitutional tort and common law tort. The difficulty is the broad sweep of the Court's approach. To exclude from fourteenth amendment protection anyone negligently injured by a state actor may effectively limit constitutional tort actions. Unfortunately, it also seriously undermines substantive constitutional protection. In addition, such exclusion raises questions of whether the Court arrived at its conclusion through legitimate constitutional interpretation or whether it is a result-oriented response to the perceived excesses of constitutional tort litigation.

3. Municipal and Supervisory Liability: Three-Party Cases and the Section 1983 Claim

This Article has explored Supreme Court cases illustrating that section 1983 has no independent state of mind requirement. In two-party cases, the Court has made it clear that state of mind is relevant only to the question of whether a constitutional violation has occurred.[211] An examination of the Court's approach to three-party cases, however, reveals inconsistencies that indicate that the relevance of the state actor's state of mind in section 1983 litigation is far from settled.[212] These cases fall into two categories—cases against supervisory personnel for constitutional violations caused by lower level officials[213] and cases against municipalities for violations resulting from city policies, either official or unofficial.[214]

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tion under the Fourteenth Amendment, recklessness must be sufficient." Davidson v. Cannon, 106 S. Ct. 668, 675 (1986) (Blackmun, J., dissenting).

Moreover, although the Court in *Daniels* determined that negligence is not sufficient to sustain an action for deprivation of procedural due process rights under the fourteenth amendment, other issues remain unresolved. The Court has not clearly indicated whether the decision in *Daniels* applies to violations of substantive due process. *See* Owen v. City of Independence, 445 U.S. 622 (1980) (police chief fired by city brought § 1983 action for violations of both his substantive and procedural due process rights; the Court's holding was limited to the immunity claimed by the city and other actors).

Another issue that may be affected by the decision in *Daniels* is whether random and unauthorized but intentional acts by a state actor, as in Hudson v. Palmer, 468 U.S. 517 (1984), will result in a constitutional deprivation in the absence of adequate post-deprivation remedies.

211. *See supra* text accompanying notes 121-43.

212. *See infra* text accompanying notes 229-304.

213. *See, e.g.*, Davidson v. Cannon, 106 S. Ct. 668 (1986) (suit for negligent failure to protect plaintiff against other prisoners included the prison warden as a defendant); Parratt v. Taylor, 451 U.S. 527 (1981) (suit against prison warden and hobby manager for loss of hobby kit by prison employees); Rizzo v. Goode, 423 U.S. 362 (1976) (suit included the Mayor and Police Commissioner in actions concerning brutality by police officers).

214. *See, e.g.*, Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986) (forcible entry directed by county prosecutor established a county policy actionable under § 1983); City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985) (plurality opinion) (one incident of

The three-party cases present special problems in section 1983 litigation. Although the statute requires only a showing of action committed under color of state law resulting in a constitutional violation, it is not clear how that showing is to be made if the action of the defendant has not been the *immediate* cause of the harm. Nothing in the statute's language or its legislative history suggests that the basis of liability in a three-party section 1983 case should be any different from that in a two-party case, but the complication of an extra party has consistently perplexed the lower courts and has often led them to conclude that the plaintiff must make a showing that the third party was at fault.[215]

The Supreme Court has not provided guidelines for resolving these difficult issues.[216] Rather, it has sent mixed messages about the statutory requirements for the section 1983 cause of action in a three-party situation. On the one hand, it has indicated that the basis of section 1983 liability is strict liability.[217] On the other hand, it has implied that a finding of fault on the part of a supervisor or a municipality might be necessary in order to state a section 1983 claim.[218] The Court needs to make clear that the basis for liability in a three-party section 1983 case is prescribed by the statute and that the culpability or state of mind of the government actor—regardless of whether that actor is a front-line employee, a supervisor, or a municipality—is irrelevant.

A review of the three-party Supreme Court cases reveals the source of the apparent confusion. The Court has occasionally focused on fault as an aspect of a three-party section 1983 case because it has failed to make the distinction between *vicarious* liability and *strict* liability. In a common law tort case in which plaintiff asserts vicarious liability as the basis of liability, the defendant need not have directly caused the harm himself.[219] Instead, liability is imposed because the defendant is deemed responsible, as a matter of policy, for someone else who causes the harm.[220] In a case imposing strict liability, however, although the plaintiff need not establish the defendant's fault, he still must establish that the defend-

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police abuse does not establish a policy by city); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (suit against city and city officials for cancelling license to hold music concerts); Owen v. City of Independence, 445 U.S. 622 (1980) (suit by chief of police included city manager and city council for deprivation by city manager when chief was wrongfully discharged); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (city policy requiring female employees to take maternity leave before medically necessary).

215. *See* cases cited *supra* note 22.

216. The Court has made it clear that § 1983 municipal liability may not be based on respondeat superior. Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978). *See supra* note 33.

217. *See* Owen v. City of Independence, 445 U.S. 622 (1980) and *infra* notes 254-88 and accompanying text.

218. *See* City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985) and *infra* notes 289-303 and accompanying text.

219. *See Prosser & Keeton, supra* note 4, § 69.

220. *See id.* §§ 69-70 (in-depth discussion of justifications for the vicarious liability concept).

ant actually caused his injury.[221] In recent section 1983 three-party cases the Court has implied that without a showing of fault, imposition of liability could only be based on a vicarious liability theory.[222] Vicarious liability, according to the Court, is an unacceptable basis for a section 1983 suit because it does not fulfill the statutory requirement of "subject, or cause to be subjected."[223] The Court has, in essence, confused the concept of actual causation—required by the statute—with the concept of fault—which is not required by the statute. To see how this confusion developed, it is necessary to examine these cases and trace the transformation of the actual causation requirement.

The Court first directly addressed the liability of supervisory personnel for constitutional violations caused by front-line employees in *Rizzo v. Goode*.[224] Plaintiffs sought injunctive relief against the Mayor, City Managing Director, and the Police Commissioner of Philadelphia claiming a pervasive pattern of police mistreatment of minorities in violation of their constitutional rights.[225] The trial court found evidence of procedures tending to discourage the filing of civilian complaints and ordered the defendants to develop a comprehensive program for handling police misconduct.[226] The Court of Appeals for the Third Circuit affirmed both the findings and the order.[227] The Supreme Court reversed, finding the district court's order to be "an unwarranted intrusion by the federal judiciary into the discretionary authority committed to [the defendants] by state and local law to perform their official functions."[228] Focusing on the causation language in section 1983, the Court noted that the policemen who allegedly violated constitutional rights were not named as parties and that no affirmative link existed between any plan or policy of defendants and the occurrence of police misconduct.[229] The Court saw the sole causal connection between the defendants and the injury to be their failure to act to change police procedures.[230] The Court suggested that such a mere failure to act cannot give rise to liability under section 1983.[231]

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221. *See id.* § 75. Vicarious liability is, in one sense, strict liability because liability is imposed without regard to the defendant's fault. *See id.* § 69 at 499.

222. *See* cases cited *supra* note 179.

223. *See* Monell v. Department of Social Servs., 436 U.S. 658, 691-92 (1978).

224. 423 U.S. 362 (1976).

225. *See id.* at 366-67.

226. Council of Orgs. on Philadelphia Police Accountability & Responsibility v. Rizzo, 357 F. Supp. 1289, 1318 (E.D. Pa. 1973), *aff'd sub nom.* Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

227. *See* Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

228. 423 U.S. at 366.

229. *Id.* at 371.

230. *Id.*

231. *See id.* at 375-76. Nonliability for a failure to act, "nonfeasance," was well established early in the common law of tort and has persisted. *See, e.g.*, Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901) (no duty imposed on physician to respond to call from dying man); Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928) (no duty to save a drowning man); Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A. 809 (1898) (no duty to

Some courts and commentators have interpreted *Rizzo* to stand for the proposition that nonfeasance or failure to act on the part of a supervisor is not sufficient to establish liability under section 1983.[232] The nonfeasance interpretation of *Rizzo* leaves in doubt the circumstances, if any, in which supervisory personnel will be liable for the unconstitutional acts of subordinates. That plaintiffs sought equitable relief, however, is an important factor in *Rizzo* that may limit its reach. The Court recognized that section 1983 permits equitable relief but particularly noted that issues of federalism are especially delicate if the plaintiff requests equitable remedies.[233] Because the damage remedy is less intrusive into governmental function than the kind of relief sought in *Rizzo*,[234] a different approach to supervisory personnel may be appropriate if monetary rather than equitable relief is sought.[235]

References to *Rizzo* in a later case, *Monell v. Department of Social*

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warn one against walking into a dangerous machine); Sidwell v. McVay, 282 P.2d 756 (Okla. 1955) (no duty to prevent child from hammering dangerous explosives). Although certain circumstances and relationships have been held to give rise to a duty to act, these situations are limited and the general rule remains that mere inaction cannot result in liability. This common law principle has long been subject to vigorous criticism. For discussions and criticisms of the nonfeasance issue in tort law, see M. Shapo, The Duty to Act: Tort Law, Power and Public Policy (1977); Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 44 Am. L. Reg. N.S. 209 (1905); Bohlen, *The Moral Duty to Aid Others As a Basis of Tort Liability*, 56 U. Pa. L. Rev. 217 (1908); Franklin, *Vermont Requires Rescue: A Comment*, 25 Stan. L. Rev. 51 (1972); McNiece & Thornton, *Affirmative Duties in Torts*, 58 Yale L.J. 1272 (1949); Rudolph, *The Duty to Act: A Proposed Rule*, 44 Neb. L. Rev. 499 (1965); Weinrib, *The Case for a Duty to Rescue*, 90 Yale L.J. 247 (1980). For a discussion of the problem in the context of constitutional tort, see Wells & Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. Mich. J.L. Ref. 1 (1982).

232. *See* Lenard v. Argento, 699 F.2d 874, 885-86 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983); Fernandez v. Chardon, 681 F.2d 42, 55 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); Reimer v. Smith, 663 F.2d 1316, 1323 (5th Cir. 1981); *see also* S. Nahmod, *Civil Rights*, *supra* note 18, at 178; Kirkpatrick, *supra* note 112, at 61.

233. [F]ederal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law."

> . . . Even in an action between private individuals, it has long been held that an injunction is "to be used sparingly, and only in a clear and plain case." When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.' "

Rizzo v. Goode, 423 U.S. 362, 378-79 (1976) (citations omitted).

234. *See id.* at 378-80. The district court had issued an order "significantly revising the internal procedures of the Philadelphia police department." *Id.* at 379.

235. The Court has traditionally been sensitive to federal intrusion into state matters through the use of federal courts' equitable powers. *See supra* notes 46-53 and accompanying text. *But see* Whitman, *supra* note 31, at 41-67 suggesting that a nonmonetary equitable award is, in many cases, the more appropriate judicial response. The "courts should prefer equitable remedies to damages in most constitutional section 1983 suits because money judgments often disrupt local government to a greater degree than the returns in the vindication of constitutional rights can justify. Equitable relief, however, can have fewer disruptive side effects, while promising to be more effective in changing official behavior." *Id.* at 42.

Services,[236] further undermine the nonfeasance interpretation of *Rizzo*. Plaintiffs in *Monell* were female employees of the Department of Social Services and Board of Education of New York City who were forced pursuant to official policy to take unpaid pregnancy leave before it was medically necessary.[237] They claimed that this policy violated their fourteenth amendment rights.[238] The district court held that *Monroe v. Pape* barred recovery of back pay against the City[239] and the Court of Appeals for the Second Circuit affirmed.[240] The Supreme Court reversed, finding from its reevaluation of the legislative history of the Civil Rights Act of 1871 that Congress intended municipalities to be "persons" within the meaning of section 1983.[241] After *Monell*, a municipality may be sued if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[242] Further, though the "touchstone" of section 1983 is the allegation of an official policy, the municipality may also be sued for a deprivation pursuant to a govern-

236. 436 U.S. 658 (1978).

237. *Id.* at 660-61.

238. *Id.* at 705-06 (Powell, J., concurring).

239. 394 F. Supp. 853 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 259 (2d Cir. 1976), *rev'd*, 436 U.S. 658 (1978).

240. 532 F.2d 259 (2d Cir. 1976), *rev'd*, 436 U.S. 658 (1978).

241. *See* Monell v. Department of Social Servs., 436 U.S. 658, 664-89 (1978). The Court in *Monroe* examined the legislative history behind the Ku Klux Klan Act and determined that Congress' rejection of the "Sherman Amendment," that would have extended county and municipal government liability for damages caused by Klan violence, indicated that Congress had no intention of including municipalities as "persons" under section 1 (now § 1983) of the 1871 Civil Rights Act. *See* Monroe v. Pape, 365 U.S. 167, 187-92 (1961).

The Court reassessed this position in *Monell*. It found that section 1 and the Sherman Amendment were not attached and examined the attacks made on the constitutionality of the proposed amendment by one of the opponents, Representative Blair. Monell v. Department of Social Servs., 436 U.S. 658, 666, 673-76 (1978). Representative Blair's argument was that the federal government could not impose additional obligations on a municipality because this was the exclusive realm of the state government. *See id.* at 675. The Court continued,

> [A]s Blair indicated, municipalities as instrumentalities through which States executed their policies could be equally disabled from carrying out state policies if they were also obligated to carry out federally imposed duties. . . . Thus, there was ample support for Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to "destroy the government of the States."

Id. at 678-79 (citation omitted). The Court concluded that this "Hobson's choice" was not presented in that part of the act which was to become § 1983. The Court found § 1983 did not impose an "obligation to keep the peace" but "merely impos[ed] civil liability for damages on a municipality that was obligated by state law to keep the peace . . . ." *Id.* at 679. The Court also stated that the "doctrine of dual sovereignty apparently put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it." *Id.* at 680.

242. *Monell*, 436 U.S. at 690.

mental "custom."[243]

The Court's decision that municipalities may be held liable under section 1983 has greatly expanded its scope.[244] Despite this expansion, however, the Court also reaffirmed a major limitation on the liability of municipalities by finding that Congress did not intend them to be vicariously liable.[245] The Court focused on the causation language in the statute, imposing liability on any person who "subjects, or causes to be subjected"[246] another to a deprivation of a federally protected right. The Court noted that the "language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor."[247] In addition, the Court examined two of the traditional rationales for respondeat superior—that it may help to reduce injuries and that the cost of injuries should be borne by the employer and then spread to the community on an insurance theory—but found them insufficiently persuasive to justify imposing vicarious liability on municipalities for the unconstitutional acts of employees.[248] Thus, in rejecting respondeat superior, the Court in *Monell* appeared to have rejected the notion that damages for constitutional injuries should be absorbed by municipalities either on a cost allocation theory or simply as a cost of doing government business.

The Court's rejection of vicarious liability raises questions about what is required to make a successful claim in a three-party case involving municipal liability. After *Monell*, all that can be stated with any certainty is that the deprivation must result from a municipal policy or custom[249] and that actual causation is a necessary element.[250] Unfortunately, the Court did not suggest how actual causation might be established. The Court merely stated that the government is only responsible if execution of the policy or custom "inflicts" the injury and was the "moving force" behind a particular deprivation.[251] Presumably what is needed is affirmative proof of both the policy or custom that created the risk of constitutional violations and the causal link between the policy or custom, and the plaintiff's constitutional injury. Under the facts of *Monell*, the causation issue was not difficult because the "formal, written policies" carried out by state officials—forcing pregnant workers to take unpaid medical leaves—were in themselves unconstitutional and implementation of them by government officials caused the deprivation.[252] The

243. *Id.* at 690-91.

244. *See* Whitman, *supra* note 31, at 49-50.

245. *Monell*, 436 U.S. at 691-92.

246. 42 U.S.C. § 1983 (1982).

247. *Monell*, 436 U.S. at 692.

248. *Id.* at 693-94. *But see supra* note 33 (discussing challenges to the Court's analysis in rejecting respondeat superior).

249. *See Monell*, 436 U.S. at 690-91.

250. *See id.* at 692.

251. *See id.* at 694.

252. *See id.* at 713 (Powell, J., concurring).

Court admitted that its treatment of municipal liability was sketchy because it had "no occasion to address . . . what the full contours of municipal liability under § 1983 may be."[253] Certainly it provided little assistance as to how to establish causation if the policy itself were not unconstitutional or if the claim were based on custom rather than policy.

Two aspects of the *Monell* case are important to the conclusion reached here that the basis of liability in all section 1983 cases is strict liability. First, the *Monell* Court referred to *Rizzo* to support its conclusion that section 1983 requires proof of actual causation.[254] The Court indicated that the basis for refusing to impose liability in *Rizzo* was that any liability would have been based on respondeat superior.[255] The Court said, "[b]y our decision in *Rizzo v. Goode*, we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability."[256] This statement implies that the nonfeasance interpretation of *Rizzo* is erroneous. Presumably, if failure to supervise had been established, the defendants would have been liable if the failure to supervise were causally linked to the harm. Thus the focus is on actual causation. Further, the reference to *Rizzo*, a supervisor liability case, in *Monell*, a municipal liability case, suggests that the liability of supervisors will be imposed on the same basis as liability of municipalities.[257] The focus in both types of three-party cases should be on actual causation.

The second aspect of *Monell* that supports the strict liability basis of all section 1983 cases, is the absence of any indication that a municipality must be at fault in creating policies or customs that lead to constitutional invasions. Except to rule out vicarious liability and require actual causation, the Court in *Monell* did not indicate the basis of liability.[258] It obviously did not require fault as a part of a plaintiff's section 1983 case against a municipal defendant. Nothing in *Monell* indicates that the Court intended anything other than strict liability.

The conclusion that fault is not a relevant issue in a three-party case any more than it is in a two-party case is strongly supported by the Court's decision in *Owen v. City of Independence*.[259] The Court held that municipalities are not entitled to qualified immunity under section 1983

253. *Id.* at 695.
254. *See id.* at 692.
255. *See id.* at 693.
256. *Id.* at 694 n.58 (citation omitted).
257. Both municipal and supervisory liability apparently would still be limited to employee's acts. Although non-employers in some circumstances may be liable for the acts of independent contractors, these generally involve situations in which an independent contractor has been hired to do a particular job. Occasionally, the fact of supervision may be relevant. *See generally Harper & James, supra* note 4, § 26.11 (discussing the application of respondeat superior outside of employment relationships); *Prosser & Keeton, supra* note 4, § 71 (same).
258. *See Monell*, 436 U.S. at 694-95.
259. 445 U.S. 622 (1980).

committed in good faith by their officials.[260] In *Owen*, the chief of police brought a 1983 action against the city and others for having made false accusations about him and for dismissing him without notice and an opportunity to be heard.[261] He claimed this violated his fourteenth amendment right to procedural due process.[262] The city claimed a qualified immunity.[263] The Court of Appeals for the Eighth Circuit found that the city had violated plaintiff's fourteenth amendment right, but that it should be afforded a qualified immunity because the Supreme Court cases establishing the right to a name-clearing hearing were not decided until after the plaintiff's discharge.[264] This conclusion was consistent with earlier Supreme Court decisions providing qualified immunity to individual government officials who acted in violation of constitutional rights before the Supreme Court had clearly established the existence of such right.[265]

The Supreme Court reversed, holding that a municipality "may not assert the good faith of its officers or agents as a defense to liability under § 1983."[266] Finding no mention of immunities or defenses in either the language of the statute or its legislative history, the Court turned to the common law as it existed at the time the statute was passed and discovered no tradition of immunity for municipalities.[267] Finally, the Court considered public policy to justify its conclusion that cities should not be immune and found it would be " 'uniquely amiss' . . . if the government itself . . . were permitted to disavow liability for the injury it has begotten."[268]

In *Owen* the Court reaffirmed the actual causation requirement established in *Monell*, holding that a city is only liable under section 1983 for the execution of a government policy or custom that inflicts injury.[269] Interestingly, however, the *Owen* Court justified its decision to deny municipal immunity on considerations expressly rejected in *Monell*. It noted that the possibility of a damage remedy against a city would encourage policymakers to "err on the side of protecting . . . constitutional rights. . . . [And to] institute . . . programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[270] This seems at odds with the *Monell* Court's apparent rejection of the

260. *See id.* at 638.

261. *See id.* at 625-30.

262. *See id.* at 630.

263. *See id.* at 633.

264. *See id.*

265. Early on, the Court found that individual government actors should not be expected to predict the future course of constitutional law. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

266. Owen v. City of Independence, 445 U.S. 622, 638 (1980)

267. *See id.* at 638-50.

268. *Id.* at 651 (quoting in part Adickes v. Kress & Co., 398 U.S. 144, 190 (1970)).

269. *See Owen*, 445 U.S. at 657.

270. *Id.* at 652.

accident reduction rationale as a reason to impose vicarious liability.[271] Further, despite its rejection of "equitable loss spreading" as a justification for imposing vicarious liability in *Monell*,[272] the *Owen* Court specifically approved the theory as a justification for denying immunity to the city finding that "it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated."[273]

To resolve this apparent conflict, it is necessary to distinguish between the different purposes for which the Court used the justifications in each case. In *Monell*, the justifications were posited to impose *vicarious* liability on municipalities for injury inflicted solely by its employees.[274] In light of the countervailing arguments for rejecting vicarious liability, the Court found the justifications unpersuasive.[275] In *Owen*, the effect of the Court's holding on the immunity issue was to impose *strict* liability on the city for the policies at issue.[276] In traditional tort law, the injury reduction and risk allocation rationales have been used to justify vicarious liability and strict liability; both impose liability without regard to fault.[277] The significant difference between the two theories is that vicarious liability imposes liability in the absence of direct causation—the employment relationship with someone who has actually caused harm is sufficient to impose liability.[278] Strict liability theory, although not requiring proof of fault, does require proof of causation.[279] The *Owen* Court noted this distinction and stated that "when it is the local government itself that is responsible for the constitutional deprivation—it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government."[280]

That the basis of liability in *Owen* is strict liability is clear. Because the existence of the right claimed by plaintiff was unknown at the time of his discharge,[281] there was no issue of fault with respect to the conduct of the city or its employees. No government official intentionally deprived the plaintiff of his right. Nor can it be said that those responsible knew or should have known that their conduct would violate the plaintiff's right. Thus, fault, as understood in common law tort, is absent. In perhaps the most telling statement regarding the basis of liability in three-party cases, the Court stated:

271. *See Monell*, 436 U.S. at 693-94.
272. *See id.*
273. *Owen*, 445 U.S. at 655.
274. *See Monell*, 436 U.S. at 693-94.
275. *Id.*
276. *See Owen*, 445 U.S. at 655 n.39; *see also id.* at 658 (Powell, J., dissenting).
277. *See Prosser & Keeton*, *supra* note 4, §§ 69, 75.
278. *See id.* § 70.
279. *See id.* § 75 at 536-58.
280. *Owen*, 445 U.S. at 655 n.39.
281. *See id.* at 658 (Powell, J., dissenting).

> Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.[282]

The Court thereby recognized the recent movement of tort law away from a fault-based approach to a strict or enterprise liability approach,[283] focusing on the same policy factors to justify the rejection of municipal immunity.

Although *Owen* is the clearest statement of the basis for liability in a three-party section 1983 case, the majority never used the term strict liability.[284] Indeed, the focus of the case was not on what the plaintiff had to establish to state his claim under section 1983, but rather on what the defendant would be permitted to assert in order to avoid liability.[285] The inference that the Court is talking about strict liability is quite clear, but the Court has not yet specifically established the requisites for the three-party case as clearly as it has for the two-party case.

The Court's decision in *Parratt v. Taylor*[286] supports the inference drawn from *Owen* that the three-party section 1983 case is based on strict liability. The *Parratt* Court obviously was aware that it was dealing with a three-party case as it specifically noted that the defendants had not personally handled the plaintiff's property.[287] Unfortunately, the Court never directly addressed the three-party aspect of the case. Early in the decision, the Court stated unequivocally that the "initial inquiry" in a section 1983 action focuses only on (1) whether the conduct complained of was committed under color of state law and (2) on whether the conduct resulted in a deprivation of a federally protected right.[288] No showing of state of mind or culpability is required.

Recently the Supreme Court had another opportunity to articulate the proper approach to three-party cases. In *City of Oklahoma City v. Tuttle*,[289] the Court considered the proof a plaintiff must muster to establish a policy of inadequate police training causing a constitutional depriva-

282. *Id.* at 657.

283. For discussions of the no fault approach to tort law, *see, e.g.*, G. Calabresi, Costs of Accidents, A Legal and Economic Analysis, 12 (1970); A. Ehrenzweig, Negligence Without Fault (1951); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. Colo. L. Rev. 153 (1976); Leflar, *Negligence in Name Only*, 27 N.Y.U. L. Rev. 564 (1952); McNiece & Thornton, *Is the Law of Negligence Obsolete?*, 26 St. John's L. Rev. 255 (1952).

284. That the majority imposed strict liability was pointed out by the dissenters. *See* Owen v. City of Independence, 445 U.S. 622, 658 (1980) (Powell, J., dissenting).

285. *See id.* at 638 & n.18.

286. 451 U.S. 527 (1981).

287. *See id.* at 537 n.3.

288. *See id.* at 535; *see also supra* notes 127-30 and accompanying text (discussing strict liability basis of *Parratt*).

289. 105 S. Ct. 2427 (1985).

tion. The specific issue in *Tuttle* was whether proof of a single instance of excessive force by one officer is sufficient to establish a municipal policy of inadequate training of police officers.[290] The trial court instructed the jury that it could infer from "a single, unusually excessive use of force . . . that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge."[291] The Supreme Court found this inference from a single act of force insufficient as a matter of law.[292] Having decided the specific issue, the Court had no need to consider how much proof is generally necessary to establish a policy of inadequate police training. Nevertheless, Justice Rehnquist expressed his views on the extent of proof necessary to establish a municipal policy or custom leading to a constitutional violation in a police misconduct case.[293]

Justice Rehnquist's plurality opinion noted the undeveloped state of municipal liability theory and looked to *Monell*, the seminal case on municipal liability under section 1983, for guidance.[294] Unfortunately, the opinion appears to have seriously misconstrued the *Monell* holding on the actual causation requirement. The plurality opinion apparently confused the concept of fault with the concept of actual causation and the vicarious liability theory of recovery with a theory of recovery based on strict liability.[295] For example, the opinion accurately stated that *Monell* requires a showing that a municipal policy or custom caused a deprivation because a municipality should be liable only "for *its own* violations of the Fourteenth Amendment."[296] The *Tuttle* plurality interpreted this to mean that "municipal liability should not be imposed when the municipality was not itself at *fault*."[297] Noting that the *Monell* Court imposed municipal liability only for deprivations caused by a "custom or policy,"[298] the *Tuttle* plurality went on to conclude that this "provides a *fault-based* analysis for imposing municipal liability."[299] In fact, there is nothing in the majority opinion in *Monell* to indicate that the Court intended by its policy or custom requirement to create a "fault-based"

290. *See id.* at 2431. The suit was brought by the widow of a man shot by an Oklahoma City police officer. The officer received a call to respond to a robbery in progress at a bar. A description was given of an armed suspect matching Tuttle's description. It was later stipulated by the parties that Tuttle had placed the call himself. Shortly after the officer arrived and restrained Tuttle, and subsequent to the barmaid's assertion that no robbery had occurred, Tuttle broke away, crouched, and reached into his boot. The officer then shot and killed Tuttle. A toy pistol was later found in Tuttle's boot. *See id.* at 2429-30.

291. *Id.* at 2435.

292. *See id.*

293. *See id.* at 2435-36.

294. *See id.* at 2433.

295. *See id.* at 2439-40 (Brennan, J., concurring in part and concurring in the judgment).

296. *Id.* at 2433 (quoting *Monell*, 436 U.S. at 683) (emphasis added).

297. *Id.* (emphasis added).

298. *Id.*

299. *Id.* at 2434 (emphasis added).

analysis for municipal liability. The Court in *Monell* focused exclusively on the need to establish actual causation so that liability would not be imposed on the basis of vicarious liability.

The *Tuttle* plurality went on to state that *Monell's* requirement of a " 'policy or custom' . . . was intended to prevent the imposition of municipal liability under circumstances where no *wrong* could be ascribed to municipal decisionmakers."[300] To use the word "wrong" in this context suggests that, to recover, the plaintiff must establish that the city has done something blameworthy. The concept of wrong is relevant here only in the sense that one whose constitutional rights have been invaded has been "wronged." Under section 1983, legal responsibility is imposed without inquiring whether the one causing the harm has been at fault in the common law tort sense of the word.

Again, in discussing the amount of proof that might be required if the municipal policy itself is constitutional,[301] the *Tuttle* plurality concluded that "more proof than a single incident will be necessary in every case to establish both the requisite *fault* on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation."[302] As a result, what the Court in *Monell* regarded as a single causation requirement,[303] the plurality in *Tuttle* transformed into a double requirement—the plaintiff must show both fault and causation.

Finally, the *Tuttle* plurality did not address the trial court's focus in its instruction on "deliberate indifference" or "gross negligence" as the proper standard for determining whether inadequate training or supervision rises to the level of a constitutional violation. The only mention the Court makes of the "gross negligence" standard is in a footnote, stating that "it is open to question whether a policy maker's 'gross negligence' in establishing police training practices could establish a 'policy' that constitutes a 'moving force' behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policy maker would be required."[304]

300. *Id.* at 2435 (emphasis added).

301. In Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986), the Court concluded that a single decision by a municipal policy maker resulting in a constitutional deprivation was sufficient to satisfy the *Monell* "official policy" requirement. In *Pembaur*, the county prosecutor instructed deputy sheriffs to "go in and get" witnesses named in a capias in violation of the petitioner's fourth amendment rights. *See id.* at 1292. Thus, unlike the situation in *Tuttle*, the policy in *Pembaur* was itself unconstitutional. *See id.* at 1293.

302. *Tuttle*, 105 S. Ct. at 2436 (emphasis added) (footnote omitted).

303. *See Monell*, 436 U.S. at 692.

304. *Tuttle*, 105 S. Ct. at 2436 n.7. The Supreme Court has granted certiorari in a case presenting the issue of whether gross negligence is sufficient to establish a policy of inadequate training. Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1374 (1986). In *Kibbe*, the Court of Appeals for the First Circuit affirmed a jury verdict for plaintiff in a suit arising out of a high speed auto chase. Plaintiff's decedent was shot and killed while attempting to elude police officers. 777 F.2d at 802-03. The chase involved ten officers and three separate shooting incidents. *Id.* at 805. The court held that the actions of the officers and the lack of police guidelines, *id.* at 807-08,

These and other enigmatic statements using the words fault or wrong can only compound the confusion in an area of law already assailed by doubt. The Court needs to provide a uniform approach to all section 1983 cases, both two-party and three-party, that will not frustrate the purposes of section 1983 by inserting a state of mind inquiry.

III. THE NATURE OF THE BEAST—STRICT LIABILITY AND RISK ANALYSIS

A. *Risk Analysis—An Analytical Framework for Classifying Constitutional Torts*

As the foregoing discussion indicates, the evolution of the section 1983 species of tort liability has been determined by a variety of influences since the Supreme Court's decision in *Monroe v. Pape*. The tort overlay, especially the introduction of fault concepts, that many courts have imposed on section 1983 litigation has confused the strict liability basis of the statute.[305] This unwarranted commingling of the statutory section 1983 action with common law tort principles has created a hybrid species of liability with unclear characteristics. As a result, the remedies for invasions of highly valued constitutional interests are uncertain.

Obviously, courts need explicit, settled principles to guide their decisions in section 1983 cases, and litigants need the same to predict them. Citizens need assurance that their constitutional rights will be uniformly protected. What is needed is an analytical framework for constitutional tort that is compatible with its classification as a statutorily created variety of strict liability. Ideally, the analytical system would allow for further natural evolution of the species unimpeded by common law tort concepts that blur the distinctions between the constitutional tort species and common law varieties. It must advance these aims yet remain consistent with the statutory and tort law parentage of the section 1983 action.

A risk analysis approach to constitutional tort rooted in the common law of tort and adapted to the special needs of section 1983 litigation would provide a uniquely appropriate solution to the many problems presented by section 1983 cases. Risk analysis is not a new concept in the law of torts. It has been proposed by various torts scholars as a method for defining the scope of liability in tort cases.[306] Its basic prem-

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supported a jury finding that "the department's gross negligence in training . . . caused the premature use of deadly force against [plaintiff's decedent]." *Id.* at 809.

Kibbe would be an ideal case for the Court to clearly establish that fault has no place in the § 1983 case. The Court should use *Kibbe* to clarify that the three-party § 1983 case does not contain any additional state of mind requirement, and, therefore, does not differ from the two-party § 1983 case.

305. *See supra* notes 121-36 and accompanying text.

306. *See, e.g.*, R. Keeton, Legal Cause in the Law of Torts 108 (1963) (suggesting risk analysis to replace proximate cause); Green, *Duties, Risks, Causation Doctrines*, 41 Tex. L. Rev. 42, 43-47 (1962) (comparing risk analysis to traditional tort causation doctrines);

ise is that accountability for harm should be commensurate with the scope of the risk created by the defendant's tortious activity.[307]

Although primarily propounded as an approach to negligence cases, risk analysis has also been recognized as an effective method for resolving strict liability situations.[308] In negligence cases, tort law seeks to minimize risks by requiring reasonably prudent conduct.[309] Strict liability acknowledges that certain kinds of risks should be borne by those who undertake the activity that creates the risk, even though there is no fault, such as failure to use reasonable care or intentional interference with a legally protected interest.[310] Liability is based on the creation of an undue risk of harm to society.[311] Most, if not all, areas of strict liability focus on the risk-creating quality of the actor's conduct. For example, in strict liability for injuries caused by abnormally dangerous activities, the actor is held accountable because of the risk that even a carefully run operation will result in injury.[312] In strict products liability, the risk that the dissemination of a dangerously defective product will result in injury is clearly the doctrinal linchpin of the system of law requiring manufacturers to bear the costs of injuries.[313]

The key to the utility of risk analysis as an analytical framework in any tort situation is in the definition of risk.[314] Accordingly, care must be taken to correctly identify the nature of the risk to be protected against. In a section 1983 constitutional tort case, risk is not difficult to formulate because it is defined within the statute itself. The defined risk is that conduct under color of state law will cause a constitutional violation. Unlike common law negligence, the statute does not set forth a standard of ordinary care. It simply imposes liability whenever the risk-creating activity produces harm to the protected interests.

By drafting the statute in a way that imposes strict liability, Congress recognized that the government's coercive power creates such a great risk of harm to constitutionally protected interests that it justifies imposing liability when government conduct results in constitutional harm.[315]

Maleson, *Negligence is Dead But Its Doctrines Rule Us From the Grave: A Proposal to Limit Defendants' Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause*, 51 Temp. L.Q. 1, 16-37 (1978) (proposing risk analysis as a superior alternative to proximate cause; applying risk analysis to products liability cases).

307. *See* R. Keeton, *supra* note 306.

308. *See id.* at 108; Maleson, *supra* note 306, at 16-20.

309. *See* 3 *Harper & James*, *supra* note 4, § 12.1; *Prosser & Keeton*, *supra* note 4, § 31 at 169-170.

310. *See Prosser & Keeton*, *supra* note 4, § 75.

311. *See id.* § 75, at 538.

312. *See id.* § 78, at 545-59.

313. *See id.* §§ 95-98.

314. *See* R. Keeton, *supra* note 306, at 18-19.

315. *See supra* note 87; *see also* Parratt v. Taylor, 451 U.S. 527, 534 (1981) ("Section 1983 . . . has never been found . . . to contain a state-of-mind requirement"); Monroe v. Pape, 365 U.S. 167, 187 (1961) (no requirement of wilfulness for civil action under § 1983).

A congressional policy to minimize the risk of constitutional violations is therefore implicit in the existence of section 1983 as a remedial device for those who have suffered constitutional injury. Risk analysis would best effect that policy.

B. *How Risk Analysis Works in a Section 1983 Context*

Using risk analysis, any person acting under color of state law, whether an individual or a municipality, who deprives another of a constitutionally protected right is liable provided the conduct, policy or custom creates a risk that a constitutional deprivation will occur and the risk results in a constitutional injury. To establish a section 1983 case under this analysis, the plaintiff must first demonstrate a deprivation of a constitutional right.[316] Depending on the constitutional claim, this may include the need to show that the state actor who personally directly invaded the right acted with a particular state of mind or degree of culpability.[317] In light of *Daniels*, many cases will never get beyond this point.[318] The plaintiff then must establish that the defendants were acting under color of state law and that the acts caused the constitutional harm.[319] The risk analysis approach in a three-party case requires a showing that a risk of constitutional harm was created by the defendant's conduct, namely the creation or implementation of a policy or acquiescence in a custom, and that a causal nexus exists between the created risk and the deprivation suffered.

1. Establishing Risk

The method used to establish risk will depend on the facts of the case. In a two-party situation the risk is that an individual government actor's conduct will result in a deprivation. Therefore, proof of the existence of a risk will relate only to the actual transaction in which the deprivation occurred. The very act that created the risk will also be the act that caused the deprivation.

In the three-party case, on the other hand, the risk is that a supervisor's conduct, or a policy or custom of a municipality or supervisor, creates a risk that someone else, usually a subordinate employee, will violate a constitutional right. In such cases, in addition to proof relating to the transaction in which the violation occurred, the plaintiff must establish the existence of the conduct, policy or custom of the third party that led to the initial risk of constitutional injury. Since respondeat superior has been eliminated as a basis for liability for both municipalities and super-

316. *See* Baker v. McCollan, 443 U.S. 137, 140 (1979).

317. *See supra* notes 179-81 (discussing state of mind requirements that the Court has applied to different constitutional provisions).

318. *See supra* notes 170-77 and accompanying text.

319. The statute requires plaintiff to show "subjects, or causes to be subjected." 42 U.S.C. § 1983 (1982). For arguments that this language and the legislative history includes respondeat superior liability, see sources cited *supra* note 33.

visors, the plaintiff must do more than show that the mere hiring of the employee or instructing the employee to function within the scope of his employment created the risk that a deprivation would occur.[320] Rather, in the three-party case, the plaintiff must prove the existence of the policy or custom itself and the risk it created to constitutional rights. The difference between the two-party and three-party cases is not in the basis of liability imposed—in both situations it is strict liability—the difference is in the proof necessary to establish the risk.

Because the guidelines for municipal and supervisory liability under section 1983 are still developing, it is difficult to say what kind or amount of proof courts will find sufficient to establish the existence of a risk. For municipal liability, if the municipal policy itself is unconstitutional, as it was in *Monell*, there will be few difficulties proving the existence of the risk or its causal link to the deprivation of plaintiff's constitutional right. If the policy or custom is not in itself unconstitutional and the claim is that the risk occurs by implementation of or acquiescence in the policy or custom, or a failure to take affirmative action to change the policy or custom, there may be serious difficulties with proof. In this kind of case the courts have allowed the concept of fault to creep in. In cases claiming a constitutional injury as a result of inadequate training or supervision of front-line personnel, the lower courts have required plaintiffs to establish fault amounting to gross negligence or deliberate indifference to the risk.[321] In *Tuttle*, the Supreme Court gave some guidance regarding the proof question,[322] but *Tuttle*'s value as an indicator of the requisites of the three-party case is limited by the narrow issue presented and the plurality's possibly inadvertent injection of fault language.

Under a risk analysis approach, the question is whether the policy or custom with regard to training or supervision created a risk that low-level employees would violate constitutional rights. The plaintiff is not required to allege or prove the defendant was at fault. In the case of a violation caused by inadequate training or supervision, the plaintiff would have to prove the inadequacy, but not the defendant's fault in causing the inadequacy.

2. Establishing Causation

The language, "subjects, or causes to be subjected,"[323] of the statute indicates the need to establish causation and demonstrates the appropriateness of imposing liability on third parties who have "caused" the sub-

320. Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978). Should the Court reverse its stand on this issue, section 1983 liability imposed on municipalities through respondeat superior comports well with the risk analysis approach suggested here. The risk would be the existence of the government employment relationship that puts employees in a unique position to invade citizens' constitutionally protected interests while acting within the scope of their employment.

321. *See supra* notes 36-40 and accompanying text.

322. City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2436 (1985) (plurality opinion).

323. 42 U.S.C. § 1983 (1982).

jection.[324] Since *Monell*, it is clear that proof of causation is critical to any section 1983 case.[325] While the causation requirement can present difficult problems in any constitutional tort case,[326] the subspecies of three-party cases are of such complexity that older methods of identifying the element of causation may be ineffective.

Unfortunately, beyond recognizing causation as a statutory requisite, the Supreme Court has done little to identify the appropriate test for actual causation in a constitutional tort context or to indicate how much or what kind of proof of actual causation is necessary in the three-party situation. Although the Court has often relied on a common law tort approach in constitutional tort cases, it has not used the familiar common law tort tests for actual causation.[327] In *Monell*, the Court indicated that execution of the official policy must "inflict" the injury.[328] The standard was met in *Monell* because the Court found that the maternity policy was the "moving force" of the violation.[329] In *Tuttle*, the plurality opinion stated, "[a]t the very least there must be an *affirmative link* between the policy and the particular constitutional violation alleged."[330] Beyond these statements, the Court has been silent on a method for determining actual causation in a three-party case.

Actual causation problems may differ in three-party cases depending

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324. For an argument that this language does not allow for third party liability in a § 1983 case, see Nahmod, *Constitutional Accountability*, *supra* note 112, at 22-24. He argues that because the "causes to be subjected" language is in the passive voice, it indicates that the drafters intended liability to attach if a defendant's conduct *actually* caused a constitutional violation. *See id.* at 17. This approach requires an incredibly strained interpretation of the statutory language. It seems obvious that the drafters chose the "causes to be subjected" language to indicate that responsibility for constitutional violations should extend to those who create risks that others will violate constitutional rights.

325. Monell v. Department of Social Servs., 436 U.S. 658, 691-92 (1978).

326. For a detailed consideration of the many and varied causation problems that can arise in constitutional tort contexts, see Eaton, *Causation in Constitutional Torts*, 67 Iowa L. Rev. 443 (1982).

327. In Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), the Court used a modified substantial factor approach. Plaintiff was not rehired as a teacher because of his "lack of tact in handling professional matters." *Id.* at 282. Two incidents were cited, calling a radio station to complain about the school's dress code and using obscene gestures. *Id.* The Court's analysis required a two-tier standard of cause in fact that required the plaintiff to show that there was a constitutional deprivation and then put the burden on the defendant to show the same decision would have been reached "even in the absence of the protected conduct." *Id.* at 287.

The conduct complained of in *Mount Healthy* had both a constitutional element, protected first amendment speech, and a non-protected element. The Court decided it was necessary to determine if the non-constitutional element was independently sufficient to support the Board's decision. *See id.* at 287. This situation is different from the typical three-party case in which the conduct either has or has not deprived an individual of a constitutional right. *See* Eaton, *supra* note 326, at 457-61; *see, e.g.*, Daniels v. Williams, 106 S. Ct. 662 (1986) (leaving a pillow that causes injury on the steps does not result in a constitutional deprivation just because it was done by a state actor).

328. *See Monell*, 436 U.S. at 694.

329. *Id.*

330. 105 S. Ct. at 2436 (emphasis added).

on whether it is a municipal or a supervisory case. Further, within the category of municipal three-party cases, proof of causation will differ depending on whether the claimed policy or custom was unconstitutional per se or merely created the risk that unconstitutional conduct would occur. In *Monell*, because the policy was itself unconstitutional, the plaintiffs had little difficulty in showing that the policy was the cause of the injury. In *Tuttle*, where the claimed policy of inadequate training was not in itself unconstitutional, the Court said that much more than proof of a single incident of abusive behavior was necessary to establish the "causal connection between the 'policy' and the constitutional deprivation."[331] If the policy itself is not unconstitutional but creates a risk that unconstitutional conduct will occur, it will be more difficult to establish that the policy or custom caused the injury. The actual actor's conduct will be more independent and further removed from the policy than the implementation of official policy.[332]

The focus on the effect of nonfeasance in *Rizzo v. Goode*[333] has added a potential complication to the actual causation issue in section 1983 three-party cases involving the liability of supervisory personnel. Obviously, a causal link is more difficult to prove if the defendant has not specifically commanded or approved the conduct that results in the injury. Thus, if the nonfeasance interpretation of *Rizzo* is correct, mere acquiescence in a custom that creates a risk of constitutional harm does not establish causation.[334] The Supreme Court in *Rizzo* may have confused nonfeasance with the imposition of vicarious liability.[335]

Under a risk analysis approach the causation question is whether the injury occurred within the scope of the risk created by the defendant's activity. If the proven risk is that an individual's conduct, or a munici-

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331. *Id.*

332. It is in this type of case, where the policy itself is not unconstitutional, that the courts have required a showing of a high degree of culpability. *See, e.g.*, Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985) (to hold city liable for inadequate training plaintiff must show gross negligence), *cert. granted*, 106 S. Ct. 1374 (1986); Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985) (same), *cert. denied*, 106 S. Ct. 879 (1986); *see also* Polk County v. Dodson, 454 U.S. 312, 326 (1981) (suggesting that only policies unconstitutional in themselves will satisfy *Monell's* policy or custom requirement).

333. 423 U.S. 362 (1976).

334. Arguably inadequate training is not mere acquiescence or nonfeasance because it arises from active conduct. The level of training given to police officers is a matter of conscious decision. Whether a police officer receives one hour or twenty hours of training in the use of a firearm in the line of duty depends on the "active" policy decisions made by the third party, usually the police department or the municipality. Acquiescence in a decision to provide only one hour of such training, leading to "inadequately trained officers," rises to the level of misfeasance on the part of the third party. Moreover, despite the common law "no duty to act" rule, there have always been certain relationships giving rise to a duty to act, especially if one party is in a relatively stronger position than the other. *See Prosser & Keeton, supra* note 4, § 56, at 373-85. An example is the parent-child relationship in which the parent is under a duty to protect the child. A natural extension of this exception would be to impose a duty on the governing to act for the benefit of the governed.

335. *See supra* notes 256-57 and accompanying text.

pality's policy or custom will result in a constitutional deprivation—either directly or through the actions of a third party—and such a deprivation in fact occurs, then the actual causation requirement is satisfied. In the case of supervisory or municipal malfeasance, it should be clear that creation of or acquiescence in policies or customs creating constitutional dangers, or even a failure to change policies imposing risks, is in itself a kind of risk creation. If constitutional injury in fact occurs, the creation of the risk has been causally related to the injury.

3. Scope and Extent of Liability

A question that may arise with the assessment of risk as an analytical structure for strict liability imposed by section 1983 is whether its scope is sufficiently well defined. In common law tort the scope or extent of liability has traditionally been limited by the concept of "proximate cause."[336] From time to time a proximate cause kind of inquiry has crept into constitutional tort litigation as well.[337] Proximate cause has long been a source of confusion in common law tort and should be kept out of the analysis in constitutional tort cases. Proximate cause rubric invites a focus on foreseeability and reasonableness that could undermine the effectiveness of risk analysis. Concepts such as foreseeability, reasonableness or intent narrow the scope of risk for the purposes of assigning liability and therefore should be eliminated from the strict liability inquiry outlined above. Proponents of risk analysis value risk analysis as an alternative to proximate cause.[338]

It may be argued that, in light of the current attitude toward section 1983 litigation in the courts,[339] the scope of liability would be too broad under a risk analysis approach to section 1983 liability. The scope of liability in section 1983 under risk analysis, however, would still be subject to the built-in limitations of constitutional tort. For example, the *Monell* policy or custom requirement rules out vicarious liability.[340] An order to an employee to fulfill a job-related obligation is simply to instruct the employee to act within the scope of his employment.[341] Torts

336. *See* 4 *Harper & James, supra* note 4, § 20.4; *Prosser & Keeton, supra* note 4, § 42.

337. *See, e.g.*, Martinez v. California, 444 U.S. 277, 284-85 (1980) (indicating in dictum that proximate cause limited state parole board's liability for parolee's murder of 15 year old girl); Arnold v. IBM Corp., 637 F.2d 1350, 1355-58 (9th Cir. 1981) (acts of corporate employees in initiating investigation that led to plaintiff's trial for theft were cause in fact of his injury but not proximate cause, therefore no § 1983 liability); McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980) (suggesting foreseeability is applicable to § 1983 action for heart attack suffered in course of town's intrusion on plaintiff's land); Johnson v. Greer, 477 F.2d 101, 106-07 (5th Cir. 1973) (proximate cause limits § 1983 liability of psychiatric clinic's administrator for plaintiff's shoulder injury suffered in course of false imprisonment).

338. *See supra* note 306.

339. *See supra* notes 41-69 and accompanying text.

340. *See Monell*, 436 U.S. at 691-695.

341. For example, *Monell*'s bar on vicarious liability limits municipal liability for constitutional violations by police officers. The officers interact with citizens on a daily basis

of employees acting within the scope of their employment have long been attributable to employers on a respondeat superior theory.[342] The relationship alone would be insufficient to establish *Monell's* policy or custom requirement for municipal liability.

Further, the Supreme Court's recent narrow view of a constitutional violation significantly reduces the possibility that the broad scope of the risk in a risk analysis approach will lead to a flood of section 1983 litigation.[343] After *Daniels*, claims of negligence in the institutional setting will generally fail because negligence is insufficient to establish a fourteenth amendment deprivation claim. Moreover, the Court's limitation on damages recoverable in section 1983 cases reduces the chance that liability will be too extensive.[344] In light of these restrictions, there is little danger that a broad view of risk will adversely affect the proper control of the constitutional tort species.

How the *extent* of liability will be determined in constitutional tort using a risk analysis approach is also of some concern. Like scope of liability, extent of liability has been determined in common law tort by use of the "proximate cause" concept. Courts and scholars have long disagreed on how proximate cause limits the extent of liability. Some conclude that a tort-feasor is held responsible for only the foreseeable consequences of his tortious acts,[345] whereas others assert that if any harm is foreseeable, the tort-feasor is responsible for all the consequences.[346] Under a risk analysis approach foreseeability of the manner

in situations in which the violation of constitutional rights may be a result of intentional conduct, inadequate training to deal with a particular situation, or simply a near instantaneous reaction to a perceived threat to himself or others. The last situation simply involves action in the course of employment, ruling out municipal liability.

342. *See* Restatement (Second) of Agency § 219 (1957); 5 *Harper & James, supra* note 4, §§ 26.6-.10; *Prosser & Keeton, supra* note 4, §§ 69-70.

343. *See supra* text accompanying notes 144-212.

344. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (punitive damages are not recoverable against a municipality); Carey v. Piphus, 435 U.S. 247 (1978) (only actual damages are recoverable).

345. One case that clearly demonstrated this position was Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'g Co., [1961] App. Cas. 388 ("Wagon Mound I"). This case involved a ship in Sydney harbor that negligently allowed furnace oil to be released into the harbor. The oil spread across the water to a dock where repair work was taking place. Molten metal fell onto cotton waste which ignited, causing the oil to burn and the dock to be destroyed. The English Privy Council decided that the defendant could be held liable only for the foreseeable consequences which included the possibility of the oil fouling the dock but not the resulting fire. This approach has been discussed by numerous scholars. *See*, Dias, *Remoteness of Liability and Legal Policy*, Cambridge L. J. 178 (1962); Fleming, *The Passing of Polemis*, 39 Can. B. Rev. 489 (1961); Morison, *The Victory of Reasonable Foresight*, 34 Aust. L.J. 317 (1961); Payne, *Foresight and Remoteness of Damage in Negligence*, 25 Mod. L. Rev. 1 (1962); Williams, *The Risk Principle*, 77 L.Q. Rev. 179 (1961). An American analysis can be found in Green, *Foreseeability in Negligence Law*, 61 Col. L. Rev. 1401 (1961).

346. Two cases have exemplified this approach. The earlier was an English case, *In re Polemis*, 3 K.B. 560 (1921), in which a workman dropped a plank into the hold of the ship *Polemis*. The dropping of the plank could have foreseeably caused damage to the pipes and valves in the hold of the ship. It was unforeseeable, however, that the plank

of injury and type of injury is irrelevant, so extent of liability would be determined by whether a constitutional deprivation was within the scope of the risk created. If the deprivation was linked to the activity posing the risk, the violator should be liable.

Although some courts addressing the extent of liability problems have reached conclusions based on foreseeability,[347] developments in constitutional tort favor an interpretation that would reject foreseeability in connection with both scope and extent of liability. Of particular importance is Justice Douglas's conclusion that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[348] Although a limitation on responsibility to "natural consequences" of actions is a restriction of sorts, it is broader than a "proximate cause" limitation based on forseeability.[349] A "natural consequences" approach has been used in cases that reject foreseeability as a factor in determining legal causation[350] and in cases imposing strict liability.[351] A natural consequences approach changes the focus from a concern with the quality and characteristics of the activity producing the risk to a concern for whether a link between activity and injury can withstand scrutiny as a fair imposition of accountability.

The Court's decision in *Owen v. City of Independence*,[352] further indicates that responsibility for injury in constitutional tort should not be limited by foreseeability. In *Owen*, the Court imposed liability on the city even though at the time its policy was implemented, it was unfore-

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would strike a spark, igniting gasoline vapors, destroying the ship and cargo. The Court held that since damages were direct and some damage was foreseeable, the defendant was liable for all direct damages. This English case was later overruled by *Wagon Mound I*, discussed *supra*, note 345.

In the United States, the Court of Appeals for the Second Circuit addressed the direct consequences issue in *In re* Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965). In this case a ship had been negligently moored and was torn away from its moorings by river ice. The ship travelled downstream and struck the moorings of a bridge causing the bridge to collapse into the river. This created an ice jam in the river which caused flooding upstream damaging businesses and factories on the water front. The Second Circuit determined that if any harm was foreseeable then the defendant was responsible for all resulting harm. For an analysis of this approach, see *Prosser & Keeton*, *supra* note 4, § 43 at 296-98.

347. *E.g.*, Arnold v. IBM Corp. 637 F.2d 1350, 1355 (9th Cir. 1981); Beard v. Mitchell, 604 F.2d 485, 495-96 (7th Cir. 1979); Furtado v. Bishop, 604 F.2d 80, 89 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978); Hamilton v. Chaffin, 506 F.2d 904, 913 (5th Cir. 1975).

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

349. *See Prosser & Keeton*, *supra* note 4, § 42 at 273.

350. *E.g.*, Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961).

351. *See* Fletcher v. Rylands, 1 L.R.-Ex. 265, 277 (1866) (opinion of Blackburn, J.) (strict liability for natural consequences); *see also* 3 *Harper & James*, *supra* note 4, § 14.4 (discussing applications of strict liability); Harper, *Liability Without Fault and Proximate Cause*, 30 Mich. L. Rev. 1001 (1932) (discussing possible approaches to causation and liability).

352. 445 U.S. 622 (1980).

seeable that it would result in constitutional injury.[353] Considering the serious potential for invasions of fragile liberties, the scope of responsibility for constitutional injury must be broad. Obligations must be imposed on municipalities and supervisory personnel to adopt policies and train subordinates to minimize the risk of constitutional harm.

C. *Advantages of Risk Analysis in Section 1983 Litigation*

A number of advantages would be derived from using risk analysis for constitutional tort. Perhaps the most important benefit is that it works well in all types of section 1983 situations. The focus in every case, two-party and three-party, is on the risk created and the relationship between risk and injury. This provides the uniform analytical structure and consistent vocabulary that the constitutional tort species needs.

Ironically, the unwillingness of courts to use risk analysis in common law tort cases makes it particularly suitable for use in constitutional tort litigation. Although legal scholars have long praised risk analysis as a workable method for determining liability in all kinds of tort cases, it has never been widely accepted by the courts.[354] This resistance in the common law tort context, makes risk analysis more appropriate for constitutional tort litigation by supplying a set of principles analytically separate from common law tort principles. The application of familiar tort concepts encourages illegitimate fault inquiries. Risk analysis avoids the overlay of common law tort with its rubric that has so confused the issues in the past.[355]

Risk analysis also forecloses a problem posed by the *Daniels* case. In *Daniels*, the Court held that negligent conduct can never constitute a fourteenth amendment deprivation.[356] Obviously the Court was referring to the *negligent* conduct of the state actor who directly invaded the plaintiff's interest. It is possible, however, to envision a suit brought against a third party municipality or supervisor for a front-line employee's deliberate violation of the plaintiff's right. If the focus is on the third party's "fault" rather than on whether he created a "risk" that the front-line employee would infringe the right, a court might conclude after *Daniels* that the culpability of the third party's conduct was insufficient to give rise to a fourteenth amendment deprivation. Such a result would clearly exceed the Court's holding in *Daniels* and would be at odds with the recognition of third party liability in section 1983 and the poli-

353. *See id.* at 651-52.

354. *But see*, Dewey v. A.F. Klaveness & Co., 233 Or. 515, 379 P.2d 560, 562-63 (1963) (O'Connell, J., concurring).

355. Although the position taken here is that there is no place for negligence concepts in constitutional tort, some commentators have suggested that a negligence approach is appropriate in third party situations. *See, e.g.*, Nahmod, *Constitutional Accountability*, *supra* note 112 (arguing for a negligence approach to fourteenth amendment § 1983 liability of local government bodies); *A Theory of Negligence*, *supra* note 31 (arguing for a modified negligence approach to supervisory liability in § 1983 cases).

356. Daniels v. Williams, 106 S. Ct. 662, 667 (1986).

cies underlying constitutional tort. A focus on *risk*, however, would allow for recognition that, although only one intentional due process deprivation had occurred, liability for the conduct or policy creating the risk that such a deprivation would occur, should be imposed on the third party.

Risk analysis has the added advantage of furthering all the goals of section 1983 litigation that the Supreme Court has consistently recognized[357] without interfering with the immunities used to protect competing public or governmental interests. It provides compensation for those injured by unconstitutional conduct and vindication for injuries to constitutional rights. Risk analysis allows for the kind of equitable loss-spreading the *Owen* Court recognized as a legitimate goal of the section 1983 remedy. Perhaps more importantly, it not only serves to deter individual unconstitutional conduct, it also provides needed incentives for those in influential positions to institute procedures and policies designed to prevent constitutional violations and to hire front-line employees sensitive to individual liberties. Competing interests will continue to be protected by the immunities the Supreme Court has recognized. Moreover, interests in judicial administration are served by the use of risk analysis because the simplicity of the approach will help clarify which cases state a section 1983 claim and which do not.

Finally, the focus on the creation of risk rather than on fault is consistent with the statute's language, requiring only a constitutional violation resulting from conduct under color of state law. It also accords with the Supreme Court's recognition in *Monroe* that any kind of conduct might lead to constitutional harm.[358] Focusing on government behavior that *creates* a risk takes account of causation language in the statute and still avoids imposition of liability based on vicarious liability.

CONCLUSION

Although the Supreme Court has expressed repeated concern about the expansion of constitutional tort, it has never introduced common law tort concepts of state of mind or level of culpability into the section 1983 action as a means of stemming the flow of cases. The Court's restrictive approach to constitutional interpretation, as evidenced by its recent decision in *Daniels*, is troubling in light of its potential impact on the protection of individual liberty. This approach to limiting section 1983 actions may pose less threat to the protection of personal liberties, however, than

357. *See supra* note 3.

358. In *Monroe* the Court stated,

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance *or otherwise*, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe v. Pape, 365 U.S. 167, 180 (1961) (emphasis added).

an approach that superimposes a state of mind requirement on the statute. In *Monroe*, the Supreme Court specifically recognized that the Constitution is a flexible document responsive to changing societal needs and susceptible to changing interpretations based on those needs.[359] Statutes, on the other hand, are by comparison more rigid. Once passed and construed, the meaning and content of a statute remain unchanged until a legislative body disagrees with a judicial interpretation or decides a change is in order.[360] Decisions like *Daniels* and *Davidson* indicate that at this time the Court perceives less need for constitutional protections than it has seen in the past or may see in the future. Given the flexibility of the Constitution, the Court may legitimately decide at a later time, in response to different societal needs, that an expansion of constitutional protections is again necessary. On the other hand, the Court has acknowledged that it does not have the power to remake section 1983. It has undertaken to change its interpretation of Congressional intent only after careful reexamination of legislative history.[361] The continuation of this position is essential to the future of section 1983 litigation.

Despite the perception by some that no crisis of oppression requiring the kind of remedy section 1983 was created to provide currently exists,[362] the potential for abuse of power never disappears. Section 1983

359. *See id.* at 185; *see also* Monell v. Department of Social Servs., 436 U.S. 658, 715-16 (1978) (Rehnquist, J., dissenting) (discussing Court's different applications of stare decisis in constitutional versus statutory interpretation).

360. *See Monroe*, 365 U.S. at 180.

361. For example, only through careful reexamination of legislative history did the Court in *Monell* include municipalities as "persons" under section 1983, reversing that portion of *Monroe* holding municipalities are not persons within the meaning of § 1983. *See supra* notes 12, 241.

362. Many would question whether protection is still required from the types of abuses that prompted the passage of the original Civil Rights legislation or that occurred in Monroe v. Pape. *E.g.*, *Civil Rights Docket*, *supra* note 46, at 1044 n.38. That serious abuses still occur is obvious from a review of a few recent section 1983 cases.

Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985), involved a sixty-six year old black man who was arrested on a rape charge when identified by the victim who saw him pass by in a car. None of his identifying features matched the description given by the victim at the time of the rape, four months earlier. Goodson was held in the Atlanta city jail for several days in a filthy, insect-infested cell and was refused medical treatment. Even though another detainee threw up on him he was not allowed to clean himself or change clothes; nor was he given a blanket in spite of the fact that the windows in his cell were broken and it was late October. When Goodson was finally released, his car, which had been stored in the impound lot, had been painted with words "sex offender."

In Brandon v. Holt, 105 S. Ct. 873 (1985), the victims were two teenagers who were "parking." An off-duty police officer in a pickup truck identified himself as a police officer, had the young man step out of the car, and then struck him and cut him with a knife. The officer then tried to break into the car to get the young woman. The couple managed to get away in their car, and the officer fired a shot at them and then chased them to the hospital. *Id.* at 875 n.2. The officer had "a history of violent and irregular behavior . . . well known within the Police Department." *Id.* at 875 (footnote omitted).

In Doe v. New York City Dep't of Social Servs., 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983), the Catholic Home Bureau under the direction of the New York City Commissioner of Welfare, placed two girls in a foster home. Annual evaluations failed to disclose that the girls were being abused by the foster father. Even though

was created not only as a response to a specific crisis of oppression but as a guardian against future abuses of governmental power. If the current Supreme Court perceives a need to curtail actions brought under the statute, it is better for the future of constitutional tort that it effects the curtailment by focusing on the constitutional aspect rather than by imposing a state of mind requirement in the statute itself. To breed a convenient tort concept like state of mind with the statutory strict liability action would do irreparable harm to the evolution of the constitutional tort species. It would create a weakened strain, unable to withstand the unfavorable climate currently existing in its natural habitat, the federal courts, and would inevitably lead to the extinction of the species. Should the time arrive that the Court is willing to take a more expansive view of the Constitution, the statute will be unable to respond in the way its drafters intended. A recognition that section 1983 creates a strict liability action and that all cases arising under it can be dealt with through a risk analysis approach will help guarantee that the species will survive this difficult period and will emerge with the vitality to fulfill the function for which it was created.

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there was substantial evidence of abuse which could have been discovered in 1975, the girls were not removed from the foster home until mid-1977.

Finally, in Webster v. City of Houston, 735 F.2d 838 (5th Cir. 1984), a seventeen year old stole a van from a car lot. He was pursued in a high speed chase by the police. When the van was stopped the boy emerged from the van unarmed. Two officers began to strike him and pull his hair. One officer's pistol discharged striking the boy in the head. While he lay mortally wounded, another officer provided a "throw down weapon" and the officers at the scene agreed to tell the story that the youth had emerged from the van with a gun and threatened them. The truth did not come out until the boy's parents managed to get a federal investigation of the incident over a year later.