Volume 15
Number 3 *Spring 1981*

*pp.*453-496

Spring 1981

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Valparaiso University Law Review

Volume 15 Spring 1981 Number 3

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The traditional and perhaps the principal function of legal texts is to provide a conceptual structure against which the law governing a particular subject matter may be understood.[1] The writer of texts, it is hoped (or at least was hoped in the era in which faith in rules was uncontroversial) creates a coherent fabric out of the chaos of the cases.[2] To that service deference to the demand for practical relevance has recently been added. And so we find sample pleadings and helpful hints. There is, of course, no harm in such insertions if the intellectual demands of the principal task are observed. Logical (or at least rational) structure and order remain, however, the principal tasks, and these are valuable services to perform.

Professor Nahmod has performed these services with some success in his recent book on Section 1983[3]—the statute creating a federal cause of action for the so-called "constitutional tort" committed "under color" of state law. He has a measure of success because his choice of subject matter implicitly recognizes the impor-

*See S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (1979); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974).

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†The opinions expressed here are my own. I nevertheless wish to thank my colleagues, John Farago, Ivan Bodensteiner, Rosalie Levinson, and David Vandercoy for their comments on earlier drafts of this paper. Responsibility for error is of course mine.

1. Certainly classification, distinction and structure—the making of coherence out of the chaos of the cases—marked the great era of American law text writing in the nineteenth century and were, despite the obvious problems thought to have been generated, the chief contribution of Blackstone's *Commentaries*. For an interesting account of the process and its influence see White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671 (1977), *reprinted in* G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978).

2. It is clear that faith in rules has never been wholly forsaken despite the force of the argument against it. *E.g.*, Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928). At least it is clear if one, taking an empirical tack, reviews the current catalog of any reputable law publisher.

3. 42 U.S.C. § 1983 (1976). The book is S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (1979).

tance of the cause of action as a subject of inquiry independent of the constitutional provisions it purports to enforce. The book nevertheless fails. It fails not from failure to satisfy its apparent objective—to provide a framework and explanation of the current law of the statute—for it at least adequately describes the cases within an arguably accurate analytical structure. Rather, the book fails because it does not provide us with a viable conception of the cause of action and because its central conceptual offering—"constitutional duty"—constitutes merely a description of the failure of the courts to provide us with such a conception.

These are of course only charges. In seeking to substantiate them, this critique initially outlines the judicial failure and proposes criteria for a minimally acceptable conceptual framework for section 1983. The critique then suggests an alternative to "constitutional duty" by questioning the generally accepted proposition that the Constitution regulates the unauthorized conduct of government officials and by arguing that Section 1983 should itself be identified as the source of the federal "duties" imposed upon individual officials.

ON THE DIFFICULTY OF DEFINING AN APPROPRIATE ANALYSIS

Section 1983 is the basis for almost every case of constitutional importance involving the states and their political subdivisions. The underlying theory and implications of the cause of action it creates are properly the subjects of a growing body of scholarly discourse.[4] Recently, the statute has become the subject of a judicial concern with its relationship to the tort law of the states.[5]

The discourse and the concern reflect a recurring and fundamental difficulty in the application of the statute. The difficulty evident in the cases is that of unstated shifting reference, for it has

4. Articles of particular value are Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORDER 557; Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 SO. CAL. L. REV. 355 (1978); Levine, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483 (1977); McCormick, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1 (1974); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974); Neuman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW.U.L. REV. 277 (1965); Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

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

never been made clear whether the courts are rendering constitutional, statutory or federal common law decisions.[6] Applications of the statute after *Monroe v. Pape*[7] display a tension between two views of the cause of action. The first treats both the question of liability for damages and the issues of policy relevant to that question[8] at a statutory or interstitial federal common law level of analysis.[9] The second view treats the question and those issues at a purportedly constitutional level of analysis.[10] Thus, there are cases

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6. For examples of shifting judicial positions on how questions of blameworthiness of conduct are to be treated—as issues of constitutional meaning, affirmative defense, or common law elements of the cause of action—see the "constitutional false imprisonment" cases: Baker v. McCollan, 443 U.S. 137 (1979); Williams v. Anderson, 599 F.2d 923 (10th Cir. 1979); Bryan v. Jones, 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976); Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969). For an example of lack of clarity of analysis, see Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1977).

Professor Nahmod appears to recognize at least a part of this difficulty in his criticism of the judicial tendency to confuse elements of the cause of action with affirmative defenses. S. NAHMOD, *supra* note 3, at 64. Nahmod suggests that "negligence" is an issue only in the context of the affirmative defense of "good faith immunity" *unless* negligence is relevant, at a constitutional level of analysis, to the question of constitutional violation. *Id.* However, negligence may be treated either as an element of the prima facie case or as a question of affirmative defense without giving the negligence concept a constitutional basis. Assuming an initial decision that liability for negligence would serve the purposes underlying the statute, the decision is a policy choice governed by such considerations as the court's perception of the relative ease of access to evidence. The burden of proof question generally has been resolved by the Court in favor of plaintiffs as a matter of interstitial federal common law making. *See* Gomez v. Toledo, ___ U.S. ___, 100 S. Ct. 1920 (1980).

7. 365 U.S. 167 (1961).

8. For a framework describing such policies at common law, see Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); 29 COLUM. L. REV. 255 (1929).

9. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 116 (1978) (Stevens, J., dissenting) Paul v. Davis, 424 U.S. 693, 717 (1976) (Brennan, J., dissenting) ("abuse of power" as an element of the statute); Monroe v. Pape, 365 U.S. 167, 187 (1961) (interpreting the *statute* to require merely the tort standard which "makes a man responsible for the natural consequences of his actions"); Bonner v. Coughlin, 545 F.2d 565, 571, 574-76 (7th Cir. 1976) (dissenting opinion), *cert. denied*, 435 U.S. 932 (1977); Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); Shapo, *Constitutional Tort, supra* note 4, at 298 (courts have failed to identify the "types of harm against which the *statute* protects." (emphasis supplied)); *Id.* at 326-27 (noting that *Monroe* signaled the development of a federal common law and suggesting an "outrageous" conduct requirement as a matter of *statutory* interpretation). The immunity defense cases may also be cited as examples. *See, e.g.*, Procunier v. Navarette, 434 U.S. 355 (1978); O'Conner v. Donaldson, 422 U.S. 563 (1975); Wood v. Strickland, 470 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547, 554 (1967) (Congress, by enacting Section 1983, did not intend to abrogate "common law" immunities).

10. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976); Paul v. Davis, 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362, 376-77 (1976). *Compare* Justice Brennan's dissent-

in which a court merely borrows a common law cause of action and treats it as the federal cause of action without citing the constitutional provision violated,[11] and there are cases in which a court invokes common law concepts or policies of questionable constitutional origin and attaches constitutional labels.[12] The "state of mind" of the individual purportedly violating the Constitution under color of state law—as addressed by the courts in its various incarnations[13]—is a constitutional element in one case,[14] a common law or statutory element in another,[15] and both in a third.[16]

The two views are more fundamentally reflected in judicial attempts even to describe the cause of action. We have repeatedly been told that the statute creates a "species of tort liability,"[17] but the "species" has not been adequately identified. We have been told

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ing opinion in Paul v. Davis, 424 U.S. 693, 717 (1976) (arguing that the statute is concerned with abuse of power) *with* Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 428 (1977) (arguing that abuse of power or authority is a constitutional requirement for liability). And *compare id.* at 413 ("outrageousness" standard at constitutional level of analysis) *and* Baker v. McCollan, 443 U.S. 137, 147-48 (1979) (Blackmun, J., concurring) (same) *with* Shapo, *Tort*, *supra* note 4, at 327 (outrageousness standard at statutory level of analysis).

11. *See, e.g.*, Bryan v. Jones, 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976); Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).

12. *See, e.g.*, Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

13. See S. NAHMOD, *supra* note 3, at 59-77 (using "state of mind" to describe intent, negligence and variations of both); Kirkpatrick, *Defining A Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 U. CIN. L. REV. 45 (1977). It should be noted that it is possible to voice significant disagreement with the "state of mind" label, particularly but not exclusively as applied in the commentary under discussion to negligence. *See, e.g.*, 2 HARPER & JAMES, THE LAW OF TORTS § 16.1 (1956); PROSSER, TORTS 16-17 (4th ed. 1971); Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 31 (1972). *But see* Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908).

The Supreme Court has twice granted certiorari to decide whether negligence is actionable under Section 1983. (It is not clear if the Court was questioning whether negligence is actionable as a matter of statute or whether, as Professor Nahmod seems to suggest, negligence is sufficient to violate particular constitutional provisions. S. NAHMOD *supra* note 3, at 60). Nevertheless, in both cases, the Court avoided the issue. Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978). It appears, however, that the issue might be reached this term. Parratt v. Taylor, No. 79-1734 (U.S. 1980).

14. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1978).

15. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961).

16. *See* Baker v. McCollan, 443 U.S. 137, 140 n.1 (1979).

17. *See, e.g.*, Monell v. New York City Dept. Social Services, 436 U.S. 658, 690-95 (1978); Carey v. Piphus, 435 U.S. 247, 253 (1978); Imbler v. Pactman, 424 U.S. 409, 417 (1976).

as well that the species protects federal interests distinct from and potentially inconsistent with[18] the interests protected by state tort law, but judicial attempts to identify these distinct interests have not been convincing. The attempts suggest, rather, a desperate effort to distinguish constitutional tort from state tort. The effort is made both by resort to the notion that the degree of blameworthiness of individual conduct somehow constitutes the subject of constitutional concern[19] and by removing, through tortured renderings of precedent, previously protected interests from the judicial list of constitutional concerns.[20] The attempts, although often framed in terms of constitutional interpretation, reflect an analysis influenced by policy issues—particularly those of judicial administration and of the federal court management of federal-state relationships[21]—that are not linked by coherent theory to the constitutional provisions purportedly "interpreted."

A few examples should be sufficient to illustrate the point. In *Estelle v. Gamble*,[22] where "deliberate indifference" was adopted as

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18. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 173 (1961). *Cf.* Bivens v. Six Unknown Named Agents of The Federal Bureau of Narcotics, 403 U.S. 388, 394 (1971) (implied cause of action).

19. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1978). It is conceded that *Estelle* is not without constitutional precedent, Louisiana *ex rel* Francis v. Resweber, 329 U.S. 459 (1947), but Justice Stevens' dissenting insight deserves to be taken seriously: "Subjective motivation may well determine what, if any remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it." 479 U.S. at 116.

20. *Compare* Paul v. Davis, 424 U.S. 693 (1976) *with* Wisconsin v. Constantineau, 400 U.S. 433 (1971). For criticism of the *Paul* opinion on the basis of its misuse of precedent, *see, e.g.*, Monaghan, *supra* note 10, at 405; Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 325-28 (1977).

21. One may make a structural argument for the constitutional origin of the policy underlying Younger v. Harris, 401 U.S. 37 (1971), or even for the rather strange application of *Younger* principles in Rizzo v. Goode, 423 U.S. 362 (1976), but it is at best difficult to conclude that the Congress could not modify the policies adopted by the Court in these cases. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 152-56 (1978). *See also* Choper, *The Scope of National Power Vis a Vis The States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977). *But see* Farago, *Function Without Form: The Asymmetrical Hermeneutics of Jesse Choper*, 15 Val. U. L. Rev. 605, 621-30 (1981) (criticizing Professor Choper's argument, repeated in J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-205 (1980)). Section 1983, of course, is a *statute*. As such, it is subject to *statutory* interpretation (even statutory interpretation informed by a concern with federalism). On the question of "federalism" as a limitation upon the meaning of constitutional provisions—particularly upon grants of power to Congress—see note 65 *infra*.

22. 429 U.S. 97 (1978).

a constitutional standard in cases of official neglect of a prisoner's medical needs, the Court's opinion was permeated with a judicial fear that a lesser standard would create a federal law of medical malpractice.[23] In *Rizzo v. Goode*,[24] the Court inappropriately applied the rationale of *Younger v. Harris*[25] to executive conduct while suggesting that there is no "constitutional duty" of supervision.[26] That opinion's concern with federalism as a limitation upon the remedial authority of federal courts was therefore linked to a problem of substantive constitutional obligation. And in *Paul v. Davis*,[27] the Court concluded that personal reputation is not a constitutionally protected interest. Here the opinion is devoted in substantial measure to an expression of fear of a general federal tort law.[28]

The phenomena just described—analyses which shift without warning and without disclosure from tort to Constitution to judicial administration and back again—requires explanation. The needed explanation would be what I would term "a viable conception of the cause of action." The described phenomena suggests the criteria by which any proposed conception may be measured. First, it must explain the relationship between the statute and the particular constitutional provision invoked in a lawsuit brought under the statute. Second, it must explain the relevance of constitutional provisions invoked against government action to the federal regulation of the individual conduct of government actors.

If these criteria are accepted, the immediate problem is to measure Professor Nahmod's conceptual offering against them. It should be initially understood that there is substantial judicial and academic support for Nahmod's argument that the fundamental inquiry in a "constitutional tort" action is that of the individual defendant's "constitutional duty."[29] Moreover, his earlier explication of that theory[30] has clearly influenced judicial decision.[31]

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23. *Id.* at 106.

24. 423 U.S. 362 (1976).

25. 401 U.S. 37 (1971). The *Younger* rationale was founded upon deference to state judicial forums, not state government in general. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 156 (1978); C. WRIGHT, A. MILLER, E. COOPER, 17 FEDERAL PRACTICE AND PROCEDURE 552 (1978).

26. Rizzo v. Goode, 423 U.S. at 376-77. *See* note 66 *infra*.

27. 424 U.S. 693 (1976).

28. *Id.* at 698-99.

29. There is at least support in the sense that the decisions are consistent with the conception. *See, e.g.*, Baker v. McCollan, 443 U.S. 137 (1979); Ingraham v. Wright, 430 U.S. 651 (1977); Paul v. Davis, 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976). *See* note 31 *infra*.

30. Nahmod, *supra* note 4.

31. *See, e.g.*, Bonner v. Couglin, 517 F.2d 1311, 1318 n.21 (7th Cir. 1975) (opin-

Constitutional duty, despite the constitutional label, is a concept that appears to be largely borrowed from Dean Leon Green's common law tort theories.[32] As the concept was at least initially

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ion of then Circuit Judge Stevens), *modified*, 545 F.2d 565 (7th Cir. 1976) (*en banc*), *cert. denied*, 435 U.S. 932 (1977). It has influenced other commentators as well. *See, e.g.*, Kirkpatrick, *supra* note 13, at 67 n.120.

32. *See* L. GREEN, THE LITIGATION PROCESS IN TORT LAW (1965) (collecting Dean Green's law review articles). For a general explanation of Green's duty-risk theories, see Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1. Nahmod's debt to Green is evident despite Nahmod's insistence that "tort concepts" are not "determinative" in 1983 actions. S. NAHMOD, *supra* note 3, at 61; Nahmod, *supra* note 4, at 23 n.80. What, precisely, Nahmod means is not clear, but his theory appears to have at least two, possibly three, components. One is a rejection of "proximate cause" in favor of a determination of the scope of liability by the judge. This component directly tracks Green, and is a component with which I am in full agreement. The second component is that state law should not be automatically adopted as the rule of decision because federal interests and policies are at stake. There is little to disagree with here, at least if one is not too dogmatic about the proposition. *But see* Paul v. Davis, 424 U.S. 693 (1976). If there is a third component or, perhaps, alternative meaning, of the notion that "tort concepts" are not determinative, it is that the Constitution provides alternative concepts—in some form distinct from "tort concepts"—with which to resolve cases which involve the allocation of harm as between individuals factually connected to the harm. It is with this potential meaning that I am in disagreement.

The argument that Section 1983 preserves "public" rather that "private" interests and therefore creates a cause of action distinct from tort, Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972), may have validity in the sense that there may be a deterrence policy underlying the statute, but it is not correct that the interests preserved by the cause of action are not personal. *See* Carey v. Piphus, 435 U.S. 247 (1978). The rationale underlying a cause of action for damages for constitutional deprivation is compensation for deprivation of personal interests, not enforcement of a public interests through the incentive of a private remedy. *Id. Cf* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring) (implied cause of action).

The argument that the statute regulates a relationship distinct from that regulated by state tort law, Neuborne, *The Procedural Assault on the Warren Legacy: A Study of Repeal By Indirection*, 5 HOFSTRA L. REV. 406, 433 (1977), is viable to the extent it refers to the necessity for "state action" and, possibly, to the extent that the fact of "state action" makes the harm suffered different in kind from similar harm suffered in the absence of some indicia of government involvement. Expectations of government regularity and rationality are invaded. McCormack, *supra* note 4, at 9-10. But it is at best difficult to accept the proposition that Section 1983 regulates the distinct relationship between state and citizen by requiring an individual government official to pay damages for conduct violative both of constitutional guarantee and state law or policy. *See Monroe v. Pape*, 365 U.S. 167, 202-259 (1961) (Frankfurter, J., dissenting). What is regulated in such an instance is a relationship between individuals. One of those individuals is "clothed" with state granted-power, and that fact invokes policy concerns (running in often inconsistent directions) not present in the usual automobile accident case, but the relationship remains individual. On the general question of the relationship between tort and constitutional tort, *see generally* Carey

developed by Nahmod, it requires an analysis under which both the requisite "constitutional standard of conduct" and the particular defendant's "constitutional duty" are determined by reference to "constitutional policy" and by constitutional interpretation.[33]

In his more recent work, Professor Nahmod appropriately cites in support of the constitutional duty concept federal court opinions that purport to focus on questions of the scope of constitutional protection or that treat "state of mind" elements of the cause of action as compelled as a matter of constitutional interpretation. According to Nahmod, an inquiry into a defendant's state of mind properly focuses on "the constitutional question"[34] where "state of mind is relevant to the constitutional violation."[35] He therefore undertakes a review of cases decided under distinct constitutional provisions to determine the "state of mind" necessary to their violation,[36] with the

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v. Piphus, 435 U.S. 247 (1978); Glennon, *supra* note 4; Levine, *supra* note 4; Note, 93 HARV. L. REV. 966 (1980).

33. Nahmod, *supra* note 4, at 13.

34. S. NAHMOD, *supra* note 3, at 63 (citing Estelle v. Gamble, 429 U.S. 97 (1976); Weatherford v. Bursey, 429 U.S. 545 (1977)). For another explicit treatment of state of mind as the crucial question in applying different constitutional provisions see Kirkpatrick, *supra* note 13.

35. S. NAHMOD, *supra* note 3, at 64.

36. S. NAHMOD, *supra* note 3, at §§ 3.03-3.11. Professor Nahmod labels this an inquiry into "basis of liability." If that label is intended to distinguish the inquiry from the constitutional duty notion, the distinction is unstated. I have interpreted "basis of liability" as the other side of a duty coin. *See* S. NAHMOD, *supra* note 3, at 60. Nahmod, to his credit, recognizes that the courts have not explained why the relevance of state of mind varies with the constitutional provision in issue. S. NAHMOD, *supra* note 3, at 63. As his conception nevertheless clearly incorporates the Court's position, I do not interpret his position as inconsistent with the notions either that state of mind is relevant or that it varies with the provision in issue.

Despite the language employed in the cases supporting Nahmod's arguments regarding appropriate state of mind (or blameworthiness of conduct) elements for particular constitutional provisions, it is possible to read those cases as instances of interstitial common law making within the framework of the statute and, therefore, as statements of statutory rather than constitutional duty.

The distinction in approach which would be imposed by the latter reading is suggested by comparing Judge Swygert's dissenting opinion in Bonner v. Coughlin, 545 F.2d 565, 571 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1977), with the majority's opinion in that case. *Bonner* involved a claim by a prisoner that the negligence of prison guards in leaving the prisoner's cell door open exposed a trial transcript to theft, thus depriving the prisoner of property without "due process." The majority in *Bonner* argued, among other things, that there is no due process protection against "negligence." 545 F.2d at 566-67. Judge Swygert argued that a negligence inquiry warps the analysis. Nahmod suggests that Swygert meant that negligence is sufficient to make out a due process claim. S. NAHMOD, *supra* note 3, at 65. I suggest this is a

caveat that a different state of mind—for example, gross negligence rather than intent[37]—may be sufficient in "different situations."[38]

As a conception, constitutional duty suggests two answers to the explanations demanded of it here. First, the relationship between the statute and the Constitution is largely one of fusion. The statute is mere vehicle.[39] The Constitution provides, apparently within the four corners of the instrument, the policies necessary to a determination of its legal consequences. To this conception there is an exception—for the good faith defenses obviously express policies material to liability not derived from the instrument—but the defenses are only an exception.[40] In short, the Constitution may ap-

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misreading. Judge Swygert's point was that an inquiry into intent or negligence is the wrong inquiry:

> The en banc majority . . . holds that Bonner's interest in his transcript was not a protected right under the Fourteenth Amendment because, it asserts, that amendment does not protect interests which are violated through mere negligence. This holding is illogical. Whether Bonner's interest in his transcript is a protected right is completely unrelated to whether the agency that impaired that interest did so intentionally or negligently. The Fourteenth Amendment protects deprivations [sic] of "life, liberty or property, without due process of law." In determining whether Bonner had a protected right, the sole question to be decided is whether the loss of the transcript falls within any of those categories. Bonner still will not be able to prove a section 1983 violation unless he can show that the state was involved in the impairment of his interests. But that is a separate inquiry, irrelevant to whether a protected right of the plaintiff is at stake. 545 F.2d at 571.

Judge Swygert concluded that a defendant's conduct should be analyzed within the context of the under color of state law element of the *statute* under a "misuse of power" standard and that negligence could in some instances constitute such a misuse of power. 545 F.2d at 574-76.

37. S. NAHMOD, *supra* note 3, at 67.

38. *Id.* at 76.

39. *See* Chapman v. Houston Welfare Rights Organization 441 U.S. 600, 617 (1979).

40. Although Professor Nahmod seeks to separate "duty" from the affirmative defenses, S. NAHMOD, *supra* note 3, at 64, the latter seem to be, at least initially, clearly statements of "duty." The affirmative defense label is chiefly useful for allocating burden of proof (or, at least, of pleading). *See* Gomez v. Toledo, ___ U.S. ___, 100 S. Ct. 1920 (1980) and note 6 *supra*. It is obvious, however, that affirmative defenses are statements of statutory or interstitial federal common law duty. They express an antecedent judicial analysis of relevant policies: policies of avoiding unfairness to executive officials, of avoiding inhibition of beneficial official action and of avoiding deterrence of public service. These policies are expressed by means of a malice or knowledge culpability standard. *See generally* Freed, *Executive Immunity For Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526, 563 (1977). The *Monroe* opinion, and the cases which speak in terms of the *statute* requiring or not requiring particular states of mind or degrees of culpability, may be interpreted as

parently be viewed under the constitutional duty conception as itself generating and defining the individual duty of individual officials to particular others.[41]

Second, the relevance of the constitutional provision invoked in a Section 1983 action to the federal regulation of individual conduct is that it defines the regulation. The constitutional duty conception

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expressions of a similar analysis within the framework of the *prima facie* case. *Monroe's* intent standard was adopted to further the compensatory purposes of the *statute*.

Professor Nahmod's contention that constitutional duties must be identified, may be interpreted, contrary to the interpretation suggested in the above text, as requiring examination of policies relevant to liability in defining "constitutional duty." This interpretation suggests a fusion of constitutional and statutory issues without anticipating answers to liability questions solely from the Constitution itself. Nahmod has argued, for example, that deterrence is a primary objective of the federal remedy. Nahmod, *supra* note 4, at 10-11. If what is meant is that deterrence must be considered in defining a given defendant's "constitutional duty" to a particular plaintiff, it may be assumed that a remedial policy—that of deterrence of constitutional deprivation—is to be considered. It is not clear, however, that this is what is meant, for Professor Nahmod's 1974 article also speaks in terms of constitutional policy and constitutional interpretation in defining constitutional duties—a suggestion which at least implies that constitutional duties are matters not of remedial policy but of constitutional compulsion. *Id. See also* NAHMOD, *supra* note 3, at 62-64.

Since Professor Nahmod does not identify what constitutional policies he considers relevant to a definition of duty, it is difficult to determine how those policies are thought to control the liability of different potential defendants. Some guidance, however, is provided by his rejection of negligence as a basis for liability. Nahmod, *supra* note 4, at 21-22. If it is assumed that this conclusion is founded upon constitutional interpretation, it appears that constitutional policy forces a restrictive view of the persons with some factual connection to an unreasonable search and seizure who are potential defendants. *See* Rizzo v. Goode, 423 U.S. 362, 376 (1976) (no "constitutional duty" to supervise). If remedial policies play a meaningful role in defining constitutional duty, a different conclusion may be reached. *Cf.* Owen v. City of Independence, 445 U.S. 622, (1980) (city has no good faith defense where it "causes" constitutional deprivation within meaning of the *statute*).

Professor Nahmod recognizes both deterrence and compensation as policies underlying the Section 1983 damages remedy. Both policies are conceptually distinct from the constitutional provisions enforced by that remedy. It is apparent, for example, that the fourth amendment does not, except as a matter of its authority, deter unreasonable searches; rather, the remedies provided for its enforcement deter such searches. *Cf.* Scott v. United States, 436 U.S. 128, 135-39 (1978) (exclusionary rule). If these remedial policies may be considered in defining duty, it is possible to justify the liability of other persons, in addition to those whose conduct involved intentional or grossly negligent infliction of harm. The "duty" in question would, however, be a statutory or common law duty, not a constitutional duty.

41. *Cf.* Palsgraf v. Long Island Rd. Co., 248 N.Y. 339, 162 N.E. 99 (1928) (common law tort duty runs to particular plaintiff). The reference is necessarily implied in Nahmod's rejection of proximate cause, a rejection with which I am in accord.

clearly suggests, because the statute is mere vehicle, that the Constitution speaks directly to individual government actors by means of standards of conduct derived, again with the exception of the defenses, from the instrument. What were earlier perceived here as shifts in reference from tort to Constitution to constitutionally extraneous policy are, under Nahmod's conception, apparently not present at all or, if present, can and should be eliminated by an exclusive reference to constitutional meaning.[42]

These answers are not, of course, Professor Nahmod's answers. Professor Nahmod did not, at least expressly, ask these particular questions. They are, I think, nonetheless implicit in "constitutional duty" as a concept. They are, moreover, the responses of a dominant conception of Section 1983 I propose to attack shortly. That conception seeks to make constitutional guarantees answer questions about individual liability in concrete cases. It is a conception suggested by an insistence that "state of mind" is constitutionally derivable and is, albeit certainly never in pure form, a conception which runs through the cases cited here. I think it wrong for two reasons. First, it is far from clear that any constitutional guarantee provides significant guidance in resolving the question of who will bear risks of loss or harm generated by the conduct of individual officials. Nor are there identifiable "constitutional policies" which will inform analysis of that question.[43] Second, it is even less apparent that

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42. An analogous notion is reflected in the work of certain of Professor Monaghan's critics, particularly with respect to the *Bivens* remedy assertable against federal officers. *Compare* Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) *with* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135 (1978). *See also* Schrock & Welsh, *Up From Calandra, The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974). I do not read Professor Monaghan's recent criticism of the common law method in constitutional adjudication as a disaffirmance of his earlier explanation of *Bivens*. Monaghan, *Professor Jones and the Constitution*, 4 VT. L. REV. 87, 93 n.24 (1979).

43. Candor requires an attempt, nevertheless, to suggest reasons for the view that constitutional guarantees do provide such guidance. The attraction of the constitutional level of analysis is that it suggests that constitutional rights do not exist as abstractions but are given meaning only in concrete cases in which a court concludes that there has been a breach of a correlative duty. *See* McCormick, *supra* note 4, at 4. Stated perhaps more brutally, there is no constitutional right if there is no liability. *See* Dellinger, *Of Rights and Remedies: The Constitution As A Sword*, 85 HARV. L. REV. 1532, 1540 (1972); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 35-36 (1968). Moreover, there is an historical attraction to the view: It is consistent with the notion that the Constitution is law and was originally conceived as both a part of, and enforceable

"states of mind" are derivable from constitutional guarantees or essential to their operation.[44] The balance of this review will be

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through, the mechanisms of the common law. *See* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1159 (1969).

The attraction of the theory that a court should define a constitutional duty derived from constitutional policy and constitutional interpretation in every case, and the attraction of the theory that "state of mind" requirements may be derived from constitutional provisions, is that both theories seek to make constitutional limitations upon state power speak to the individual officials who exercise that power. The difficulty is that constitutional limitations do not speak to individuals; they speak to governments. See notes 48-52 *infra* and accompanying text.

44. Of course Professor Nahmod is not alone in emphasizing "state of mind" elements in constitutional adjudication, and judicial emphasis upon "state of mind" in at least the broad sense is not unique to damages actions under Section 1983. *See, e.g.*, Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Village of Arlington Hts. v. Metro. Housing Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); Snowden v. Hughes, 321 U.S. 1 (1944); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting). It seems clear that there is some distinction between "intent" in the tort sense in which it has been used by Nahmod and others, *e.g.*, Kirkpatrick, *supra* note 13, and the "basis for decision" sense in which motivation analysis uses the term. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). However, the differences need not be thought important for the purpose of distinguishing "motivation theory."

The commentary is voluminous, and, although there have been allusions to across-the-board insistence upon inquiry into motivation, Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976), most have focused upon equal protection doctrine, an area in which, possibly with the addition of some first amendment issues, the rationale for motivation analysis seems most clearly viable. *See, e.g.*, Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). *See also* J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 145 (1980); Ely, *The Centrality and Limits of Motivation Analysis*, 14 SAN DIEGO L. REV. 1155, 1161 (1978); Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978). *But see* Eisenberg, *Reflections On a Unified Theory of Motive*, 15 SAN DIEGO L. REV. 1147, 1152 n.23 (1978).

The point made here is not an attack upon "motive theory" as such. The point, rather, is to confine motive inquiry at a constitutional level to the rationales for such an inquiry and to reject any attempt, under color of constitutional motive analysis, to impose state of mind requirements not founded upon such rationales. *Cf.* J. ELY, *supra* at 145 (motive is immaterial where there is a constitutional "right" in issue; it is material only where basis for decision is the subject of constitutional regulation). In particular, the point is to reject the constitutional label for state of mind requirements imposed in fact for reasons (particularly reasons of "federalism" and of judicial management of dockets) not related to the policies underlying the constitutional provision at stake in any given case. For examples of suspected labeling, see, *e.g.*, Baker v. McCollan, 443 U.S. 137, 147-48 (1979) (Blackmun, J., concurring); Estelle v. Gamble, 429

devoted to a defense of these doubts and of their implication: the relevant "duty" in a Section 1983 cause of action against an individual government official is a statutory duty and the analysis of that duty should be clearly identified as a statutory analysis.

THE ORIGINS OF THE PROBLEM: OF INDIVIDUALS AND GOVERNMENTS

To the extent that there presently exists any judicial conception that satisfactorily explains the cause of action, it is suggested by the surviving[45] holdings in *Monroe v. Pape*[46]: individual government actors may be found liable under the statute for a deprivation of constitutional right even where their conduct was neither authorized nor prohibited by the government that "clothed"[47] them with authority and power; plaintiffs need not exhaust state remedies as a prerequisite to pursuit of the federal remedy; and a common law conception of intent may be made an element of the cause of action in at least the context of a fourth amendment deprivation. The major implications of these holdings are clear: The Constitution speaks, or may be made to speak, to individuals. The government's policy stance is, at least where inconsistent with the individual's conduct, immaterial. Common law tort concepts play some role in formulating the federal remedy.

There are two difficulties with these implications. First, it is not clear when or at what level of analysis tort concepts are relevant. Although in *Monroe* "intent" was invoked as a matter of the interpretation of the *statute*,[48] in later cases, as Professor Nahmod's analysis correctly suggests, state of mind has been deemed a matter of constitutional importance.[49] Second, constitutional guarantees do not speak to individuals, they speak to governments.[50] A constitu-

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U.S. 97 (1976); Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1977).

45. *See* Monell v. New York City Dept. Soc. Services, 436 U.S. 658 (1978).

46. 365 U.S. 167 (1961).

47. *Id.* at 184 (quoting from United States v. Classic, 313 U.S. 299, 325 (1941): "Misuse 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.").

48. 365 U.S. at 187: "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

49. *See* Baker v. McCollan, 443 U.S. 137 (1979); Estelle v. Gamble, 429 U.S. 97 (1976).

50. This claim is, of course, controversial and largely inconsistent with controlling case law. *See* authorities cited note 56, *infra*. The commentators display some ambivalence on the question. *Compare* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1146 (1969) *with Id.* at 1147. *See* Hart, *The Relations Between State and*

tional level of analysis takes into account, by means of a balancing test, or a rationality test, or a compelling interest test, the governmental interests that underlie the challenged action or policy. Where the focus of inquiry is upon an individual, albeit an individual in government clothing, the individual can often cite no government interest as justification for his conduct.[51] Where a government interest is present, it can be cited only vicariously. That the individual official cannot in every instance claim that a government interest underlies his conduct suggests that there are distinct categories of cases. In some, the individual official merely provides the occasion for a constitutional decision regarding the validity of government conduct or policy and the analysis will take a constitutional form.[52] In at least some others, the sole reason for judicial inquiry is individual conduct unrelated to governmental interest or policy, and the link to federal concern arises solely from the fact of government clothing. In the latter type of case, the analysis will likely be framed in terms of abuse of power and will not, except perhaps by virtue of labels, take constitutional form.[53] A third category includes cases where both governmental interests and individual conduct are potential candidates for analysis; the analysis employed may display elements of both preceding categories.[54]

There is, however, an additional and crucial dimension to the problem. It is apparent that constitutional guarantees are concerned with safeguarding private interests that are protected as well by

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Federal Law, 54 COLUM. L. REV. 489, 521-24 (1954); Levine, *supra* note 4, at 1487-91. *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1162 n.15 (1978).

The term "government" will be used here to avoid extended discussion of the distinctions between federal government (to which the statute does not apply), state government (to which it does in a sense apply, but with substantial distinctions generated by the eleventh amendment) and municipal government (to which it does apply in full force). The point of the present critique is the general conception, not the technical application of the statute, and the complexities of the application will therefore be assumed. With regard to the complexities, see Levinson, *Suing Political Subdivisions in Federal Court: From Edelman to Owen*, 11 U. TOLEDO L. REV. 829 (1980).

51. *Compare* Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975), *modified*, 545 F.2d 565 (7th Cir. 1976) (*en banc*), *cert. denied*, 435 U.S. 932 (1977) *with* the dissenting opinion in the *en banc* decision, 545 F.2d at 576-77.

52. *See, e.g.*, O'Conner v. Donaldson, 422 U.S. 563, 576 (1975) (state cannot confine non-dangerous mentally ill individual, remand for determination of immunity question).

53. *See, e.g.*, Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1974); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970).

54. The good faith immunity cases may be viewed as examples. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Pierson v. Ray, 386 U.S. 547 (1967).

the common law. This overlap is most apparent in the case of the vaguest of the constitutional guarantees, for it is clear that both the due process clause and state tort law are concerned with the protection of "life, liberty and property;" but it is descriptive in some degree of all the guarantees.

If there is truly a distinction between federally protected and state protected interests, it is a distinction grounded, as a threshold matter, in the governmental character of the threat to these interests. As a matter of analysis, the distinction is grounded in potentially distinct accommodations of conflicting interests and policies. It is the threshold matter which presents the difficulty, and that difficulty requires some extended discussion.

Government and Individual Threats to Constitutionally Protectable Interests

Although founded upon venerable precedent, the Court's conclusion in *Monroe* that government policy is immaterial to the problem of the federal regulation of an official's conduct even where that policy is consistent with federal regulation eliminated constitutional adjudication's analytical moorings. The justification for federal protection of private interests—that governmental conduct which threatens those interests requires regulation[55]—is at least facially absent in any case in which there exists a constitutionally sufficient government "remedy" for an individual official's conduct that invades a constitutionally protected interest.[56] It is therefore facially absent where the government's prohibition of the individual official's conduct cannot itself be successfully challenged as constitutionally insufficient.[57] The justification for federal protection is, in

55. *See* The Civil Rights Cases, 109 U.S. 3 (1883). *Cf.* United States v. Williams, 341 U.S. 70, 77-81 (1951) (Frankfurter, J.) (rights protected against private conduct versus rights protected against state).

56. *Contra, e.g.*, Snowden v. Hughes, 321 U.S. 1 (1944); Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913). The extreme version of the proposition in the text is suggested by Barney v. New York, 193 U.S. 430 (1904), a case gutted in *Home Tel.* and formally interred in United States v. Raines, 362 U.S. 17 (1960). *See* note 79 *infra*.

57. *Cf.* Ingraham v. Wright, 430 U.S. 651 (1977) (state tort remedies constitute sufficient "process" to satisfy due process obligation of the state). "Remedy" as used in the text would therefore include both traditional meanings of the term, such as tort law, and any government procedure (such as a hearing), rule or policy (such as a prohibition upon use of excessive force by police, or a statute, applicable to officials, prohibiting murder). It would also include any process created to avoid risks of intrusion into protected interests, such as an identification process. *See* Baker v. McCollan, 443 U.S. 137 (1979), discussed in text at notes 107 to 112 *infra*.

With respect to the proposition that regulation of government is the extent of

short, absent where the government makes no express or implicit claim that the challenged conduct in issue was lawful.

Monroe's rationale for reaching individual conduct was that the fact of government clothing—the fact that the individual is granted general authority to act on behalf of government and the instruments of government power[58]—makes it desirable that the individual conduct be regulated. Regulation desirable as a matter of policy is not, however, equivalent to regulation compelled by the original justification for constitutional regulation. If it is assumed that the original justification rested in a concern for government threats to protectable interests, one cannot without obvious difficulty suggest that constitutional regulation is justified in a case in which the sole threat to constitutionally protectable interests is an individual official's conduct that contravenes governmental policy. There is simply no governmental threat to be regulated in such a case. Nor can such a suggestion be made where the government in question has provided no remedy but has no constitutional obligation to do so. There is no governmental threat if there is no governmental obligation.

These propositions obviously contain inherent ambiguities: what is a "constitutionally sufficient remedy" and when is "governmental protection" against individual threat adequate? The presence of a governmental remedy only "facially" obviates governmental threat because mere presence compels neither meaning nor application. There remain, in short, the problems of ambiguous government remedies and of their non-enforcement.

Ambiguous Government Commands

The problem of ambiguous government remedy is the problem suggested by *Snowden v. Hughes*.[59] It was there claimed that a state agency's violation of state statute constituted a violation of equal protection—a claim the Court rejected as a matter of substantive doctrine. The Court nevertheless accepted the claim's premise: the conduct of state officials is state action even when it is in violation of state commands. Justice Frankfurter, in a concurring opinion, was

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the justification or rationale for constitutional guarantees, see Burke & Reber, *State Action, Congressional Power and Creditors Rights: An Essay on the Fourteenth Amendment*, 46 So. CAL. L. REV. 1003 (1973) (discussing rationale for and values preserved by state action doctrine).

58. Monroe v. Pape, 365 U.S. 167, 184 (1961).

59. 321 U.S. 1 (1944).

unwilling to accept that premise, and insisted that the action of state functionaries "cannot be deemed the action of the state . . . until the highest court of the State confirms such action and thereby makes it the law of the State."[60]

Justice Frankfurter's position is of course not "the law." Nor, at least in its pristine form, should it be the law. In that form, it implies a too narrow view of the meaning of government threat, for it seems to require, by means of a constitutional doctrine of exhaustion of state remedies, a federal judicial role limited to review of formal government rules. Government obviously does not act only by formal rule. It acts through its officials in countless informal ways, and those actions present threats to protectable interests. It is equally obvious that informal action can be "authorized" by formal government command, can be arguably authorized and arguably unauthorized by formal government command, can occur in practice even if facially inconsistent with formal government command, and can occur in practice in the absence of any formal government command. In all such instances, a claim of government authorization, and therefore of government prerogative, however facially unwarranted, may be made. To insist upon review only of formal government rule is to ignore much, if not most, conduct arguably governmental.

There is nevertheless a kernel of validity to Justice Frankfurter's position. Because "the state . . . can only act through functionaries, the question naturally arises what functionaries, acting under what circumstances, are to be deemed the state for purposes of bringing suit . . . on the basis of illegal state action."[61] That "problem is beset with inherent difficulties. . . ."[62] It is, however, a problem

> not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by a state is *pro tanto* the state. Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court.[63]

The kernel of validity here is not that intended by Justice Frankfurter. It is not that the policeman's discrimination must

60. *Id.* at 17 (Frankfurter, J., concurring). *See also* Monroe v. Pape, 365 U.S. 167, 235-39 (1961) (Frankfurter, J., dissenting).

61. Snowden v. Hughes, 321 U.S. 1, 16 (Frankfurter, J., concurring).

62. *Id.*

63. *Id.*

necessarily be kept out of federal court. It is, rather, that government threat cannot be identified by reference to "abstract considerations." What is required is a judgment, not a formula. The formal institutional action formula suggested by Justice Frankfurter is inadequate because it ignores too much. The formula he attacks, although attractive because it eliminates the need for making the judgment, is equally inadequate both because it generates the analytical confusion noted earlier and because it generates unlimited judicial discretion by eliminating the analytical boundaries placed on that discretion by the necessity of government threat.

The formula Justice Frankfurter attacked is that of defining "government threat" to include the threat presented by the conduct of an individual official whether or not the conduct is authorized by government and whether or not the government in question has itself a constitutional obligation to prohibit the conduct.[64] Such a definition of threat imposes a fundamental shift in analysis from that evident in the review of a formal government rule. The question is no longer that of the legitimacy of a government claim of prerogative; by the definition the presence or absence of such a claim is immaterial. The question becomes, instead, whether a loss should be judicially shifted and whether sufficiently blameworthy conduct is present to warrant federal intervention. This shift requires, in short, inquiry into whether a federal standard of individual conduct ought to be imposed.

That inquiry requires an analysis at a constitutional level that necessarily takes a form similar to a tort analysis; the analysis is framed in terms of negligence, intent, and abuse of authority as matters of constitutional doctrine. If the fundamental conceptual shift from the constitutional regulation of government to the constitutional regulation of individual conduct is not recognized and justified, the analysis would very likely be concerned with prudential remedial policies—particularly that of a vaguely defined "federalism"—that are immaterial to the meaning of particular constitutional guarantees.[65] Because abandonment of the original

64. *See, e.g.*, cases cited note 60 *supra*.

65. *But see* Paul v. Davis, 424 U.S. 693, 700-01 (1976) (federalism was not repealed by the fourteenth amendment and limits the amendment's substantive meaning). With respect to congressional power, *compare*, National League of Cities v. Usery, 426 U.S. 833 (1976) (tenth amendment as limitation on commerce power) *with* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (eleventh amendment not a limitation upon fourteenth amendment enforcement power) and *see* note 21 *supra*.

It is impossible to deny that the motivation for doctrines of federalism is constitutional in origin. There is clearly a notion of distinct government sovereignties

justification for constitutional regulation permits no basis for distinguishing cases of an individual official's misconduct from cases of government misconduct, the analysis would also invoke such policies in cases in which the obligations of government *are* at issue.[66]

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basic to the constitutional scheme. That such a notion limits the substantive meaning of a constitutional guarantee in any sense other than the standard one of accommodating conflicting private and government interests is nevertheless difficult to accept. The motivation for deciding *Paul* and Rizzo v. Goode, 423 U.S. 362 (1976), on federalism grounds is either respect for and deference to state accommodations of policy in state remedial processes governing individual conduct, or a conclusion that such processes are substantively unchallengable. If federalism is a policy merely of deference to state remedies, it is a federal remedial policy counseling federal hesitation where an individual's abuse of authority is in issue. If federalism is the label assigned to substantive constitutional decision, it is of course a policy "material to the meaning of particular constitutional guarantees," but only in the sense that there has been a decision that a state's claim of governmental prerogative is upheld. *See* Ingraham v. Wright, 430 U.S. 651 (1977) and note 66 *infra*. There is of course nothing impermissible in making a substantive constitutional decision in favor of the state on grounds of something entitled "federalism" if what is meant is that there is nothing constitutionally illicit in what the state has done or not done. What is wrong with these decisions, rather, is that it is not clear this is what is meant. What seems to be meant instead is that the Court believes itself faced with official "torts" better resolved by state than federal law that it has no principled basis for distinguishing the proper objects of federal and state concern other than the invocation of a federalism notion it declines to define precisely. There are two dangers in such a meaning. The first is suggested by *Paul*. Although that decision was purportedly based upon narrow "constitutional" grounds involving the nature of protectable interests, the general principle invoked was a federalism notion not itself explained. 424 U.S. at 700. Justice Stevens' subsequent attempt to rationalize *Paul* on substantive grounds reflecting federalism values is satisfactory but clearly suggestive of a distinction between government and individual official misconduct. Ingraham v. Wright, 430 U.S. 651, 701-02 (1977) (dissenting opinion). The second danger is suggested by *Rizzo*. The Court there invoked both federalism in the sense of remedial hesitation and, at least in passing, absence of "constitutional duty" in some substantive sense—a combination suggesting a blurring of at least theoretical lines between substantive and remedial policy. 423 U.S. at 376-77. It would of course be possible for the Court to conclude that a state's structure of remedial rules is substantively inadequate but to refrain from invoking a particular remedy on grounds, *e.g.*, of federalism. What seems objectionable is a decision on the substantive issue influenced by remedial considerations. *See* note 66 *infra*.

66. An example is Rizzo v. Goode, 423 U.S. 362 (1976). The fact of constitutional violations was there assumed. The question was that of the propriety of equitable relief against supervisory officials for failures of supervision. Among the many reasons for rejection of such relief in *Rizzo* (including "federalism") was that the individual officials had no "constitutional duty" to supervise. *Id.* at 376-77. Of course they had no such duty. If the present discussion is accepted as premise, only governments have "constitutional duties." Assuming constitutional violations occurred in fact, however, the problem before the court was one of remedial policy, not constitutional duty. It is clear that a supervisor's negligent supervision has or can have a factual con-

nection to a constitutional deprivation. The question was therefore that of the supervisory officials' statutory duty under Section 1983.

It is apparent that both the compensation policy of the statute, by virtue of more and deeper pockets, and the deterrence policy of the statute, by virtue of an assumption that supervisors subjected to potential liability for inadequate supervision would take steps to correct the misconduct of subordinates, would be served by liability for negligent supervision. Whether such liability is a real possibility is of course dependent upon one's interpretation of both *Rizzo* and of Monell v. New York City Dept. of Soc. Services, 436 U.S. 658, 694 n.58 (1978). *See, e.g.*, Levinson, *supra* note 506, at 841-46; Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 235-37 (1979).

Professor Nahmod suggests, I think quite properly, that *Monell's* emphasis upon cause in fact (and upon the "cause" language of the statute) is properly interpreted as a reference to the question of duty. S. NAHMOD, *supra* note 3, at 178-79. The problem is not one of cause—it is apparent that there is nearly always a factual connection (stated in terms of failure to train or otherwise) between the conduct of local governments or supervisory personnel and the misconduct of the immediate government actor. *Cf.* Martinez v. California, 444 U.S. 277 (1980) (factual connection between conduct of government and non-government actors). The question is whether the supervisor had a duty to act. But Nahmod initially terms the question one of "constitutional duty": "the rejection in *Monell* of *respondeat superior* indicates that there is no constitutional duty running from the local government to the deprived plaintiff," S. NAHMOD, *supra* note 3, at 179. He follows that statement with the confusing statement that official policy or custom "is a condition precedent to the imposition of a constitutional *or 1983* duty upon a local government." *Id.* (emphasis supplied). It seems clear, however, that the "failure to act" duty issue suggested by *Monell* has, by the terms of that opinion, nothing to do with constitutional deprivation. *Monell* is a case pervasively and narrowly concerned with *statutory interpretation*. To the extent footnote 58 in the *Monell* opinion, 436 U.S. at 694, modifies *Rizzo*, it suggests a statutory understanding of *Rizzo*, *Rizzo's* constitutional duty language to the contrary notwithstanding.

Despite the fact that *Monell* was concerned with a question of statutory rather than constitutional "duty," it is possible to legitimately frame the issue suggested by footnote 58 in *Monell*, 436 U.S. at 694, and by *Rizzo*, as one of constitutional obligation requiring a constitutional analysis. In constitutional terms, the question is one of governmental obligation to create a procedure or remedy by which supervision will occur, perhaps as a matter of due process and perhaps as a matter of the more specific constitutional provisions "violated" in *Rizzo*. It is difficult to believe, for example, that a government could, as a matter of constitutional law, issue guns to its policemen in the absence of any rule regarding the use of such weapons. A government which therefore in effect authorized the "murder" of criminal suspects would presumably be engaged in the deprivation of life without due process of law. *See* Monroe v. Pape, 365 U.S. 167, 211 (1961) (Frankfurter, J., dissenting) (citing Wolf v. Colorado, 338 U.S. 25, 28 (1949)).

What this article suggests about *Monell* is that the Court has the problem in some measure backwards. It seems concerned with finding a statutory obligation on the part of government to not generate policy which "causes" constitutional deprivations by individual officials. If the present analysis is accepted, the proper concern would be that of the government's constitutional "remedial" obligation in the broad sense of the term remedy—*i.e.*, is the government's policy itself unconstitutional either because it affirmatively authorizes invasions of protected interests for insufficient reasons or because it fails to prohibit such invasions? If unconstitutional, the govern-

Personalization of government threat, in addition to generating the noted confusion, eliminates analytical limits upon judicial discretion. That is true not only in the limited "federalism" sense with which Mr. Justice Frankfurter was concerned—his insistence upon review only of formal state rules clearly limits occasions for the exercise of federal judicial authority—but also in the broader sense that distinct analytical inquiries impose distinct limits upon the exercise of discretion. Inquiry only into the constitutional validity of a government claim of prerogative confines discretion by rendering additional inquiries—those suggested by the tort analogy—immaterial.

It is true that the argument for limiting judicial discretion appears to have less force in the case of federal regulation of an official's abuse of authority than in the case of federal judicial review of legislation.[67] It is not likely that the democratic values underlying judicial deference to legislative decision will be threatened by liability for such an abuse of authority. It may therefore be argued that unconfined judicial discretion is not a sufficient reason for more narrowly defining government threat: To the extent that an official's conduct reflects legislative decision, judicial discretion is limited not only by a narrow inquiry into the validity of that decision but also by a presumed deference to representative decision making processes. To the extent an official's conduct contravenes legislative choice, a major basis for limiting judicial discretion is absent.

There is surface plausibility to this argument, but it ignores the fact that deference to legislative decision is desirable at the federal as well as the state level of government. If one accepts the proposition that Congress should have a substantial role to play in

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ment's liability would presumably be strict. *See* Owen v. City of Independence, 445 U.S. 662 (1980). Of course, if one assumes a facially constitutional government policy, the conduct of individual agents of the government, in *e.g.*, engaging in "unconstitutional" searches is not thereby necessarily rendered "constitutional." The question in such a case is whether the conduct of the agent may be deemed governmental in the sense that it is the object of constitutional regulation. The facially constitutional policy might, for example, be unenforced. Or, if the government is not constitutionally required to "supervise," in the sense at least of a constitutional requirement imposing a particular remedial structure on a police department, the conduct of particular policemen might nevertheless be characterized as governmental—the absence of a remedial structure being a datum in that determination. If the searches were "unconstitutional," the question of who pays, as *Monell* and *Owen* make clear, is a statutory issue. If the searches were "constitutional," in the sense that an adequate government remedial structure obviated any claim of government authorization, the question of liability would be a statutory issue. *See* text at notes 98-114, *infra*.

67. *See generally*, ELY, *supra* note 44.

determining the nature and scope of the federal regulation of the states[68]—a proposition at least implicit in the assumption that it is a congressionally created cause of action with which we are presently concerned—preservation of a congressional forum for accommodating state and individual interests is itself a positive value. A constitutional definition of government threat that includes individual misuse of power limits the potential extent of Congress's role and impairs the value.

In rejecting both Justice Frankfurter's "formula" and its alternative—that individual misuse of power constitutes government threat—this discussion has seemed to suggest its own formula: a government claim of prerogative is necessary to a government threat. Such a claim triggers a "constitutional analysis," not a "tort analysis," for it invites consideration of government interests, not individual misbehavior. A government threat is implied by a government claim of prerogative, because it suggests that an official's conduct is consistent with government decision or policy. A claim of prerogative also defines the government threat in the sense that it defines the proper object of constitutional regulation. However, the fact that an official makes such a claim of government prerogative does not necessarily mean that a government threat is present. As will be pointed out in the next section, it may be desirable, as a matter of judicial administration, to utilize a claim of prerogative as a proxy for distinguishing government and individual threat, but it does not follow from the claim that the party making it is the government. Nor is it true that the absence of a formal claim necessary means that analysis of an implicit claim is precluded. The essential question is not who makes the claim, the formality of the claim, or the clarity of the claim. The essential question is whether there is a claim.

Enforced and Unenforced Government Commands: The Fourth Amendment As Illustration

The preceding section makes three fundamental points: constitutional regulation is concerned with the regulation of government threats to protectable interests; an individual official's threat to protectable interests is not a government threat to those interests where the government itself provides constitutionally sufficient protection against the threat (or where it is not constitutionally

68. *See* authorities cited notes 87-90 *infra*. *Cf.* Choper *supra* note 21 (arguing that Congress has plenary power in this context).

required to do so) because the government makes no claim to legitimacy in such a case; and, despite the inherent difficulty generated by the ambiguity of government "remedies" for individual misconduct, ignoring the distinction between a government and an individual generates confused and insufficiently limited judicial analysis at a constitutional level. The present section seeks to suggest both that the enforcement of government command is not itself an adequate formula for making the needed distinction and that a resort to purported distinctions between types of substantive constitutional commands ignores the distinction.

It is apparent that some constitutional provisions *appear* to contemplate direct regulation at a constitutional level of individual conduct. The clearest example is the fourth amendment, for it is an individual official who "searches" and "seizes." The official must therefore have probable cause and either a warrant or "exigent circumstances." It is, however, not the case that the constitutional analysis employed is therefore concerned with regulation of individual conduct. The concern remains that of government. The analysis consists of a balancing of the privacy and personal security interests protected by the amendment against the abstract and generalized interests of law enforcement or of government. It does not, for example, matter that the individual official's intent or motive was illicit, for the search he conducts may nevertheless be constitutional.[69] His intent, motive or other "state of mind" is a matter material to remedy, not constitutionality.[70] It is quite true that individual conduct is regulated under the fourth amendment in the sense that it is a government official who is told by a court adjudicating a fourth amendment claim what is and is not permissible under the amendment, but the official is told in his representative capacity. His claim that it was his prerogative to conduct a search under specified circumstances is in fact a claim that it was the government's prerogative to do so.

The clear purpose of the fourth amendment is to identify when an intrusion into generally protected private interests is warranted and, perhaps, the scope of the warranted intrusion. The purpose is not to regulate the particular policeman's idiosyncratic conduct in ef-

69. Scott v. United States, 436 U.S. 128, 138-39 (1978).

70. *Id.* at 139 n.13. *But cf.* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring) (suggesting the fourth amendment may be an peculiarly appropriate basis for an implied cause of action against federal officials in view of its regulation of individual conduct).

fecting an otherwise constitutional search or seizure.[71] A case such as *Jenkins v. Averett*[72]—in which the court found a fourth amendment violation in an arresting officer's use of excessive force because the arresting officer's conduct constituted "gross negligence" amounting to "intent"[73]—is therefore not properly classified as a case involving direct constitutional protection of private interests. If the fourth amendment as such regulates means of effecting a search or seizure, it properly does so directly only in the case of a government policy authorizing or commanding a means repugnant to the amendment, not in the case of individual "frolic and detour."

The assertion that "frolic and detour" is not the concern of the amendment leaves the problem, again, of determining when it is "frolic and detour" and not government conduct which is at issue. The fourth amendment remains the illustration. In the typical fourth amendment case in the criminal context, the government claims a search was lawful. The police officer's conduct in effecting the search is therefore clearly analyzed as government conduct: the government, even where that government has promulgated a prohibition against searches conducted in violation of the fourth amendment, clearly threatens a constitutionally protected interest.[74]

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71. *But see* Terry v. Ohio, 392 U.S. 1, 16-17 (1968) (scope of intrusion); Schmerber v. California, 384 U.S. 757, 771-72 (1966) (means of intrusion). It has been argued with considerable force that one purpose of the fourth amendment is to preclude arbitrary police conduct by limiting the discretion of the policeman in the field. W. LAFAVE, 1 SEARCH AND SEIZURE 15-18 (Supp. 1981); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 415-16 (1974). *See* Camara v. Municipal Court, 387 U.S. 523, 532 (1967). A scheme of government rules regulating individual police conduct might under some circumstances, and particularly where the rules are followed, preclude a finding of a fourth amendment violation. *See* South Dakota v. Opperman, 428 U.S. 364 (1976). I am not, however, contending that a government, by granting greater discretion, generates less risk of a constitutional violation. My contention is quite the opposite, for the degree of discretion granted is significantly material to the question whether the policeman's conduct is properly characterized as the government's conduct. Indeed, treating the individual officer's conduct as the primary focus of attention may generate an incentive for the government to abdicate its responsibility for regulating that conduct. *See* note 66 *supra*; LAFAVE, *supra* at 172 (1978). *But see Id.* at 15 (1981 Supp.).

72. 424 F.2d 1228 (4th Cir. 1970).

73. *Id.* at 1232. *See* S. NAHMOD, *supra* note 3, at 67.

74. The government is a threat because it claims the search was legitimate and has therefore presumably "authorized" the search. The exclusionary rule in effect operates to require such a claim. It is of course clear that the government could make no such claim and could even prohibit the search and nevertheless attempt to use the evidence obtained in the search. In making such an attempt, the government would, however, be attacking the remedy, not asserting a claim to the legitimacy of the

Let us suppose, however, an atypical case. The policeman conducts a clearly unauthorized government-prohibited search (*e.g.*, without warrant, without probable cause, without exigent circumstance) and is disciplined by the government for so doing. The government in this atypical case does not appear to constitute a threat to a protected (privacy) interest; the basic justification for constitutional regulation—the regulation of government threats to protected interests—is not present.

If the government does not, in the hypothetical atypical case, present a threat to a protectable interest, has there been a "violation" of the fourth amendment? The question may be made more difficult by varying the hypothetical. Suppose the government does not enforce its prohibition, or that it enforces the prohibition in general but not in the particular case. Does the government remain a threat within the meaning of the original justification for constitutional regulation? If the government enforces its prohibition only in the case of intentional violations, may a concept of constitutional law which requires the presence of a government threat incorporate the government's enforcement standard and therefore adopt intent as a constitutional standard through the "back door" of an "adequate" government remedy?

The answers to these questions require a return to some basic principles. The reason for inquiry into the presence or absence of a government remedy is not to measure state remedies against a constitutional standard the concern of which is adequacy. The reason, rather, is to identify the character of the threat to protected interests. Adequacy may be viewed as the direct concern of due process,[75] but a provision such as the fourth amendment is not facially concerned with whether the government has or has not created a structure of rules consistent with the provision's commands. It is concerned, rather, with whether the government did or did not comply in fact with those commands.

In another sense, however, the inquiry into the presence or absence of a government remedy does measure adequacy. This inquiry measures adequacy because it assumes that the proper function of constitutional regulation is the regulation of government claims that government conduct is legitimate. Such a claim may be

search. The intimate connection between the exclusionary rule "remedy" and the constitutional prohibition is nevertheless obvious. *See* United States v. Robinson, 414 U.S. 218, 224 (1973).

75. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

reflected in a formal rule, and the presence of a government claim is most obvious in such a case. Mr. Justice Frankfurter's position to the contrary notwithstanding, such a claim may also be reflected informally in the conduct of government officials. It is therefore clear that one means of determining whether there is an absence of government threat is determining whether an individual official is prohibited by government rule from engaging in the conduct which is the subject of claimed constitutional regulation.

It is less clear whether an identified government rule must be enforced to obviate government threat. It may with justification be argued that an unenforced rule is no rule; that what is crucial is government custom, not government rhetoric.[76] But if there is a generally enforced government rule, there is no clear government claim of prerogative in any specific instance where enforcement does not occur in fact.[77] What is required, again, is judgment rather

76. *See* Adickes v. Kress & Co., 398 U.S. 144 (1970); Robinson v. Florida, 378 U.S. 153 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963).

77. In Monroe v. Pape, 365 U.S. 167 (1961), the Court declined to impose an exhaustion of state remedies requirement because "[t]he federal *remedy* is supplementary to the state remedy." 365 U.S. at 183 (emphasis supplied). Justice Frankfurter, in dissent, argued that the "under color" language of Section 1983 refers to state authorized misconduct in somewhat the same sense that the text here uses the phrase "generally enforced" government rule. 365 U.S. at 235-37. Justice Frankfurter at one point suggested that application of a state's good faith immunity defense would constitute sufficient "authorization" to warrant the conclusion that the state (by the present terminology, the "government") was involved ("presented a threat to protectable interests"). At another point he refers to his conception of fourteenth amendment due process (that is, to the conception central to his position in the "incorporation" debate), and might therefore have insisted upon something more indicative of government authorization than a mere defense conferred upon police officers as a part of the government's enforcement scheme. 365 U.S. at 237-38. Justice Frankfurter recognized the possibility of an "extension" through congressional enactment, 365 U.S. at 211-12, 238-39, but was unwilling to interpret Section 1983 as such an extension.

It seems proper to conclude, within the framework of the conception advocated here, that the presence of state law defenses to state prohibitions would not *ipso facto* render a policeman's conduct authorized by the state. It is simply not true that the absence of a remedy in fact in the particular case necessarily means that the state has not fulfilled its constitutional obligations: a government's decision not to punish, at least if made for reasons distinct from any attempt to avoid constitutional restrictions upon government conduct, does not render an official's misconduct "authorized." *Cf.* Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1977) (government decision based in part upon constitutionally impermissible considerations not remediable—at least in the sense of reinstatement—if permissible considerations would have "caused" the decision). Despite the remedial context, *Mt. Healthy* may be viewed in adequacy terms as suggesting that, although consideration of constitutionally improper matter constitutes a "government threat" to protectable interests, the

than formula. One datum for the judgment is the presence or absence of a rule, and another undoubtedly is the presence and degree of enforcement. A third is the clarity and specificity of the rule. The proper test of government threat is less important than the point that the presence of government threat to protected interests in the form of a government claim of prerogative must be identified if the appropriate analysis is to be identified.

It may legitimately be objected that the difficulty inherent in separating government threat from individual threat impeaches the distinction. Such an objection is, however, an objection grounded upon administration of the statute, not the invalidity of the distinction as a concept. It is an objection viable in the grey area and may justify, within the grey area, a more-or-less arbitrary classification.

The difficulty of the separation is illustrated by the hypothetical case, suggested above, of an enforced government prohibition of a search. Assume that the policeman is sued in a Section 1983 action. He might argue by way of defense that the search was in fact "constitutional" despite the absence of state authorization. This is a viable argument. The fact that the search was not authorized by the state does not decide the question whether the government could, consistently with a constitutional standard, authorize that search. The proposition that the justification for constitutional regulation is absent where there is no government threat to a protected interest is not a statement that state law controls federal questions.[78] Nor is it necessarily a statement that an individual official lacks standing to assert government interests where government has struck a balance which limits those interests in a manner

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resulting decision, if it would have been made for licit reasons in any event, does not constitute a government threat. Of course the government's remedial "rule" may also be viewed as a source of authorization and the proper subject of constitutional analysis. *See, e.g.*, Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975).

78. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 390-94 (1971); Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975). *See* notes 76-77 *supra* and accompanying text. *Cf.* Glennon, *supra* note 4 (suggesting the "borrowing" of state law).

It is of course apparent that, if the argument made here is at least for the moment accepted, the "government threat" notion is intimately bound up with state law as well as state custom and policy. If enforcement of state prohibitions in specific cases is thought unnecessary to warrant a finding that no government threat exists, note 77 *supra*, the state's good faith defense becomes, in a very limited sense, a factor controlling the application of the federal standard. It is, however, not controlling in the sense in which Justice Frankfurter's *Monroe* dissent might make it controlling, note 77 *supra*. Under the present conception, there exists the second category of cases. *See* text accompanying notes 88-96 *infra*.

potentially more restrictive than a constitutional standard would permit. It is, rather, a statement that the object of constitutional regulation is government and that one cannot invoke a constitutional guarantee absent an assumption—at least hypothetical if not real—that government presents the threat to interests protectable under the guarantee.

There are of course very real objections to permitting the officer to make this argument—it seeks, for example, an advisory opinion—but, if we assume that permission is granted, the analysis employed is a constitutional analysis: the officer frames the argument in terms of exigency and probable cause, not "state of mind." If it is concluded that there was a fourth amendment violation, the conclusion is in fact that there was a hypothetical fourth amendment violation: *if* the officer's search had been authorized, there would have been a fourth amendment violation. What we have in the hypothetical case is an abuse of individual power and authority and nothing more than that. There is, under the limited and unlikely conditions of the hypothetical, no government claim of prerogative. If the policeman were permitted to make the argument, it is for policy reasons independent of the character of the threat presented to protected interests by the policeman's conduct. Whether there is or is not a government claim of prerogative in a given case is, in practice, likely to be muddled, and it therefore may be desirable to treat the official's claim as a government claim. But such a treatment, albeit justified on grounds of administration, remains treatment of a government, not an individual claim of legitimacy of conduct.

These assertions raise the question why it might be thought necessary to regulate by constitutional law a wholly individual threat to protectable interests. The question is suggested by the second argument the policeman in the atypical case might make. The second argument is that there was no fourth amendment violation because the government did not authorize his conduct.[79] As the government presents no threat to a protected interest, the justification for constitutional regulation is absent. We are now at the heart of the objection to basing the analysis on government claims of

79. *See* Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 288 (1913). It is interesting that the Court relied, in *Home Tel.*, principally upon Ex Parte Young, 209 U.S. 123 (1908), a case founded upon fiction. It should nevertheless be clear that *Home Tel.* would not necessarily be decided differently, even at a constitutional level of analysis, under the conception proposed here. It is only Justice Frankfurter's insistence upon formal state rules as the measure of state action that would compel a different result. *See* Barney v. New York, 193 U.S. 430 (1904).

prerogative, for it can forcefully be argued that the analysis lets the constable off the federal hook by too narrowly defining the object of constitutional regulation.

We may presume that letting the constable off is an undesirable, as distinguished from unconstitutional, result. It has never been wholly clear why it is an undesirable result, but at least two possibilities suggest themselves. If one assumes that the appropriate test of government threat is the absence of any generally enforced government rule prohibiting official misconduct (so that there is no government threat if neither the government's expressed position nor its custom or practice presents a threat), there remains the individual case in which the rule is not enforced. Though such a case may not involve a government threat in a constitutional sense (for the reason, *e.g.*, that a government-generated defense to the usual enforcement of the prohibition, such as good faith, may be thought to present no threat) one might nevertheless claim that there is a legitimate federal interest in appearances—in the presumed perception of the citizenry that a policeman, however unauthorized his conduct, is a policeman.[80] One might claim, moreover, that the difficulty inherent in distinguishing government from individual threat in such a case generates a risk of error in classification sufficient to warrant prophylaxis: one may wish to regulate individuals as a means of deterring governments.[81] The difficulty inherent in discovering government claims of prerogative, which arises once it is recognized that such a claim may be made by means other than formal rule, may justify some more or less arbitrary classification. One such classification is suggested by the potential line between general enforcement of government rules and specific enforcement of government rules. The classification carries with it, given the difficulty of the underlying inquiry, risk of error.

Assuming, then, the desirability of federal regulation of individual threat, there are three possible solutions. First, one may disregard the notion that the original concern of constitutional

80. *See* Monroe v. Pape, 365 U.S. 167, 238 (1961) (Frankfurter, J., dissenting).

81. The argument may also justify arbitrary classification in cases such as that suggested by the policeman seeking to invoke government interests where government has prohibited his conduct, but it would not justify ignoring the need for a classification as a starting point of analysis. One must come to some initial conclusion about whether government or individual threat is the object of regulation, or the dangers of confusion discussed in the text arise. More important, the classification permits further consideration and direct analysis of the reasons for extension of constitutional values to individual conduct without the intrusion of constitutional rhetoric.

guarantees was limited to government threats to protected interests. The difficulties with this solution are those suggested earlier: confused analysis, the removal of shackles on judicial discretion and, therefore, a denial of the values underlying the notion that the Constitution regulates only government.[82]

Second, one may make an exception to the original concern notion in fourth amendment cases and, probably, in the case of any other guarantee one wishes to conceive as subject to violation by individual officials. The second alternative would, in effect, treat the justification for constitutional regulation as dependent upon the guarantee, or the factual situation, in issue. Such treatment would be somewhat similar to Professor Tribe's notion that the meaning of "state action" is intimately a matter of the constitutional guarantee and its application, and should therefore be treated substantively as varying with context.[83] Under this notion, constitutional provisions regulating government rules and those regulating government actors are to be distinguished.[84] Although I do not agree with this distinction, the similarity of the assertion made here that government claims of prerogative are regulated by constitutional law and Professor Tribe's argument that structures of government rules are regulated by at least some aspects of constitutional law is patent. My disagreement is with Professor Tribe's attempt to solve the dilemma by invoking actor-regulating provisions—a notion inconsistent with my major premise.

There are three difficulties with this solution. First, it is not clear which constitutional provisions fall within which category. As noted here, the fourth amendment is best viewed as concerned with government rules or claims of prerogative, not actors as such. Attempts at finding textual bases for actor regulation have not been persuasive,[85] and it is difficult to see any textual basis for such a

82. *See* notes 64-68 *supra* and accompanying text. The same disadvantage may be said to infect the third alternative suggested here, text *infra* at notes 88-96, but the third alternative is grounded upon legislation (or, at least, upon the possibility of congressional veto). It is therefore not a threat to at least one major value underlying "state action" doctrine: the doctrine's limitation upon the institution of (nondemocratic) judicial review.

83. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1147-74 (1978).

84. *Id. See also* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 176-77 (1978) (Stevens, J., dissenting); Glennon & Novak, *A Functional Analysis of the "State Action" Requirement*, 1976 SUP. CT. REV. 221, 230-31.

85. *See* Kirkpatrick, *supra* note 13 at 64 (suggesting "reasonableness" requirement of fourth amendment is basis for negligence liability). Professor Kirkpatrick himself recognizes the difficulties with the proposition. *Id.* at 64 n.110. *See also* in this connection, Scott v. United States, 436 U.S. 128, 138-39 (1978).

finding in any constitutional provision. Second, the solution suffers from at least one of the same difficulties as the first. It authorizes, by an exercise of judicial discretion in the categorizing of rule-regulating and actor-regulating provisions, unbounded judicial discretion in regulating individual conduct not reflective of government threat. Third, by asserting that at least some constitutional provisions are prima facie actor-regulating, the solution renders unnecessary the inquiry into reasons for regulating individual threats to protected interests. That inquiry, however, is crucial if the Court is to be confined in its decision making by the underlying and limiting value at the core of state action theory: that it is government which defines the legitimate object of the courts' regulatory function.[86]

The third alternative solution by which the federal regulation of individual threat can be justified is to relegate these cases to a category independent of the government threat category—to a category of cases in which the original concern is modified *by statute* so as to subject the conduct of individuals to federal regulation. The advantages of the third alternative are two. First, it permits principled justification for decision making on the basis of the identification and explication of the reasons for the federal regulation of individual conduct. Second, it permits Congress, as the source of the third alternative, to regulate or to not regulate individual conduct and to formulate and accommodate federal policies appropriate to those regulatory decisions.[87]

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86. The point here is to suggest that the object of the self-executing aspects of constitutional law is properly confined to regulation of government conduct including—as *The Civil Rights Cases* suggest—government authorization of private conduct through non-regulation. 109 U.S. 3, 17 (1883). The grounds for such a confined role may, it is true, be found in part in the preservation of liberty. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149-57 (1978). But they may at least equally be found in the constitutional values underlying the organization of government, *id.* at 1149-50, and most particularly in the limited role properly assigned the judiciary in a democracy.

87. I recognize that reference to Congress may not be thought an advantage by some. It is at least fairly clear that Congress possesses the power to expand or contract the federal cause of action and would possess that power even if the Court sought to imply a cause of action directly. *See* note 118 *infra* and accompanying text. It is beyond the scope of the present discussion to examine the premise that a greater congressional role in exercising that authority is preferable to the ad hoc approach adopted by the courts, but at least three reasons may be summarily suggested: (1) the inherent advantages of Congress as a fact finder in formulating appropriate federal policy; *see generally* A. Cox, *The Role of Congress in Constitutional Determination*, 40 U. CIN. L. REV. 199 (1971); (2) congressional superiority as an institution representing state interests and, therefore, the institutional appropriateness of Congress in acccommodating federalism, *see generally* Burt, *Miranda and Title II: A Morganatic Mar-*

Section 1983 As Congressional Amendment of Original Constitutional Concern

The means by which the third alternative may be implemented is to invoke the authority of the Congress to amend the original constitutional concern. The source of congressional authority is clear: the enforcement clause of the fourteenth amendment. It is of course possible to challenge the scope of that authority,[88] but the premise of this discussion is that it legitimately exists.[89] Upon that assumption, the rationale is equally clear: Congress may view constitutional guarantees as norms that may be remedially extended[90] to encompass individual conduct, particularly where Congress distrusts the effectiveness, as distinguished from the existence, of state remedial structures.

The statutory means of reaching individual conduct necessarily implies a statutory mode of analysis, for the statutory means, although an extension of constitutional norm in the sense of general principle, leaves the original concern of federal regulation—the regulation of government—intact. It therefore leaves the original constitutional mode of analysis intact. The constitutional mode will not, however, give answers to questions it was not designed to answer. The statutory means therefore requires both statutory questions and statutory answers—even answers supplied interstitially by common law making. Such questions and answers relate to individual liability and therefore quite properly resemble tort questions and tort answers. Negligence, intent, and similar constructs are, under this statutory view of the cause of action,

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riage, 1969 SUP. CT. REV. 81; Choper, *supra* note 21; and (3) the absence of a structure of clearly defined federal interests which has made judicial decision in this area largely rudderless and which Congress might resolve by providing direction, *see generally* Shapo, *supra* note 4.

88. *See, generally*, Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975).

89. *See, e.g.*, Fullilove v. Klutznick, ___ U.S. ___, 100 S. Ct. 2758 (1980); Katzenbach v. Morgan, 384 U.S. 641 (1966). *But see* Oregon v. Mitchell, 400 U.S. 112 (1970). *See generally* Burt, *supra* note 87; A. Cox, *Foreword: Constitutional Adjudication and the Protection of Human Rights*, 80 HARV. L. REV. 91 (1966); Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment To Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV. 656 (1977).

90. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). On the question of congressional authority to intrude upon federalism, *see generally* Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 152-56 (1978); Choper, *supra* note 21; Monaghan, *supra* note 42, at 26-38.

statutory constructs. An individual government official's duty, under the statutory means, is a statutory duty.

It is obvious that the statutory means referred to here is Section 1983—more properly, one aspect of Section 1983. The underlying assumption is that "state action" and action "under color" of state law are not equivalent notions.[91] The obvious argument against the proposition that Section 1983 statutorily extends the original justification for constitutional regulation is that Congress intended no such result. That argument was, however, answered in *Monroe v. Pape*. The Court in *Monroe* invoked "intent" as a matter of statutory interpretation and extended federal regulation to abuse of individual authority and power on the basis of an extended discussion of the congressional purpose underlying Section 1983. The conclusions reached in *Monroe*, despite the ambiguity of the congressional purpose,[92] were not unwarranted conclusions. Congress sought to reach Ku Klux Klan outrages in the South and was concerned with official inaction—the ineffectivenes as distinguished from the existence of state remedies.[93] Such an objective is not inconsistent with the rationale suggested here for a statutory means of enforcing constitutional norms by modifying the original concern.

It should be apparent that viewing Section 1983 as statutorily extending constitutional norms does not itself resolve the difficulty of identifying government threat, nor does it obviate the need for identification. It merely provides the basis for seeking to classify cases as involving or not involving government threats. Classification identifies the appropriate judicial analysis, not outcomes of cases. Nor does the statutory means automatically resolve the question of when the regulation of individual threat is warranted. It

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91. *But see, e.g.*, Adickes v. Kress & Co., 398 U.S. 144 (1970). The distinction is suggested by the distinctions made in Justice Brennan's dissenting opinion in *Adickes*. *Id.* at 188-234. *See id. at* 211 ("state action" not equivalent to "under color" of state law); *id.* at 221-22 (distinguishing categories or types of interference with constitutional rights); *id.* at 224 (suggesting broad meaning of the term "deprivation" in the statute); *id.* at 231-34 (discussing state of mind as matter of statutory law). As my view of the scope and meaning of a "constitutional right"—at least in the self-effecting sense—appears much narrower than that envisioned by Justice Brennan in the *Adickes* dissent, I do not claim the dissent as direct authority here. In this connection, see also Paul v. Davis, 424 U.S. 693, 717 (1976) (Brennan, J., dissenting). *Cf.* United States v. Guest, 383 U.S. 745, 779 (1966) (Brennan, J., concurring) (interpreting 18 U.S.C. § 241).

92. *See, generally* Shapo, *supra* note 4.

93. *Id. See also* Monroe v. Pape, 365 U.S. 167 (1961). *But see* Note, 82 HARV. L. REV. 1486 (1969).

merely requires consideration of congressional purpose and generates the necessity for the articulation of reasons for such regulation.

The obvious objection to this argument is that Section 1983 does not itself create rights but merely serves as the authority for a lawsuit to enforce rights created elsewhere—in the Constitution or in other federal legislation.[94] It may therefore be claimed that abuses of power would not be actionable under the proposed interpretation because the rights created by the Constitution are rights only against claims of government.

The objection has merit, but only if its understanding of the term "rights" is accepted. To define the rights enforceable by the statute as limited to the right to be free from conduct prohibited by laws distinct from the statute would impair the theory advocated here, but it would also impair presently controlling conceptions of the Section 1983 cause of action. The Section 1983 defenses help to define the conduct against which the statute provides protection. Although there is a rather barren formal distinction between the absence of a deprivation of right and a successfully asserted affirmative defense, the right enforced by the statute in the functional sense is a right merely to be free from conduct not undertaken in good faith. The same difficulty would confront *Monroe v. Pape*: if only intentional fourth amendment violations are, as a matter of the statute, actionable, the intent requirement is a functional component of the meaning of the "right" enforced by the statute.

The statute, then, is not accurately characterized, even under the current understanding of its function, as a mere vehicle for the enforcement of rights, the meaning of which it does not affect. It is, however, true that the position advocated here—that the statute should be interpreted to create rights against individual abuse of authority on the premise that the Constitution does not do so—does not necessarily follow from that observation. There is a distinction between a statutory implementation of a presumed external right and a statutory creation of new rights. Nevertheless, the significance of that distinction may be questioned by noting that interstitial federal common law may be generated by a statutory grant of adjudicatory authority necessary to the effective enforce-

94. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617 (1979). *See generally* Maine v. Thiboutot, ___ U.S. ___, 100 S. Ct. 2502 (1980); Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

ment of federal (constitutional) policy.[95] The interests preserved by constitutional policy are at least relatively identifiable. As noted earlier, there are at least two justifications for protecting those interests by extending federal regulation to individual conduct: preserving expectations of order and rationality in the conduct of government officials and the potential need for regulating individuals as a means of deterring governments. It is not alien to accepted notions of proper judicial function to suppose that the courts may permissibly formulate a body of federal law designed to preserve identifiable constitutional interests from threats distinct from but related to those with which the Constitution itself is concerned.[96]

THE SUGGESTED CONCEPTION

It is now possible to propose an alternative conception of the cause of action created by Section 1983.[97] The basis for the conception is the distinction discussed above between at least two aspects of the statute and, therefore, two categories of cases. What follows is a description of these categories with brief suggestions concerning how some recent cases illustrate the analysis in each.

Individual Defendant as Representative of Government: The Government As Object of Regulation

One category of cases involves direct challenges to government policy, rule, or inaction. The analysis is directly constitutional and the problem it addresses is the accommodation of conflicting private and governmental interests. The analysis assumes a government

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95. *Cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (jurisdictional grant generating "federal common law"); Monaghan, *supra* note 42 (purportedly constitutional doctrines as subconstitutional doctrines "overruleable" by Congress).

96. *Cf.* United States v. Guest, 383 U.S. 745, 778-80 (1966) (Brennan, J., concurring and dissenting) (meaning of "right secured by the Constitution" in 18 U.S.C. § 241).

97. It is not pretended that the conception is new. It is suggested by *Monroe* and is at least implicit in much of the commentary. *See, e.g.*, Levine, *supra* note 4; Glennon, *supra* note 4. *See also* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969) (suggesting adequacy analysis at statutory level); Note, *Civil Rights and State Authority: Toward The Production of a Just Equilibrium*, 1966 WIS. L. REV. 831. *Cf.* Monaghan, *supra* note 42 (regarding *Bivens*, remedy) *But see* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970). It is equally not pretended, however, that these authorities support the extent to which I take the underlying notion of a distinction between government and government official misconduct. *See, e.g.*, Monaghan, *supra* note 42, at 24 n.125.

claim of prerogative as its proper subject matter. State of mind plays no role here unless state of mind is pertinent to the underlying constitutional conception—for example, the equal protection doctrine to the extent that doctrine is concerned with basis for decision.[98]

The role played by the individual in such a case is immaterial to the analysis at this constitutional level. Rather, the constitutional analysis is concerned with government as an abstraction distinct from the individuals who act in its behalf. The category is therefore best illustrated by cases in which the relief sought is equitable because that remedy is more clearly designed to afford broad relief from government policy. The category is not, however, limited to such cases. The deterrent function served by liability for damages—particularly where government entities are liable—may be viewed as affording similar relief. The statute is a legal vehicle for the lawsuit, but it can play an independent role in the sense that issues of personal liability should be subjected to a statutory or common law analysis once a decision has been reached on the constitutional issue. Therefore, it is, for example, possible that an injunction will be appropriate but that damages will not.[99]

It is possible to view a case such as *Ingraham v. Wright*[100] as falling within this category. The Court there concluded that, although school children have an interest in personal security protected by the due process clause, state tort remedies for the abuse of a teacher's common law privilege to impose corporal punishment on students are sufficient to satisfy "due process of law." Although one suspects that this formulation was in part motivated again by the Court's fear of a "general federal tort law," it does suggest an analysis concerned with the federal regulation of governments.

Professor Tribe has interpreted *Ingraham* as indicating that some constitutional guarantees—particularly due process and just compensation—cannot be violated by an individual acting in isolation; more "systematic government activity" is required.[101] Although that view has substantial merit, it should suggest an additional corollary: Where there has been "systematic government activity" sufficient to violate, for example, due process (where government as

98. *See* note 44 *supra*.

99. The implication, of course, is that the affirmative "good faith" defenses are statements of statutory duty. *See* note 40, *supra*.

100. 430 U.S. 651 (1977).

101. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1162 (1978). *See* note 50 *supra*.

abstraction has "violated" the constitution), the conclusion that no individual official's conduct constituted the violation should not be grounds for an additional conclusion that individuals cannot therefore be statutorily liable in damages.

The validity of the analysis employed in *Ingraham*—and employable in recasting *Paul v. Davis* as holding only that state defamation remedies satisfy due process[102]—is its recognition that a government's systematic response to due process concerns is what determines whether any constitutional deprivation occurred. The question of liability, if it is determined that the systematic response is constitutionally inadequate, is a separate issue. If *Ingraham* suggests that isolated individual conduct cannot violate procedural due process, it is in the sense that the meaning of constitutional deprivation must be determined by a focus of inquiry not limited to the actions of individuals. The implication of that suggestion—that it is not proper usage to refer to an individual government official's conduct as "unconstitutional"—does not compel a conclusion that the individual should not be liable for the deprivation. The conduct of individual officials can, without characterizing that conduct as either constitutional or unconstitutional, have a causal relationship or "factual connection"[103] to a constitutional deprivation even where that deprivation is defined in terms of the "systematic" obligations of government. The problem of the liability or non-liability of such an individual is a problem of remedial policy, including policies of deterrence, of fairness to individual defendants, of federalism and of judicial administration. It is, in short, a question not of constitutional but of statutory duty.

The Individual Defendant As Focus of Analysis Where Government Is Not the Object of Federal Regulation

The category of cases where the individual, not the government, is the object of federal regulation obviously includes those cases described in the earlier discussion of a statutory extension of federal regulation to reach individual misconduct. It includes cases, then, in which no government authorization or policy is inconsistent with, or a threat to, a constitutional norm or a constitutionally protected interest, as well as cases in which there exists either a government remedy for the individual conduct at issue or no

102. Ingraham v. Wright, 430 U.S. 651, 701-02 (1977) (Stevens, J., dissenting).

103. *Cf.* Thode, *supra* note 32 (factual connection element in common law tort analysis).

legitimate claim of a constitutional obligation to create such a remedy.[104] The appropriate analysis in such cases is wholly statutory. The category may be characterized as that of the true federal tort. The Constitution provides in such cases very little if any guidance, because, under the assumptions of the present discussion, the Constitution as such is not violated by the individual conduct this category seeks to regulate. Of course, the Court need not assume that the scope of the federal cause of action is as broad as the tort law of the states. Indeed, the Court may well restrict the application of the statute to instances of egregious behavior. There are excellent policy reasons for limiting this category to "outrageous" conduct[105] or to extreme abuses of authority.[106] If the proposition that Congress authorized the category as an aspect of the statute is accepted, the fact remains that the statute does not by its terms provide substantial guidance. The age of the statute alone cautions conservative application. But whether construed broadly or narrowly, the statute remains an invitation to the Court to formulate its application interstitially.

The second category, where the conduct of individual officials is at issue, and its relationship to the first category, where the conduct of government is at issue, may be illustrated by a brief description of the opinions in *Baker v. McCollan*.[107] In *Baker*, the plaintiff was arrested and incarcerated for a period of a few days because mistaken for a suspect named in a valid warrant. The Court, characterizing the claim as essentially one of false imprisonment, re-

104. *See* Monroe v. Pape, 365 U.S. 167, 211 (1961) (Frankfurter, J., dissenting) (arguing that, if state "authorized" the search in *Monroe* by declining to remedy the police conduct there involved, the dictum in Wolf v. Coloardo, 338 U.S. 25, 28 (1949)—"we have no hesitation in saying that were the state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment"—could be applicable). If it is assumed that there was government conduct present in *Monroe*—at least in the sense of non-enforcement or of underenforcement of state rules—I would place that case in the category of cases, described in the preceding section, where government is the object of federal regulation. The remedial question would then be a statutory question, as it is in either category. If there had been no violation of the warrant requirement in *Monroe*—that is, if the sole concern was with the arbitrary conduct of the police in effecting an otherwise valid search—the problem would be that suggested by Justice Frankfurter's citation of *Wolf*: did the government authorize the conduct? That would be a constitutional issue within the first category. If the state did not "authorize" the conduct, the case would fall within the second category.

105. *See* Shapo, *supra* note 4.

106. *See* Monaghan, *supra* note 10, at 423-34. *See also* Paul v. Davis, 424 U.S. 693 (1976); note 120 *infra* and accompanying text.

107. 443 U.S. 137 (1979).

jected a due process theory because, despite the error in identification, the plaintiff had been arrested pursuant to a valid warrant and made no speedy trial claim. The Court nevertheless suggested that the sheriff-defendant might have been liable under Section 1983 if he had failed to act "after the lapse of a certain amount of time" in the face of repeated protests.[108] Justice Blackmun's concurring opinion invoked a substantive due process analysis and argued that the defendant's conduct was not such as to "shock the conscience" within the meaning of *Rochin v. California*[109] because it was the defendant's subordinates, rather than the Sheriff himself, who had failed to confirm identity.[110] The dissent in *Baker* argued that there was a constitutional violation because there had been no effort to create an administrative procedure "reasonably calculated to establish that a person being detained for the alleged commission of a crime was in fact the person believed to be guilty of the offense."[111]

The dissent's argument in *Baker* properly focused upon the question of government obligation at a constitutional level of analysis. Although the majority opinion framed the question as whether there exists some right to an identification procedure at a time falling between the issuance of a warrant and the time a speedy trial is constitutionally required—an issue consistent with a focus upon government obligation—it also hinted that a sufficient period of official inaction with knowledge of protest would create an individual duty of inquiry. The hint suggests a judgment about individual fault as a matter of constitutional meaning. The concurring opinion in *Baker* makes such a judgment explicit: the question, for Justice Blackmun, was not government obligation, but rather the reasonableness (or wantonness, or whatever "conscience shocking" might mean) of individual conduct.

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108. *Id.* at 145.

109. 342 U.S. 165 (1952).

110. Baker v. McCollan, 443 U.S. at 147-48. Justice Blackmun distinguished his dissent in Rizzo v. Goode, 423 U.S. 362, 384-87 (1976), on the grounds that the supervisory conduct in *Rizzo* had been "reckless." The difficulty with that proposition is that the *Rizzo* dissent was grounded *not* upon the "unconstitutional conduct" of supervisory officials but upon the liability policies of the statute: "the Court ignores both the *language of* § *1983* and the case law interpreting that language." 423 U.S. at 384 (dissenting opinion) (emphasis supplied). Justice Marshall filed a separate dissent in which he took the position somewhat similar to Justice Blackmun's view—that there had in fact been a constitutional violation because the defendant's conduct had been "intentional". *Id.* at 149.

111. 443 U.S. at 150 (Stevens, J., dissenting).

Both the dissent and the major thrust of the Court's majority opinion in *Baker* may therefore be characterized as falling within the first of the categories suggested here. Had the Court's conclusion been that government had an obligation to create an identification procedure (a "remedy" for the risk of a deprivation of a constitutionally protected interest in liberty), the question of the Sheriff's liability would have been a question of remedial policy, perhaps framable as whether the sheriff had a statutory duty to anticipate government's procedural obligation.

Justice Blackmun's concurring opinion and the majority's hint about individual fault are properly assignable to the second category, where individual, not government, conduct is at issue. Justice Blackmun therefore improperly invoked substantive due process as the basis for decision. As it was clear from the Court's opinion that government had no constitutional obligation, the only remaining question was individual obligation. That question does not sound in the Constitution. It is a tort question properly resolved, if *Monroe's* statutory promise is fulfilled, as a matter of federal statutory or interstitial common law. If one wishes to insist upon constitutional labels,[112] substantive due process—and much of its *Lochner*-era[113] baggage—is a far more appropriate vehicle than the attempt to make other constitutional guarantees and doctrines "speak" to individuals. But the fact that it is the more appropriate vehicle ought, for many of the reasons substantive due process was discredited in the first place,[114] to give us substantial pause.

CONCLUSION

The preceding discussion suggests that there are two alternative conceptions of the constitutional tort. The first treats the Constitution as providing a general guide to protected interests to be interpreted in a manner which recognizes the limits of its relevance to individual conduct; it treats the statute—the cause of action—as the occasion for giving concrete meaning to the protection when an individual's conduct—or the relationship of individual conduct to government misconduct—is at issue. The second approach treats the Constitution as itself having immediate concrete

112. *See* Monaghan, *supra* note 10, at 423-28. *See* note 120 *infra*.

113. Lochner v. New York, 198 U.S. 45 (1905). It is of course apparent that the *Lochner* problem is not present to the extent that judicial review of legislative decision is not present, but the substantive due process problem—the absence of limits on judicial discretion inherent in a substantive due process theory—is present.

114. *See* Rochin v. California, 342 U.S. 165, 175-77 (1952) (Black, J., dissenting).

meaning and as providing, within the four corners of the instrument, sufficient policy guidance to define its legal consequences. It is certainly possible to follow the second course—to treat the Constitution as a part of the fabric of the common law and to treat the Court as possessing authority to use it as such—but one ought to recognize the risks inherent in the enterprise.

Although the Court has, in those cases in which it purports to inquire into something like "constitutional duty," employed the concept to restrict the operation of constitutional guarantees,[115] the implication of the second mode of analysis is that the Court is free to turn the Constitution into a body of federal tort law. A torts decision limiting liability remains a torts decision, not a constitutional one.[116] It is, however, a federal statute that provides the cause of action with which we are concerned; and federal statutes and federal common law remedies "implied" by the Court from constitutional provisions[117] presumably remain subject to Congressional oversight, at least to a degree that does not threaten some core minima of constitutional protection.[118] Because Congressional reluctance to amend the Court's conclusions on issues of purportedly constitutional interpretation can be expected to be great,[119] an insistence upon labeling "tort issues" constitutional issues as a means of enforcing federalism or some other policy not clearly derivable from the constitutional guarantee in issue is an insistence upon a role and authority for the Court of substantially more breadth than would appear from the immediate and superficial thrust of these decisions.[120]

115. Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976).

116. Justice Rehnquist's emphatic insistence upon distinction between "tort" and "constitutional tort" and presumed concern with limiting resort to the federal courts to the contrary notwithstanding.

117. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

118. *See* Monaghan, *supra* note 42. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 330-75 (2d ed. 1973).

119. For an instance of congressional uncertainty and reluctance, see generally *Civil Rights Improvement Act of 1977: Hearings on S-35 Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 95th Cong. 2d Sess. (1977) (S-35 included a provision purporting to "overrule" Paul v. Davis, 424 U.S. 693 (1976)).

120. At least an outline of the argument supporting this point may be seen by referring to the concept of "abuse of power." For Justice Brennan, Section 1983 is the source of the concept in this context and is the basis for distinguishing state tort law. Paul v. Davis, 423 U.S. 693, 717 (1976) (Brennan, J., dissenting). For Professor Monaghan, the concept may be found at a constitutional level in the due process clause and provides a basis for accomplishing the same end. Monaghan, *supra* note 10, at

423-28. *But cf.* Monaghan, *Professor Jones and the Constitution*, 4 VT. L. REV. 87 (1979) (attacking common law conception of judicial function at constitutional level of analysis). It is, however, not true that abuse of power or authority is unique to federal law, that tort law is not concerned with "such matters as the nature of the invasion, its magnitude, and the character of the justification asserted," Monaghan, *supra* note 10, at 428, or that a return to substantive due process analysis, *id.* at 433-34; Baker v. McCollan, 443 U.S. 137, 147-48 (1979) (Blackmun, J., concurring), is a viable solution to the problem of distinguishing appropriate roles for federal and state law. For analyses of "common law" concern with abuse, see Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 214 (1963); SHAPO, THE DUTY TO ACT, XVI (1977). In fact the common law and constitutional guarantees *do* protect similar interests; that is the attraction in treating the Constitution as the basis for common-law making, and the difficulty in separating the cause of action from the constitutional provisions it seeks to enforce.

But elevation of "abuse of power" by means of an "outrageousness" requirement to a matter of constitutional doctrine masks the perfectly sensible reasons for using such a concept—policies of federalism and concern for federal court dockets—and runs the risk of setting in legal concrete the vaguest of concepts, chiefly useful for its flexibility in a jury trial of tort issues. (Professor Monaghan cites as authority for his suggested standard RESTATEMENT (SECOND) TORTS 46, (1965)). There is of course constitutional authority for the standard, Rochin v. California, 342 U.S. 165 (1952), but that fact should give us no comfort. *See id.* at 175-77 (Black, J., dissenting).

The better course is to make the same "outrageousness" suggestion (if one is concerned with state's interests to this degree) at a statutory level of analysis, clearly labeled as such. *See* Shapo, *supra* note 4, at 327. Such a course requires a return to the fundamental question—legislative intent—and, to the extent that question is unanswerable given the nineteenth century origin of the statute and the difficulty of providing contemporary relevance to nineteenth century legislative policies, permits an interstitial judicial development subject to future congressional guidance.

The immediate impulse underlying cases such as *Paul* and *Ingraham*—an impulse I take to be that of limiting the scope of the federal remedy—I have no disagreement with. My disagreement is with the level of analysis employed in the limiting. There is, however, a second disagreement I think worth noting. It is that the impulse has found expression in terms of the value of federalism. I would submit that it is more properly framed in terms of a concern for separation of powers as a value—even as a "constitutional common law" value. It would be improper to conclude that because Section 1983 is a nineteenth century statute chiefly noteworthy for its dormancy until 1961, it should therefore not be given effect. Monroe v. Pape, 365 U.S. 167 (1961) was, in my view, a decision properly giving effect to a congressional choice of policy. The breadth of the statute permits, moreover, considerable judicial flexibility in fleshing out the cause of action. It is not improper to interpret the statute as conferring a common law making function; the nineteenth century congressional concern was largely with the inoperation of state common law systems and the breadth of the statutory language compels such a course. The federalism concern is therefore largely mooted by the fact of congressional decision.

The fact remains, however, that the statute is nineteenth century legislation largely designed to deal with an immediate problem—Ku Klux Klan activity in the South. It is not a proper exercise of judicial interpretive function to treat civil rights legislation as analogous to the Constitution and to therefore treat that function as permitting judicial decision to take whatever course it will on the theory the Congress may "correct" judicial error. *See* Neuborne, *Observations on Weber*, 54 N.Y.U.L. REV.

What is needed in the judicial struggle with the difficulty of giving a nineteenth century statute contemporary meaning is, it is quite true, a duty analysis, for such an analysis offers the best hope of satisfying the realist's insistence[121] upon explication of the real reasons for decision and of the elaborationist's dream of judicial discipline.[122] But the relevant duty is a statutory duty (undoubtedly well punctuated by constitutional values), not a constitutional one.[123]

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546 (1979) (advocating such treatment). My observation does not mean that *Monroe's* holding regarding an official's simultaneous violation of "constitutional law" and state law need be reexamined or that the congressional purpose need be confined to the immediate crisis which precipitated the legislation. It does mean that the impulse to judicial conservatism suggested by the cases referenced here has considerable merit. *See* Shapo, *supra* note 4.

I recognize that this article leaves me open to a charge of contradiction—for it has here been suggested both that a federal common law of tort is authorized by the statute and that the absence of recent congressional guidance should be factored into the equation to limit that authorization—and I will plead guilty to that charge to the following extent: There is a dynamic tension between the polar extremes alluded to here, a tension reflected in the volumes of jurisprudence devoted to the general matter of the legitimacy of judicial decision and its control and to the specific matter of judicial "application" of legislation, which I think both inevitable and desirable. My observation does not resolve specific cases, let alone "hard" ones, but a recognition of the tension "in the open" at a statutory level of analysis at least has the virtue of permitting a discourse about the tension within the framework of specific cases, and such a discourse is preferable to talk of constitutional abstractions.

121. *See*, Lewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1252-54 (1931).

122. *See*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). I do not intend here to ignore the tensions, *e.g.*, Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960), only to minimize them.

123. After this article went to press, the Supreme Court handed down its decision in Parratt v. Taylor, 49 U.S.L.W. 4509 (May 18, 1981). That decision recognizes that negligence will support a claim under Section 1983, continues to treat the statute as a mere vehicle for the enforcement of rights to be found in the Constitution, and applies a procedural due process analysis reminiscent of Ingraham v. Wright, 430 U.S. 651 (1977), to the neligent loss, by prison officials, of a prisoner's property. More specifically, the Court held that the prisoner was not deprived of property without due process because the state's post-deprivation remedial structure constituted adequate process. 49 U.S.L.W. at 4513. The Court's analysis remains, of course, inconsistent with the analysis suggested here, for it continues to treat the issue of duty at a wholly constitutional level and appears, again, largely motivated by a fear of a general federal tort law. *Id.* Moreover, there does not appear to be significant disagreement on these points among the members of the Court. *See id.* at 4515 (Powell, J., concurring) (arguing that deprivations of due process require intent and denying that due process is a basis for federal review of state tort remedies—a denial that, taken to extremes, would seem to preclude any liability for failure of supervision and to preclude the constitutional inquiry into the adequacy of state remedial structures advocated here).

Nevertheless, *Parratt* is interesting because it appears—albeit at the level of

substantive constitutional doctrine rather than state action theory—to recognize something like a concept of government authorization of an individual official's conduct. The Court, in rejecting the view that a pre-deprivation hearing is required in cases of negligent deprivation of property, argued that

> [i]t is difficult to conceive how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State.

Id. at 4512. *See also id.* at 4514 (Blackmun, J., concurring).

The Court's rejection of the argument that a pre-deprivation hearing is required in cases of an individual official's tortious conduct constitues, in effect, a rejection of a type of substantive due process theory. Although the pre-deprivation hearing argument is framed as an argument from procedure, that framing is clearly fictional: the government has no interest to assert in such a hearing and is in no position to predict conduct it has not authorized and does not desire. The argument is substantive in the sense that it operates, in effect, as an absolute constitutional prohibition of tortious conduct; no one seriously contemplates a pre-tort hearing. The Court is in a position to speak in such a fictional manner only because its analysis rests upon the further fiction that the official responsible for the negligent loss of property is the government. If it is assumed, hypothetically, that the pre-tort hearing argument was accepted, it is at best difficult to see how that official would go about fulfilling his "constitutional duty" to grant a hearing.

But the Court's rejection of the pre-tort *hearing* argument is not, it seems to me, necessarily a rejection of an argument that the government might have a constitutional duty to implement other forms of pre-deprivation "process"—a process, for example, of adequate supervision. *Compare id.* at 4511 & n.3. *with* Rizzo v. Goode, 423 U.S. 362 (1976). The Court's use of the statutory "state action" language in the quoted portion of its opinion and its apparent recognition that there is a distinction between the misconduct of state officials and the misconduct of the government, albeit in the limited context of due process, is at least a step in the appropriate direction of determining what the government's constitutional duty might be.