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DEFENDING A MALIGNED DEFENSE: THE POLICY BASES OF THE QUALIFIED IMMUNITY DEFENSE IN ACTIONS UNDER 42 U.S.C. § 1983

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INTRODUCTION

Many commentators have been critical of the qualified immunity defense commonly raised by defendants in actions brought against them under 42 U.S.C. § 1983. These commentators perceive the defense as an obstacle to the enforcement and expansion of the constitutional guarantees critical to the American democratic tradition. Other scholars have noted, however, that the defense justifiably promotes other interests that are equally critical to sustaining and nurturing our democratic institutions.¹

The authors believe that the qualified immunity defense, although not perfect, is generally a favorable factor in the promo-

1. See, e.g., David P. Stoelting, Comment, *Qualified Immunity for Law Enforcement Officials in Section 1983 Excessive Force Cases*, 58 U. CIN. L. REV. 243, 244 (1989-90) (arguing that an "increasingly impenetrable" qualified immunity defense for police officers in excessive force cases denies plaintiffs' remedies in contravention to the intent of § 1983); Kathryn R. Urbanya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions For a Police Officer's Use of Excessive Force*, 62 TEMP. L.Q., 61, 116 (1989) (stating that qualified immunity is an unnecessary defense in the fourth amendment context); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV., 115, 116 (1991) (stating that federal courts have been exceedingly generous in interpreting the qualified immunity defense and the application of the defense in many cases is completely unjustified by any relevant policy considerations); Michael C. Fayz, Comment, *Graham v. Connor: The Supreme Court Clears the Way for Summary Dismissal of Section 1983 Excessive Force Claims*, 36 WAYNE L. REV. 1507, 1541 (1989-90) (contending that the continuation of the modern interpretation of the qualified immunity defense will lead to the harmful dismissal of warranted § 1983 claims); Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The extension of Harlow v. Fitzgerald to Section 1983 Actions*, 38 EMORY L.J. 369, 370-71 (1989) (contending that the qualified immunity defense crafted by the Court in *Harlow* admittedly departs from the common law to afford significantly broader protection from liability to government officials in contravention of Congressional intent); Stephen J. Shapiro, *Public Officials' Qualified Immunity in Section 1983 Actions Under Harlow v. Fitzgerald and its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REF. 249 (1989) (stating that qualified immunity grants more protection than is warranted; forcing officials who have committed constitutional violations to litigate whether they are entitled to immunity in spite of the violations does not seem unfair, especially when compared to the alternative of leaving remediless a plaintiff whose constitutional rights have been violated in bad faith). But see John C. Jeffries, Jr., *Compensation For Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989) (arguing that immunity claims sometimes evoke a hostility born of the erroneous suspicion that any limitation on damages liability for unconstitutional acts is in principle undesirable); Peggy W. Corn, Comment, *Anderson v. Creighton and Qualified Immunity*, 50 OHIO ST. L.J. 447 (1989) (stating that the doctrine of qualified immunity serves to uphold several important policy goals).

tion of a balanced application of the section 1983 damages remedy. Indeed, the federal courts, through the development and application of an efficient qualified immunity defense, are showing increased sensitivity to four vital policies in federal civil rights litigation. These four policies are: the promotion of federalism; the reduction of the caseload in federal courts overburdened with section 1983 cases; the prevention of overdeterrence; and the avoidance of an overly expansive reading of the statute that could trivialize the Constitution.² The authors conclude that the qualified immunity defense as applied by the courts promotes the policies identified above. In examining how the defense as applied to recently decided cases furthers these policies, we analyze several different types of cases that frequently are brought against law enforcement and correctional officials under the civil rights statute.

To place this analysis in perspective, the authors first review the four policy considerations that we believe the qualified immunity defense furthers. We then briefly retrace the history of litigation under section 1983 and review the mechanics of the statute as it exists today. Next, we review the development of the qualified immunity defense and examine its current application in excessive force, arrest and detention, jail-cell suicide, and malicious prosecution claims against law enforcement officials. Finally, we examine how courts apply the defense to claims brought against correctional officials arising from strip searches, emergency situations, and medical treatment.

I. POLICY CONCERNs

Although the historical purposes of section 1983 clearly reflect the distrust of state courts and other state entities that was prevalent in 1871, the current view of some of the justices of the Supreme Court and increasing numbers of federal judges is that claims alleging misconduct by state and municipal officials do not belong in federal court. They believe such claims should in-

2. See, e.g., S. Nahmod, *Municipal Liability: What Should be Done About Section 1983?* Policy Working Paper of the National League of Cities (1987). Nahmod's paper deals primarily with problems associated with municipal liability. The authors are concerned primarily with the qualified immunity defense as it applies to state actors accused of constitutional violations. We believe, however, that the four policy considerations identified by Nahmod are equally applicable to state actors.

stead be brought in state court in the first instance, if at all.³ This federalist view is based on the belief that state courts are as competent as federal courts to decide such claims and the belief that federal courts ought to minimize their involvement in and supervision of state and local government matters.⁴

*Daniels v. Williams*⁵ is a case that demonstrates the heightened federalism concern where a section 1983 action appears only to be a state law tort claim masquerading as a constitutional claim. In *Daniels*, an inmate filed suit for alleged violations of his constitutional rights after he supposedly slipped on a pillow negligently left on a stairway by a corrections officer.⁶ In an opinion by Justice Rehnquist, the Supreme Court held that the due process clause is not implicated by negligent acts of state officials that cause unintended loss or injury, as these do not "deprive" a person of life, liberty, or property under the Fourteenth Amendment.⁷

This concern for federalism also is evidenced by the decision of the First Circuit in *Amsden v. Moran*.⁸ There, the plaintiff sought monetary damages, as well as declaratory and injunctive relief arising from the revocation of his surveyor's license by the New Hampshire Board of Licensure for Land Surveyors.⁹ The plaintiff argued that his federal constitutional rights had been violated because his license had been revoked without due process of law. The appellate court found that the plaintiff already had been granted ample opportunities to present his case in state fora and held that "in the qualified immunity/summary judgment milieu, federal courts have been well advised to steer clear of the potential quagmire inherent in disputes, like this one, which come down to matters of state-law jurisdictional and administrative requirements."¹⁰ The court went on to hold that, "[a]t bottom, this appeal exemplifies that section 1983 is not a panacea for every remonstrant disappointed either by his treatment at the hands of a state agency or by the outcome of state

3. *Id.* at 3.

4. *Id.*

5. 474 U.S. 327 (1986).

6. *Id.* at 328.

7. *Id.*

8. 904 F.2d 748 (1990), *cert. denied* 111 U.S. 713 (1991).

9. *Id.* at 750-51.

10. *Id.* at 758.

administrative proceedings.”¹¹

The federalism concern may also be heightened where a section 1983 action appears to be an effort to interfere with the operation of state government without the benefit of express statutory or constitutional mandate.¹²

A second policy consideration present in section 1983 litigation and furthered by the qualified immunity defense is the limiting of overdeterrence. Increasingly, courts are sensitive to the possibility that state and local government officials, because they are so often targets of section 1983 actions, are being improperly deterred in the performance of their duties.¹³ The Supreme Court’s absolute and qualified immunity decisions demonstrate its desire to reduce not only the incidence of official liability but the financially burdensome costs of defense, as well.¹⁴

National resources are obviously scarce, yet increasing numbers of section 1983 actions are being filed in overburdened federal courts. Reducing the load of these cases on the court system is a third essential policy consideration.¹⁵ Some courts have questioned whether the abundance of section 1983 cases in fed-

11. *Id.*

12. See generally, Nahmod, *supra* note 2 at 3. See, e.g., *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir. 1989) (holding that even if a member of state chiropractic board sent complainant an unauthorized notice of a formal disciplinary proceeding, the member could not be held liable for violating the complainant’s constitutional rights absent a showing that a notice had in fact violated a federally ensured right).

13. Nahmod, *supra* note 2, at 3.

14. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (executive officials liable only for unconstitutional conduct that violates clearly established law); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Bettencourt v. Board of Registration in Medicine of the Commonwealth of Massachusetts*, 904 F.2d 772, (1st Cir. 1990); *Yerardi’s Moody Street Restaurant v. Board of Selectmen of Town of Randolph*, 878 F.2d 16 (1st Cir. 1989) (judges absolutely immune from damages liability for judicial acts) (quoting *Bath Memorial Hospital v. Maine Heath Care Fin. Comm’n*, 853 F.2d 1007, 1012 (1st Cir. 1988) (members of a town’s board of selectmen were entitled to qualified immunity against an equal protection claim arising out of the denial of a liquor license transfer; even if the members had acted maliciously or with bad faith in denying the license transfer, all the applicants received consistent treatment)); *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir. 1986) (holding that parents of daughter involved in juvenile delinquency proceedings failed to state a cause of action and that abstention from injunction regarding state court proceedings was proper given the availability of state law remedies; the judges involved enjoyed absolute immunity from damages; foster care organization and private attorney acting as court-appointed counsel were not acting under color of state law; prosecutor was immune from state damages; and police officer was immune for actions performed in good faith in the course of his duties).

15. Nahmod, *supra* note 2, at 3.

eral courts is an efficient use of judicial resources in light of the perception that many such actions are of questionable merit.¹⁶ The Supreme Court has thus encouraged the use of summary judgment where courts are faced with such cases. For instance, in *Butz v. Economou*,¹⁷ the Court held:

Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.¹⁸

The courts' use of summary judgment and other procedural devices is thus an important safety measure for both the courts and defendants facing suit.

Finally, because it creates a monetary damages action for constitutional violations, section 1983 may encourage plaintiffs' attorneys to push a number of constitutional provisions to their outer limits. The presence of further incentives, such as the availability of attorney's fees, creates an additional inducement to plaintiffs' lawyers who may read the Constitution too expansively. Such incentives tend to propagate constitutionally trivializing actions. The avoidance of these constitutionally unworthy cases is the fourth major objective of the qualified immunity defense in section 1983 litigation.¹⁹ The Court voiced this concern in *Baker v. McCollan*.²⁰ In *Baker*, the Court held that "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."²¹ To protect against such trivialization, the United States Supreme Court has established that merely negligent con-

16. *Id.*

17. 438 U.S. 478 (1978).

18. *Id.* at 507-08.

19. Nahmod, *supra* note 2, at 3.

20. 443 U.S. 137 (1979).

21. *Id.* at 146.

duct does not implicate the Due Process Clause and is therefore not actionable under section 1983.²²

Having reviewed the four policy concerns of increasing importance to courts in section 1983 litigation, we now examine the history of the civil rights statute.

II. GENERAL HISTORICAL OVERVIEW OF SECTION 1983

The Supreme Court has stated that the purpose of section 1983 is "to interpose the federal courts between the [s]tates and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law."²³ Indeed, "it would be difficult to imagine a statute more clearly designed 'for the public good' and 'to prevent injury and wrong' than section 1983."²⁴ Compared with the long history of the statute, however, the past thirty years of litigation under 42 U.S.C. § 1983 have witnessed a remarkable transformation, with ever-increasing numbers of section 1983 cases being filed each year. Although the statute lay relatively dormant prior to 1961, the modern trend is best characterized as a period of unprecedented growth with respect to both the volume and types of cases filed. For example, only 270 federal civil rights actions were filed in 1961, compared with more than 30,000 filings in federal court alone in 1988.²⁵

Congress passed the statute on April 20, 1871, in the wake of the Civil War. Known as the Ku Klux Klan Act, its original

22. *Daniels v. Williams*, 474 U.S. 327, 332 (1986). The Court held that the due process clause is not implicated by merely negligent acts of state officials that cause unintended loss or injury, as these do not deprive a person of life, liberty, or property under the Fourteenth Amendment. The Court stressed that the due process clause was "'intended to secure the individual from the arbitrary exercise of the powers of government,' not from official oversights or mistakes that are merely negligent in nature. *Id.* at 331 (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)). The Court stated, "[F]ar from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." See also *Germany v. Vance*, 868 F.2d 9, 17 (1st Cir. 1989).

23. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

24. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 73 (1989) (Brennan, J., dissenting).

25. See, e.g., Administrative Office of the United States Courts, Annual Report of the Director of Administrative Office of the United States Courts 185, Table C-2A (1988).

purpose was to allow for the redress of constitutional violations, either performed by or with the acquiescence of state and local governments; as such, it was clearly shaped by the drafters' perception of emergency in the Reconstruction South. Within a society that did not view constitutional protections as broadly as today, however, the law remained a sleeping giant for ninety years.²⁶ Indeed, the U.S. Code Annotated notes only nineteen decisions under the statute in its first sixty-five years on the books.²⁷ As noted above, however, the statute was destined for major evolutionary changes.

The statute provides:

Every person who, (under color of law) subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The severity of the dark days following the Civil War called for a strong and effective remedy, but the statute's original scope seems incredibly narrow in the shadow of its modern interpretation. Originally, however, section 1983 was perceived as very strong medicine. Section 1983 was designed as an extremely intrusive tool. Compared with the nature of the modern statute, however, its original scope was exceedingly narrow.

In 1871, the liberties assured by the Constitution against the states did not include, for example, the provisions of the Bill of Rights. As a result, the typical practices of local criminal process did not implicate federal guarantees. States could not violate the first amendment's speech, press, or religion clauses. Decisions recognized no fundamental right to travel or vote, nor any right to privacy. The equal protection clause carried no weight outside the race context, and precious little even there.²⁸

The Supreme Court decision that began to transform sec-

26. Nahmod, *supra* note 2.

27. 42 U.S.C.A. § 1983 (1964). See also Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 n.4 (1969).

28. Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 985 (1987) (footnotes omitted).

tion 1983 into its modern shape was *Monroe v. Pape*.²⁹ In *Monroe*, Chicago police officers had broken into a house, ransacked its contents, conducted a strip search of the family, held the father without charges and released him without an apology.³⁰ The defendants conceded that their conduct violated state laws against false arrest. Nevertheless, they argued that because they had violated state law, their actions were not done "under color of" state law as required by section 1983.³¹ The Court, however, rejected the officers' argument that the plaintiff's only appropriate remedy was to file a state-law claim in state court. Rather, the court held that the statute "should be *read against the background of tort liability* that makes a man [or woman] responsible for the natural consequences of his [or her] actions."³²

Prior to *Monroe*, the lower courts rarely permitted section 1983 attacks against official misconduct violating state law. When *Monroe* permitted such claims to be brought under section 1983, it created a "dual coverage" statute, allowing plaintiffs not only to attack the constitutionality of statutes and official policy but also to attack actions carried out by officials that simultaneously violated state statutes or policies and the federal Constitution.³³ This new approach was to define the nature of the current trend in section 1983 litigation.

III. THE MECHANICS OF THE SECTION 1983 REMEDY

Courts have interpreted the section 1983 remedy as providing two distinct classes of defendants. Plaintiffs may bring individual (personal) capacity lawsuits, which seek to impose personal liability against the employee or official to be paid from his or her personal assets.³⁴ In personal capacity suits, the successful plaintiff must establish three elements: First, the action complained of must be under color of law; second, the acts must have been committed by a "person" within the meaning of the

29. 365 U.S. 167 (1961).

30. *Id.* at 169.

31. *Id.* at 172.

32. *Id.* at 187 (emphasis added).

33. Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1446 (1988-89); See also Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1487 (1969).

34. See *Kentucky v. Graham*, 473 U.S. 199 (1983).

statute; and third, the actions must be shown to have caused a deprivation of federal rights.³⁵

A second method for a plaintiff in bringing a section 1983 suit is to plead an action against the entity employing the accused agent.³⁶ There are four prerequisites to these cases. The first three are the same as for individual capacity suits. The fourth requirement is that a policy or custom attributable to the entity must have been the moving force behind the deprivation.³⁷

In essence, the third element of an actionable section 1983 claim (requiring a deprivation of federally guaranteed rights resulting from the alleged misconduct) receives a two-pronged analysis. A section 1983 plaintiff must first allege some violation of his or her *personal* rights, privileges, or immunities,³⁸ in addition, these rights, privileges, or immunities must be secured by the Constitution or federal law. What follows is a more detailed examination of the two-pronged analysis afforded the third element of a section 1983 claim.

A. *The Personal Rights Limitation*

As discussed above, a plaintiff must first prove that the deprivation of rights alleged were personal in nature. In *Archuleta v. McShan*, for example, the court noted that when police conduct is directed at a bystander, there cannot be the requisite scienter to establish a due process violation.³⁹ There, a three-year-old child witnessed his father's arrest and the accompanying force used in making the arrest.⁴⁰ The child sued the officer who made the arrest on the theory that the officer acted with intentional or reckless disregard to his emotional well-being. In granting summary judgment to the defendant, the district court noted that since the officer's conduct was not directed toward the child, the child's constitutional rights had not been violated.⁴¹ Indeed, a long line of case law has held that since a civil

35. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

36. See *Monell v. New York City Dept. of Social Services*, 430 U.S. 658 (1978).

37. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1982).

38. *Archuleta v. McShan*, 897 F.2d 495, 498 (10th Cir. 1990); see also *Soto Gomez v. Lopez Feliciano*; 698 F. Supp. 28, 29 (D.P.R. 1988).

39. 897 F.2d 495, 498 (10th Cir. 1990).

40. *Id.* at 496.

41. *Id.* But see *Mendez v. Rutherford*, 655 F. Supp. 115 (N.D. Ill. 1986) (allowing

rights action under section 1983 must be personal in nature, it does not accrue to a relative.⁴²

There are further limitations on who may enjoy section 1983 protection. Generally speaking, an entity cannot assert the constitutional rights of another.⁴³ It has been held that a public corporation is not a person under the statute, and thus, section 1983 provides no remedy for disputes between political subdivisions.⁴⁴ Likewise, a creature of the state, such as a university, is also barred from bringing a section 1983 action.⁴⁵

B. *The Federal Rights Limitation*

After asserting the violation of a right which is personal in nature, a plaintiff must next show that the deprivation complained of is a Federal right secured by either the federal Constitution, federal statutory law, or federal regulatory law.⁴⁶ This is held to be true unless the remedial devices provided in the federal statute or regulation in question are sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under section 1983.⁴⁷ A claimant alleging a viola-

recovery of additional damages on behalf of plaintiff's three-year-old daughter who suffered the emotional trauma of witnessing the assault of her father).

42. David W. Lee, Defending, 42 U.S.C. § 1983 Actions 10-16 (Oklahoma Attorney General Publication 3d ed., 1987). See, e.g., Johnson Estate by Castle v. Village of Libertyville, 819 F.2d 174, 177-88 (7th Cir. 1987) (parents could not bring a § 1983 action for pain and suffering of their child); see also Smith v. City of Fontana, 818 F.2d 1411, 1417 (9th Cir. 1987) (decedent's children could not assert a Fourth Amendment claim where their father died because of force used during an arrest); But see Sherrod v. Berry, 827 F.2d 195, 207-08 (7th Cir. 1987) (a parent may recover for loss of parental association). Coon v. Ledbetter, 780 F.2d 1158, 1160 (5th Cir. 1986) (wife who was not inside mobile home when it was fired upon could not sue); Ortiz v. Burgos, 807 F.2d 6 (1st Cir. 1986) (stepbrother, brothers, and sisters did not have a protected liberty interest in the companionship of their brother who was beaten to death); Dohaish v. Tooley, 670 F.2d 934, 936-37 (10th Cir.), cert. denied, 459 U.S. 826 (1982). Bride v. Lindsay, 718 F. Supp. 24, 26 (N.D. Ill. 1989) (siblings could not recover under § 1983 for loss of associational rights; even if siblings could be beneficiaries of an action under the wrongful death statute of Illinois, the deprivation of their interest in sibling association was not of constitutional significance).

43. City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983).

44. South Macomb Disposal Authority v. Township of Washington, 790 F.2d 500 (6th Cir. 1986).

45. United States v. Alabama, 791 F.2d 1450, 1455 (11th Cir. 1986).

46. Maine v. Thiboutot, 448 U.S. 1 (1980).

47. Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981); Garcia v. Cecos International, Inc., 761 F.2d 76 (1st Cir. 1985).

tion which does not concern such federally-protected rights will not enjoy section 1983 protection.⁴⁸

The scope of section 1983 has only recently expanded to cover such a wide spectrum of federally-protected rights. For years the statute was more narrowly construed by the courts. This interpretation resulted from the literal reading of the jurisdictional counterpart of section 1983, 28 U.S.C. § 1343(a)(3), which does not use the substantive statute's broad term "the laws." Instead, section 1343 reads: "any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."⁴⁹ Thus, the Supreme Court at one time held that laws such as the Social Security Act were not statutes "providing for equal rights of citizens" and that section 1343(3) did not grant jurisdiction of a claim of deprivation of rights under section 1983.⁵⁰ It has since been held, however, that the term "the laws" in section 1983 is to be interpreted according to its plain language and that the substantive statute includes all federal statutes, not merely civil rights or equal protection laws. On this reasoning, it was held that a claim under the Social Security Act comes within the scope of section 1983.⁵¹

Although section 1983 guarantees protection from violations of constitutional and federal law, some constitutional provisions have been found to be an improper basis for liability under section 1983. This is because certain constitutional provisions do not offer specific guarantees of federally protected rights.

For instance, in *Strandberg v. City of Helena*,⁵² the Ninth Circuit held that section 1983 provided no redress for claims of actions violative of rights secured under the Ninth and Tenth Amendments. The Court held that these amendments had never been recognized as independently securing any constitutional right for the purpose of pursuing a civil rights claim; as such, the Supreme Court had repeatedly voiced concern that a section 1983 claim be based on specific constitutional guarantee.⁵³ Even

48. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

49. 28 U.S.C. § 1343 (1948).

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

51. Lee, *supra* 40, at 40. See, e.g., *Maine v. Thiboutot*, 448 U.S. 1 (1980).

52. 791 F.2d 744, 748-49 (9th Cir. 1986).

53. See *Daniels v. Williams*, 474 U.S. 327. Other cases defining improper constitutional bases in § 1983 litigation include: *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476-77 (10th Cir. 1985) (section 1983 provides no remedy for claims resulting from

actions based on constitutional provisions which *do* guarantee federally protected rights have been found to be improper bases for civil rights actions where vital policy concerns arise.⁵⁴

Thus, not every violation of constitutionally protected rights by state or federal officials reaches the level of constitutionally violative action, and the ability to distinguish constitutional from common law tort is fundamental to section 1983 litigation. Sometimes torts which appear similar receive contradictory treatment from different jurisdictions, and to complicate matters further, the adjudicative history of section 1983 is replete with frequent attempts by plaintiffs' lawyers to cloak even simple tort actions as constitutionally violative section 1983 litigation. Generally, however, the circumstances surrounding the commission of the tort will dictate how the action is handled by the court.

For example, in *Paul v. Davis*,⁵⁵ the Supreme Court held that actions by a local police chief, who distributed hand bills that stigmatized the plaintiff as an "active shoplifter" when he had been arrested but not convicted, did not give rise to a section 1983 action. Neither the damage to the plaintiff's reputation nor the invasion of his privacy involved a federal constitutional right. The Court rejected the plaintiff's argument that the acts constituted punishment by the police chief without due process of law. The Court held that the plaintiff's only relief was under state defamation law.⁵⁶

violations of the Supremacy Clause); *Mahone v. Addicks Utility District*, 836 F.2d 921, 927-29 (5th Cir. 1988) (holding that there is no action under § 1983 for an alleged altering of a utility district so as to deny the right to vote); *Lunde v. Oldi*, 808 F.2d 219 (2d Cir. 1986) (voter whose ballot was counted did not state a § 1983 claim when he failed to allege that election officials acted in an intentionally reckless or grossly negligent manner).

54. See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475 (1974) (section 1983 cannot be used to challenge the fact or duration of confinement in a penal institution); *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986) (section 1983 will not support an action against the military); *Holdiness v. Stroud*, 808 F.2d 417, 422-23 (5th Cir. 1987) (no § 1983 action for injuries suffered as a result of actions taken by military superiors).

55. 424 U.S. 693 (1976).

56. See also *Thomas v. Kipperman*, 846 F.2d 1009 (5th Cir. 1988) (damage to reputation is not constitutional injury); *Jones v. Palmer Media, Inc.*, 478 F. Supp. 1124 (E.D. Tex. 1979) (no constitutional right was violated in the release of embarrassing material about candidate for public office by Congressional administrative assistant); *Havas v. Thornton*, 609 F.2d 372 (9th Cir. 1979) (no constitutional right was violated in complaint alleging state officials had brought malicious actions to humiliate plaintiffs); *Green v.*

*Amsden v. Moran*⁵⁷ is another good example of a thinly disguised state tort action. In *Amsden*, the United States Court of Appeals stated that "section 1983 is not a panacea for every remonstrant disappointed either by his treatment at the hands of a state agency or by the outcome of state administrative proceedings."⁵⁸ Another example is *Parratt v. Taylor*.⁵⁹ *Parratt* is a Supreme Court due process case involving prison administrators' negligent loss of an inmate's hobby materials worth \$23.50. "Unquestionably," held Justice Rehnquist, "respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation. Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process law.'"⁶⁰ Since the tort remedies provided by the State of Nebraska provided a means of redress for property deprivations which satisfied the requirements of procedural due process, a section 1983 cause of action was held to be an inappropriate remedy.⁶¹

The Court went on to state that to accept the respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would "necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under section 1983."⁶² Such reasoning, held the court, "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."⁶³

DeCamp, 612 F.2d 368 (8th Cir. 1980) (report by state senators criticizing police chief was not actionable under § 1983). See, e.g., Lee, *supra* note 42 at 40.

57. 904 F.2d 748 (1st Cir. 1990).

58. *Id.* at 758.

59. 451 U.S. 427 (1981).

60. *Id.* at 430.

61. *Id.*

62. *Id.* at 434.

63. *Id.*, quoting *Paul v. Davis*, 424 U.S. 693, 701. The *Parratt* doctrine was recently

The outcome was similar in *Estelle v. Gamble*.⁶⁴ There, the Supreme Court held that medical malpractice toward a state prisoner does not give rise to a section 1983 cause of action. The Court stated that “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”⁶⁵

We will revisit *Estelle* and the “deliberate indifference” standard later in this article. However, having reviewed the basic mechanics of the section 1983 remedy, we must first look at the nature and scope of the qualified immunity defense.

IV. QUALIFIED IMMUNITY DOCTRINE

A. *Background*

The historical rationale for official immunity is that because a government can only act through its officials and employees, and since at least one reason for official immunity is to protect the operations of government, reason dictates that those who carry out governmental operations must also be immune. An additional argument is that as a matter of fairness it would be unjust to hold a governmental officer or employee liable for performing his duty.⁶⁶ In *Scheuer v. Rhodes*, the Supreme Court described the justification for official immunity, holding:

restated in *Zinermon v. Burch*, 494 U.S. 113 (1990). There, the Supreme Court held that the existence of an adequate alternative remedy is not alone sufficient to support a finding that no Fourteenth Amendment violation has been stated. *Id.*

64. 429 U.S. 97 (1976).

65. *Id.* at 106. *But see also*, *Fielder v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) (award of damages was upheld where prisoner acted in a visibly bizarre manner and the sheriff was warned by relatives of the prisoner's sickness and refused to take preventive actions even when warned by deputies of the decedent's strange behavior); *Cooper v. Dyke*, 814 F.2d 941 (4th Cir. 1987) (holding that failure to treat wounded detainee is evidence of deliberate indifference); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985) (failure to take proper medical tests after being aware of the prisoner's need for tests can rise to the level of a constitutional violation); *Sosebee v. Murphy*, 797 F.2d 179 (4th Cir. 1986) (deliberate indifference by prison personnel could be a constitutional violation, but medical officials responded promptly to the medical emergency at hand and therefore committed no constitutional violation).

66. *Sovereign Immunity: The Tort Liability of Government and its Officials*, Report of the National Association of Attorneys General, Committee on the Office of Attorney General, at 9 (1979).

The public interest requires decisions and action to enforce laws for the protection of the public . . . Implicit in the idea that officials have some immunity - absolute or qualified - for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.⁶⁷

Although the text of section 1983 does not provide for any immunities, the U.S. Supreme Court has consistently interpreted section 1983 to implicitly grant the common law immunities and defenses that existed in 1871.⁶⁸ Therefore, the Supreme Court has granted absolute immunity to judges, legislators, prosecutors, and presidents of the United States.⁶⁹ However, the common law never extended the doctrine of absolute immunity to law enforcement and executive branch officials. Rather, a qualified immunity from damages liability is the general rule for these officials when they are charged with constitutional violations.⁷⁰

One scholar has described the law of qualified immunity as an attempt by the federal courts to accommodate three competing goals: First, to provide effective redress to persons whose constitutional rights have been violated by government officials; second, to deter officials from abusing their power in derogation of the Constitution; and third, to protect officials from being unduly burdened by the threat of potential liability in the discharge of their discretionary duties.⁷¹ Recognizing the difficulties inherent in balancing these disparate goals, the Supreme Court has attempted to strike a balance between the protection of a

67. 416 U.S. 232, 241-42 (1974).

68. See generally Stoelting, *supra* note 1. See, e.g., Briscoe v. Lahue, 460 U.S. 325, 345-46 (1983) (holding that witnesses are entitled to absolute immunity to comport with the common law immunities that existed in 1871).

69. See, e.g., Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (holding judges absolutely immune for acts committed within their judicial jurisdiction); Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951) (holding that members of the legislature have absolute immunity from civil liability "for acts done within the sphere of legislative activity"); Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) (holding a state prosecuting attorney absolutely immune from section 1983 liability in initiating prosecution and in presenting the state's case); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that former presidents are entitled to absolute immunity from liability for official presidential acts).

70. Butz v. Economou, 438 U.S. 478 (1978).

71. Stephanie E. Balcerzac, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L. J. 126, 128 (1985).

section 1983 plaintiff's constitutional rights and the goal of allowing government officials to perform their jobs without being subjected to groundless lawsuits.⁷²

Scheuer v. Rhodes typifies the early qualified immunity cases.⁷³ In *Scheuer*, the Court extended qualified rather than absolute immunity to the governor of Ohio in connection with liability for the killings of anti-war demonstrators at Kent State University. A unanimous Court in *Scheuer* stated that the broad range of powers delegated to high executive officials could lead to an abuse of constitutionally protected rights in an emergency, and that section 1983 serves to protect constitutional rights in such an instance.⁷⁴ The Court held that if, after consideration of all circumstances, the official reasonably had a good faith belief in the correctness of his actions, protection was provided through the doctrine of qualified immunity.⁷⁵

The application of the early *Scheuer* "totality of the circumstances" approach by the lower courts proved to be uneven, however. A disagreement developed between jurisdictions concerning how to measure the good faith standard. The disagreement centered on whether good faith should be measured through an objective or subjective analysis.⁷⁶

Hoping to resolve the controversy surrounding the application of the *Scheuer* good faith analysis, the Supreme Court enunciated a "two-pronged" qualified immunity test in *Wood v. Strickland*.⁷⁷ In *Wood*, a school board expelled several high school students for violating a school rule against alcohol use at school functions.⁷⁸ The Court held that a government official is not immune from liability for damages under section 1983 if he knew or reasonably should have known that his action, within his sphere of official responsibility, would violate a plaintiff's clearly established constitutional rights (the objective reasonableness prong) or if he acted with malicious intent to cause a

72. See Stoelting *supra* note 1 at 244 (discussing *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982)).

73. 416 U.S. 232, 248 (1973).

74. *Id.* at 246-47.

75. *Id.* at 247-48.

76. Stoelting *supra* note 1 at 245. See also Leon Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501, 511-12 (1977).

77. 420 U.S. 308 (1975).

78. *Id.* at 311.

deprivation of constitutional rights or other injury (the subjective "good faith" prong).⁷⁹

The subjective element of the *Wood v. Strickland* test soon proved incompatible with the Court's general admonition that insubstantial claims should not proceed to trial. The objective-subjective distinction was difficult in practice to apply. Determining whether an official acted in good faith necessarily involved an inquiry into the official's state of mind to determine the existence or absence of malicious intent. Some courts considered an official's subjective good faith as a question of fact for the jury, defendants seldom won motions for summary judgment, and often, a plaintiff might reach a jury in any section 1983 case simply through the assertion that the state of mind of the defendant was a factual issue requiring determination by the factfinder.⁸⁰

Recognizing the shortcomings of the subjective test as applied by lower federal courts, the Supreme Court corrected the problem in *Harlow v. Fitzgerald*.⁸¹ The Court adopted a wholly objective standard, eliminating the subjective prong entirely. The Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known."⁸² The clear thrust of *Harlow* was to enable defendants in civil rights actions to assert qualified immunity in the preliminary stages of the litigation through summary judgment.

In *Davis v. Scherer*, the Supreme Court followed its decision in *Harlow*, in holding that a violation of a clear state regulation does not cause the loss of a defendant's qualified immunity; there must be a violation of "clearly established" constitutional rights of which a person would have known.⁸³

79. *Id.*

80. Friedman, *supra* note 76 at 50; See generally *Unwin v. Campbell*, 863 F.2d 124, 133-34 (1988).

81. 457 U.S. 800 (1982).

82. *Id.* at 818.

83. 468 U.S. 183 (1984); see also *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (holding that the state Attorney General was not liable for wiretapping activities where applicable law was not clearly established until a year after the wiretapping; the Court held that, "[u]nless plaintiff's allegations state a claim of violation of clearly established law, a de-

The Court perhaps could have held that the violation of state regulatory or statutory law fails to state a claim under section 1983 because such a violation is not of constitutional magnitude.⁸⁴ In *Davis*, the question of whether a constitutional right of due process had been infringed would be decided by reference to state statutes.⁸⁵ The Court could still have avoided a qualified immunity analysis entirely by invoking the due process doctrine enunciated in *Parratt v. Taylor*: No federal due process right is implicated where the violation is random, unauthorized and there is an adequate remedy at law.⁸⁶

Nevertheless, the *Davis* decision furthers the policy goals inherent in the qualified immunity defense. It serves the interests of federalism by assuring that each state official's violation of state law will not require that federal courts must review that violation in a damages action. It vindicates the policy that the Federal Constitution not be trivialized by turning minor breaches of procedural rules (which, after all, may be corrected on appeal) into damages actions. Similarly, it reduces overdeterrence and aids the federal courts' effort to control increasingly cluttered dockets.

Through the elimination of the subjective good faith standard the Supreme Court had hoped to resolve some of the controversy surrounding the implementation of the good faith immunity. However, the Supreme Court failed to define how the opinions of the Courts of Appeal should be evaluated in determining what is "clearly established."

B. *The Anderson Test*

The Supreme Court's failure to define succinctly what "clearly established law" meant led to a split in the Federal Courts of Appeal. The Supreme Court again attempted to clarify the test in *Anderson v. Creighton*.⁸⁷ The *Anderson* Court, in the context of a case alleging a Fourth Amendment violation of clearly established law, considered for the first time how the qualified immunity standard laid down in *Harlow* was to apply.

fendant pleading a qualified immunity is entitled to dismissal before discovery.").

84. Cf. *Amsden v. Moran*, 904 F.2d 748, (1st Cir. 1990) cert. denied, 111 S.Ct. 713.

85. *Davis*, 468 U.S. at 193 n.11.

86. See *Parratt*, 451 U.S. at 541.

87. 483 U.S. 635 (1987).

The *Anderson* Court held that it is up to the courts themselves to determine as a matter of law whether the search was lawful in light of clearly established law and the information possessed by the officer. In *Anderson*, an F.B.I. agent and local officers conducted a warrantless search of the Creightons' home under the mistaken belief that a bank robbery suspect was present. According to the Creightons, the officers brandished shot-guns, assaulted their daughter, and knocked Mr. Creighton to the ground before putting him in jail overnight, despite the fact that he was never charged with a crime. The Creightons filed suit against the F.B.I. agent alleging that the search violated their Fourth Amendment right to be free from unreasonable searches. The Supreme Court held that the agent was entitled to summary judgment on the basis of qualified immunity if, on remand, it was determined that the search was an action which a reasonable police officer could have believed lawful.⁸⁸

The officer's subjective beliefs about the legality of the search were irrelevant, held the Court, noting that it was "inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause was present. . . . [I]n such cases those officials — like other officials who act in ways they reasonably believe to be lawful — should not be held personally liable."⁸⁹ The Court reasoned that although plaintiffs have an abstract right to be free from warrantless searches unjustified by exigent circumstances, the Eighth Circuit had erred by identifying this right at too high a "level of generality."⁹⁰ Thus, "the right alleged to have been violated, although 'clearly established' in a general sense, must also be established in reference to the particular circumstances facing the law enforcement officer before qualified immunity can be denied."⁹¹

The test set down in *Anderson* recognizes that "whether a defendant actually violated a plaintiff's rights is not the central issue: 'Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for dam-

88. *Id.* See Stoelting, *supra* note 1 at 249-50.

89. *Id.* at 641.

90. *Id.* at 639.

91. Stoelting, *supra* note 1 at 249-50; See generally Comment, *Harlow v. Fitzgerald: The Lower Courts Implement The New Standard For Qualified Immunity Under Section 1983* 132 U. PA. L. REV. 901, 921-32 (1984).

ages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.' '⁹² Thus, '[b]ecause qualified immunity does not address the substantive viability of a section 1983 claim, but rather the objective reasonableness of a defendant's actions, a plaintiff who is entitled to prevail on the merits is not necessarily entitled to prevail on the issue of qualified immunity.'⁹³

In *Walsh v. Franco*,⁹⁴ the Second Circuit outlined the elements necessary to uphold a qualified immunity defense in the post-*Anderson* era:

First, the defense should be sustained if the court finds that it was not clear at the time of the official acts that the interest asserted by the plaintiff was protected by a federal statute or the Constitution. Second, even if the interest asserted by the plaintiff was clearly of a type generally protected by federal law, the defendant is entitled to immunity as a matter of law if it was not clear at the time of the acts at issue that an exception did not permit those acts. Third, even if the contours of the plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant may enjoy qualified immunity if it was objectively reasonable for him to believe that his acts did not violate those rights.⁹⁵

C. Implementing the Modern Qualified Immunity Defense

As we have seen, determining whether a given defendant is protected under the qualified immunity doctrine depends upon several factors. As discussed above, the relevant question is whether a reasonable official could have believed the actions taken by the defendants to be lawful in light of clearly established law and the information available to the defendants.⁹⁶ Even an allegation of malice against the defendant is not sufficient to defeat qualified immunity if the defendant acted in an objectively reasonable manner.⁹⁷

92. *Amsden v. Moran*, 904 F.2d 748, 751 (1st Cir. 1990) (quoting *Davis v. Scherer*, 468 U.S. 183, 190 (1984)).

93. *Collins v. Marina-Martinez*, 894 F.2d 474, 478 (1st Cir. 1990); *accord Brennan v. Hendrigan*, 888 F.2d 189, 194 (1st Cir. 1989).

94. 849 F.2d 66 (2d Cir. 1988).

95. *Id.* at 69 (quoting *Robison v. Via*, 821 F.2d 913, 920-21 (2d Cir. 1987)).

96. *Anderson*, 483 U.S. at 641.

97. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

An example of the post-*Anderson* approach is the framing of the question in *Clark v. Evans*.⁹⁸ In *Clark*, the court framed the question in a prison shooting case as "could a reasonable officer under these circumstances have believed it was lawful to shoot rather than permitting [the prisoner] to proceed in reliance upon the ability [of another guard] to subdue [the prisoner] without using deadly force?"⁹⁹

Under this test, the defendant is concerned primarily with proving two facts: One, that the law was not clearly established at the time of the act or omission; and two, that a reasonable official would not have known that such action was violative of the plaintiff's rights. To understand the test, a defense lawyer must first understand the meaning of a key concept — the definition of "clearly established."

As previously stated, government officials sued in their individual capacities for monetary damages are entitled to qualified immunity from liability insofar as their conduct does not violate a clearly established constitutional right of which a reasonable person would have been aware.¹⁰⁰ It has been held that legal principles are "clearly established" when they have been decided by the highest court in the state where the case arose, by the United States Court of Appeals for that circuit, or by the United States Supreme Court.¹⁰¹ However, the post-*Harlow* test for qualified immunity is whether the law was clear in relation to the specific facts confronting the public official when the action occurred;¹⁰² and, as the *Anderson* Court noted, it remains up to the court to determine whether the right was clearly established in light of the information possessed by the officer.

Thus, determining when the law is clearly established in light of the particular facts confronting the officer is a two part test. First, the law must be clearly established in the traditional sense. Second, "[t]he right in question . . . cannot be simply a generalized right, like the right to due process.¹⁰³ It must be a clearly established right in a "particularized" sense. "This par-

98. 840 F.2d 876 (11th Cir. 1988).

99. *Id.* at 881.

100. *Mangaroo v. Nelson*, 864 F.2d 1202 (5th Cir. 1989).

101. *Robinson v. Bibb*, 840 F.2d 349 (6th Cir. 1988).

102. *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987).

103. *Anderson*, 483 U.S. at 639.

ticularity requirement does not mean that the very action in question has been held unlawful; it does mean, though, that in the light of the preexisting law, the illegality of the action must be apparent.”¹⁰⁴ Under this standard, a court must determine “whether an alleged right was established with *sufficient particularity* that a reasonable official could *anticipate* that his actions would violate that right.”¹⁰⁵ Therefore, in deciding the question of whether the defendant is entitled to qualified immunity from liability, the objective facts control and mere allegations of malicious intent may not prevail over those facts.¹⁰⁶

As for the particularity requirement, it has been held that civil rights defendants do not violate any “clearly established” constitutional rights for the purpose of a qualified immunity claim simply because their actions are constitutionally impermissible under a single district court opinion, particularly when that opinion is from another circuit.¹⁰⁷ Indeed, in order to defeat a governmental official’s defense of a qualified immunity, the asserted constitutional right must be sufficiently particularized as an established right to put potential defendants on notice that their conduct is unlawful.¹⁰⁸ The particularity requirement is exemplified in *Knight v. Mills*.¹⁰⁹ There, the former Massachusetts’s Commissioner of Mental Health and the Chief Administrator at a treatment center were held to be entitled to qualified immunity from civil damages in a psychiatric patient’s civil rights action based upon the administrator’s refusal of plaintiff’s repeated requests for individualized psychological therapy.¹¹⁰ The court held that the defendants were entitled to assert the qualified immunity defense by virtue of their positions as state officials charged with making policy including discretionary judgments. More importantly, however, the defendants were held to be entitled to that protection because the plaintiff failed to prove that the right in question was clearly established in any particularized sense, because at the time of the alleged depriva-

104. *Danese v. Asman*, 875 F.2d 1239, 1242 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990).

105. *Borucki v. Ryan*, 827 F.2d 836, 838 (1st Cir. 1987) (emphasis added).

106. *Henry v. Perry*, 866 F.2d 657, 659 (3rd Cir. 1989).

107. *Muhammad v. Wainwright*, 839 F.2d 1422 (11th Cir. 1987).

108. *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986).

109. 836 F.2d 659 (1st Cir. 1987).

110. *Id.* at 669.

tion, there was no clearly established constitutional or statutory right to psychological treatment.¹¹¹ Thus, a defendant may establish a right to qualified immunity by showing that the alleged right was not clear at the time of the official acts; that the interest asserted by the plaintiff was not protected by a federal statute or the Constitution; that was not clear at the time of the acts at issue that an exception did not permit those acts; or that it was objectively reasonable for the officer to believe that his acts did not violate plaintiff's rights.¹¹² Therefore, government officials "are charged with not only a knowledge of general legal principles, but also their application in similar or analogous circumstances."¹¹³

If a defendant raises the affirmative defense of qualified immunity, it is the plaintiff's burden to show that the law is clearly established.¹¹⁴ It has also been held that once an officer establishes his official immunity by showing that he was acting in his official capacity, and was within the scope of his discretionary authority, the plaintiff has the burden of showing an objective want of good faith, and that this requires more than a showing of mere negligence.¹¹⁵

Indeed, there are many claims made under section 1983 which simply fail to state a constitutionally valid claim under the statute; as a result, courts have been unwilling to deem them as "clearly established" rights worthy of protection under the statute. The importance of the four critical policy considerations are obvious in these cases, especially where there exist equally protective state remedies or where the claims fail to state valid causes of action under section 1983.¹¹⁶

111. *Id.* at 669, n.15.

112. *Krause v. Bennett*, 887 F.2d 362, 368 (2d Cir. 1989).

113. *Rios v. Lane*, 812 F.2d 1032, 1040 (7th Cir. 1987). See also *Matiyn v. Henderson*, 841 F.2d 31, 36 (2d Cir. 1988) (holding prison officials were entitled to qualified immunity where regulations were not clear and there had been no judicial interpretation of them); *Tarantino v. Baker*, 825 F.2d 772, 775 (4th Cir. 1987) (holding when a "legitimate question" exists, an officer is entitled to qualified immunity).

114. *Pueblo Neighborhood Health Centers, Inc., v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). See also *Edwards v. Gilbert*, 867 F.2d 1271, 1274-75 (11th Cir. 1989).

115. *Garris v. Rowland*, 678 F.2d 1264 (5th Cir. 1982).

116. See, e.g., *Browne v. Ponte*, 842 F.2d 16, 18-20 (1st Cir. 1988) (holding that it was not clearly established at the time of the alleged Constitutional violation that one who voluntarily signed a parole agreement containing the condition that he go to another state to face further charges was entitled to notice and hearing before extradition); *Knight v. Mills*, 836 F.2d 659 (1st Cir. 1987) (holding law regarding right to psychological

V. QUALIFIED IMMUNITY IN ACTION

Having reviewed the relevant considerations pertaining to the defense of section 1983 defendants, the authors now survey the law of qualified immunity as it pertains to law enforcement and correctional officials, two of the contexts in which the defense is frequently raised. It is important to remember that whether a law is "clearly established" or not depends almost entirely upon what facts exist in each case. Often, however, "clearly established" law is analyzed in certain commonly occurring factual contexts. This section will analyze these contexts and shed light upon the nature of the qualified immunity defense as it relates to the furtherance of federalism and the avoidance of overdeterrence, overburdened federal courts, and the trivializing of the Constitution.

A. *Law Enforcement Officials*

Law enforcement is perhaps the most volatile area of section 1983 litigation. Due to the nature of the calling, the four qualified immunity policy concerns discussed above stand very large in this area of the law. It is true that section 1983 protects society from random and abusive governmental intrusion. The United States can ill afford a system which ignores, or even worse, encourages governmental abuse of our Constitutional rights. On the other hand, society cannot have a system in which law enforcement officials are unable to carry out their duties due to the fear of being subjected to groundless lawsuits. Furthermore, a system which permits the filing of dubious constitutional claims in overcrowded courts mocks the Constitution and serves as a considerable detriment in our society's quest for justice.

treatment was not clearly established); Quintana v. Anselmi, 817 F.2d 891, 893 (1st Cir. 1987) (no clearly established right of regional director of employment administration to be protected from patronage dismissal). Vazquez Rios v. Hernandez Colon, 819 F.2d 319, 328 (1st Cir. 1987) (law not clearly established that political affiliation was an improper criterion for a cultural attache); Barbera v. Smith, 836 F.2d 96, 101-02 (2d Cir. 1987) (right of a witness to be protected from harm was not clearly established); Wilkinson v. Forst, 832 F.2d 1330, 1342 (2d Cir. 1987) (law not clearly established regarding mass searchers at Ku Klux Klan rally pursuant to state court order); Hynson v. City of Chester, 827 F.2d 932, 934-35 (3d Cir. 1987) (no clearly established right to have prison warden establish a "no show" policy that provided a mechanism for the immediate apprehension of prisoners who fail to report for weekend sentences.); See also Nahmod, *supra* note 2.

Hoping to avoid the creation of such a system, the Supreme Court has held that law enforcement officials claiming a qualified immunity from suit are not held responsible for keeping up with every changing legal nuance; rather, qualified immunity is waived only when the defendant has violated federal statutory or constitutionally protected rights of the plaintiff of which a reasonable law enforcement official would have known.¹¹⁷ However, police officers are presumed to know the law, and are expected to remain current on changing legal developments.¹¹⁸ Thus, the criteria for the successful use of a qualified immunity defense will often depend entirely upon the particular events surrounding the alleged deprivation. The following cases discuss some of the recurring themes in civil rights actions aimed at law enforcement officials, and will attempt to shed light upon the nature of the qualified immunity defense and how it serves to promote important policies in section 1983 litigation.

1. *Excessive Force*

There are two main sources of constitutional protection against the deliberate use of physically abusive force by government officials — the Fourth Amendment's prohibition against unreasonable seizures of the person, and the Eighth Amendment's ban on cruel and unusual punishment.¹¹⁹ The Fourth Amendment applies to claims of physical abuse against free citizens. After conviction, the Eighth Amendment serves as the primary source of substantive protection in cases where the deliberate use of force is challenged as excessive.¹²⁰

The Supreme Court has held that the use of excessive force or violence by law enforcement officials resulting in personal injury deprives a person of liberty without due process of law.¹²¹

117. *Anderson*, 483 U.S. 635 (1987).

118. See *Rios v. Lane*, 812 F.2d 1032, 1040 (7th Cir. 1987); *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986); *McCann v. Coughlin*, 698 F.2d 112, 124-25 (2d Cir. 1983).

119. *Graham v. Connor*, 490 U.S. 386 (1989).

120. See *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (the Fourth Amendment prohibition against unreasonable searches is inapplicable to an inmate's prison cell).

121. See *Tennessee v. Garner*, 471 U.S. 1, 22 (1984) (holding unconstitutional a Tennessee statute insofar as it authorized the use of deadly force against apparently unarmed, non-dangerous fleeing suspects; the Court held that such force was unconstitutional unless necessary to prevent the escape and the officer has probable cause to be-

Anderson, with its emphasis on a "fact specific" inquiry to determine whether clearly established law was violated, has produced a basis for granting summary judgment on qualified immunity grounds in excessive force cases. In order to establish a qualified immunity defense when facing a charge of excessive force, a law enforcement officer must show either that his conduct did not violate the clearly established rights of which a reasonable official would have known or that it was objectively reasonable under the Fourth Amendment for the officer to believe that his acts did not violate clearly established rights.¹²²

Fonte v. Collins,¹²³ is a case which exemplifies the fact specific approach in excessive force cases. In *Fonte*, a father was arrested while police officers were attempting to recover custody of his child at the request of the mother. The officers failed to establish that it was reasonable for them to believe that their conduct did not violate the father's constitutional rights, and thus were not entitled to qualified immunity in the father's subsequent civil rights suit alleging false arrest; even if the father was not entitled to custody of child, the court found that there was no evidence that he had committed any criminal act with intent to interfere with officers' investigation.¹²⁴

Klein v. Ryan,¹²⁵ also exemplifies the post-*Anderson* approach in excessive force cases. In *Klein*, deadly force was used by police officers to apprehend a fleeing burglar. The officers were later suspended because they had violated police department regulations regarding the use of excessive force.¹²⁶ Although the plaintiff claimed that the officers had other less drastic alternatives because the plaintiff was unarmed and did not physically threaten the officers,¹²⁷ the U.S. Court of Appeals for the Seventh Circuit affirmed the granting of summary judgment

lieve that the suspect poses a significant threat of death or serious physical injury to officers or others).

122. *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990). See also *Looney v. City of Wilmington, Del.*, 723 F. Supp. 1025, 1037 (D. Del. 1989) (holding that police officers did not enjoy qualified immunity from liability in arrestee's civil rights action insofar as, at the time of the arrest, a reasonable officer would have understood that continuing to beat a suspect after he was allegedly handcuffed was unreasonable and thus unconstitutional).

123. 898 F.2d 284 (1st Cir. 1990).

124. *Id.* at 285.

125. 847 F.2d 368 (7th Cir. 1988).

126. *Id.* at 374.

127. *Id.* at 373.

because it found that reasonable police officers could have been justified in using deadly force under similar circumstances.¹²⁸

As a practical matter, the fact intensive approach to applying the qualified immunity defense to excessive force claims limits the usefulness of the defense in cases where it is raised. Careful pleading and expansive argument frequently defeat a law enforcement officer's assertion in a pretrial dispositive motion that the amount of force used was objectively reasonable under the circumstances.¹²⁹ As a result, insubstantial claims frequently are not weeded out before trial which does little to promote federalism or limit the growth of federal dockets.

Notwithstanding these difficulties, it appears to the authors that the qualified immunity defense operates reasonably well in excessive force cases to vindicate its underlying purposes. The defense in this context does appear to promote the Fourth Amendment's goal of requiring law enforcement officials to use reasonable methods, and does not appear, at least on the surface, to lead to overdeterrence. Indeed, the modern paradigm for the section 1983 action is set forth in *Monroe v. Pape*,¹³⁰ an excessive force case.

2. Arrest and Detention

As mentioned above, the Supreme Court reasoned in *Anderson* that although plaintiffs may have an abstract right to be free from warrantless searches unjustified by exigent circumstances, the right alleged to have been violated, although "clearly established" in a general sense, must also be established in reference to the particular circumstances facing the law enforcement officer before qualified immunity can be denied. These prerequisites are equally meaningful in regard to warrantless search cases.

128. *Id.* at 375. See also *Bell v. City of Milwaukee*, 746 F.2d 1205, 1279 (7th Cir. 1984) (holding that where decedent plaintiff fit description of robbery felon, it was not a use of excessive force for police officers to fire warning shots into the air to scare the plaintiff into stopping).

129. See, e.g., *Calamia v. City of New York*, 879 F.2d 1025, 1036 (2d Cir. 1989). But see *Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990) (holding that the qualified immunity defense is available either where the officer's conduct did not violate clearly established rights or where it was objectively reasonable to believe that the officer's conduct did not violate those rights).

130. 365 U.S. 167.

Thus, in *Malley v. Briggs*,¹³¹ police officers were held not to be entitled to qualified immunity when seeking an arrest warrant when "a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant."¹³² The Court noted that "the qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law."¹³³ Likewise, *Malley* states that qualified immunity is available if officials of reasonable competence could disagree on the appropriateness of an action.¹³⁴ Similarly, in *Pachaly v. City of Lynchburg*,¹³⁵ a police officer was held to be cloaked with qualified immunity when searching a radio station. He was shielded from civil liability arising out of the search, even though he employed a SWAT team, searched furniture, and looked behind wall coverings, where the warrant authorized only a search for documents. The court held that realistically, the documents could have been located anywhere and therefore, the defense of qualified immunity would apply, since reasonable officers could disagree about the appropriateness of the action.

In view of the reasonableness test enunciated above, the court in *Thompson v. Olson*,¹³⁶ held that a law enforcement official's initial finding of probable cause justified not only an arrest, but a reasonable period of continued detention for the purpose of bringing the arrestee before a magistrate. The court held that following a warrantless arrest based on probable cause, an affirmative duty to release arises only if the arresting officer ascertains beyond a reasonable doubt that the probable cause which formed the basis for the arrest is unfounded. Here, the court found that the officer was merely negligent in abruptly dis-

131. 475 U.S. 335 (1986).

132. *Id.* at 345.

133. *Id.* at 341.

134. *Id.* at 335; see *Floyd v. Farrell*, 765 F.2d 1 (1st Cir. 1985) (seeking an arrest warrant is 'objectively reasonable' so long as the presence of probable cause is at least arguable. An officer will therefore be held liable for seeking an arrest warrant later found to be without probable cause only if there clearly was no probable cause at the time the warrant was requested); *LoSacco v. City of Middletown*, 745 F. Supp. 812 (D. Conn. 1990) (arrestee's allegations that the arresting police officer intentionally failed to disclose facts in the warrant application and that warrant was issued without probable cause stated a § 1983 claim for false arrest).

135. 897 F.2d 723 (4th Cir. 1990).

136. 798 F.2d 552, 556 (1st Cir. 1986).

missing an arrestee's statement that he was coming out of insulin shock.¹³⁷

Likewise, in *Jaroma v. Massey*,¹³⁸ the court held that police officers were entitled to qualified immunity in a civil rights action brought by an arrestee based on his claim that the officers in question had falsely arrested, assaulted, and maliciously prosecuted him. The officers attempted to stop the arrestee's car because its rear license plate was obscured and they had reason to believe the operator was driving the vehicle with a suspended license. Furthermore, the arrestee violently resisted arrest following long pursuit, and officers used no greater force than was necessary. Police officers were not entitled to qualified immunity from liability, however, for common law false imprisonment and civil rights violations arising out of his warrantless arrest; the court held that no prudent police officer could have failed to recognize that the warrantless arrest and imprisonment of plaintiff on the flimsy basis of unsubstantiated hearsay and self-interested rumor was improper.¹³⁹

The reasonableness test, as applied to motions for summary judgment based on the qualified immunity defense in arrest cases, may in fact increase the caseload in federal courts and impair federalism. This occurs because factual disputes as to the reasonableness of an officer's conduct frequently prevents courts from granting motions for summary judgment. Conversely, however, the reasonableness test does not contribute greatly to overdeterrence, because weak plaintiffs' cases should often be decided in the officer's favor at trial. Furthermore, the test does not trivialize the Constitution because of the now longstanding tradition of using the Fourth Amendment to promote personal privacy interests.¹⁴⁰

3. *Pre-Trial Detainees*

The Supreme Court has held that a detainee is entitled under the Due Process Clause of the Fourteenth Amendment to, at a minimum, no less protection for personal security than afforded convicted prisoners under the Fourteenth Amendment

137. *Id.*

138. 873 F.2d 17 (1st Cir. 1989).

139. *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987).

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

and no less a level of medical care than that required for convicted prisoners by the Eighth Amendment.¹⁴¹ Accordingly, courts have held that the deliberate indifference standard applies to the rights of pretrial detainees.¹⁴²

In *Gagne v. City of Galveston*,¹⁴³ the decedent was arrested for public intoxication. Although there was a policy to remove prisoners' belts, the booking officer did not do so. The court found that, despite his violation of the departmental rule, the officer had not deprived the decedent of a clearly established constitutional right.¹⁴⁴ Finding that no constitutional duty to protect prisoners from self-destructive behavior was clearly established at the time Gagne was arrested, the court dismissed the claim against the officer.

Likewise, in *Belcher v. Oliver*,¹⁴⁵ the court held that police officers' failure to afford medical screening or attention to detainee who committed suicide while detained at the city jail on charges of public intoxication and hazardous driving could not be construed as "deliberate indifference" to detainee's medical needs nor intent to punish in violation of the due process clause. The officers were held entitled to a valid qualified immunity defense because at no time during his one hour and twenty minute incarceration did the detainee express any concern about his well being, or behave in a manner that would have indicated a risk of suicide.

The outcome was similar in *Elliot v. Cheshire County*.¹⁴⁶ There, the executor of the estate of an eighteen year old pre-trial detainee who had committed suicide brought suit against the state trooper who had arrested the youth, the correctional officers at the detention facility, and the county that operated

141. See *Bell v. Wolfish*, 441 U.S. 520 (1979); *Boring v. Kozakiewicz*, 833 F.2d 468, 471-72 (3d Cir. 1987).

142. See *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Redman v. County of San Diego*, 896 F.2d 362, 365 (9th Cir. 1990); *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989), cert. denied, 494 U.S. 1027, 110 S.Ct. 1473 (1990); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1186 (5th Cir. 1986); *Roberts v. City of Troy*, 773 F.2d 720, 722 (6th Cir. 1985); *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Lightbody v. Town of Hampton*, 618 F. Supp. 6, 11 (D.N.H. 1984).

143. 805 F.2d 558 (5th Cir. 1986), cert. denied, 483 U.S. 1021 (1987).

144. *Id.* at 560.

145. 898 F.2d 32 (4th Cir. 1990).

146. 940 F.2d 7 (1st Cir. 1991).

the facility. All of the defendants moved for summary judgment, claiming that they were not "deliberately indifferent" to the dead detainee's medical needs.¹⁴⁷ The Court of Appeals held that the trooper did not manifest deliberate indifference to a known medical need where it was alleged that he failed to tell the booking officer about the young man's history of mental illness.¹⁴⁸ It held that there was insufficient evidence that the county's training practices and jail design policies were tantamount to deliberate indifference, thus requiring a jury trial.¹⁴⁹ The court held, however, that summary judgment should not be granted to individual correctional officers because there was evidence in affidavits that one correctional officer was told of the suicide threat by other inmates shortly before the decedent took his life, and this evidence could possibly show a manifestation of deliberate indifference to an inmate's needs.¹⁵⁰

In *Danese v. Asman*,¹⁵¹ the court was confronted with a similar case. There, the detainee was brought into the jail intoxicated and repeatedly claimed he wanted to kill himself. The district court found clearly established Fourteenth Amendment rights in the detainee not to be punished by way of a denial of medical care, and his right not to be deprived of his protected liberty interest in personal security. The Sixth Circuit Court of Appeals, however, stated:

The rights the district court cites as having been clearly established were not particularized rights as required by *Anderson* and thus, were not sufficient to deny the defendants qualified immunity. The 'right'

147. *Id.*

148. *Id.*

149. *Id.*

150. *Elliot*, 940 F.2d at 11-12. The Court's decision as to the correctional officer who was told about the threat is probably correct. It is less clear, however, whether the Court reached the correct result as to all the other correctional officers. It seems highly implausible that such officers are in instant telepathic communication with one another or otherwise have perfect knowledge of every statement made to a fellow officer. It therefore is highly unlikely that all of the other officers knew of the alleged statement with enough advanced warning to act indifferently to it. Such distinctions may at first appear unnecessary. In practice, however, such distinctions can be very important to individual officials who are uninsured or who must hire defense counsel using personal resources in order to defend themselves against the possibility of personal liability arising from a judgment in excess of the limits of the applicable indemnity policy or statute.

151. 875 F.2d 1239 (6th Cir. 1989), cert. denied, 494 U.S. 1027, 110 S.Ct. 1473 (1990).

which is truly at issue here is the right of a detainee to be screened correctly for suicidal tendencies and the right to have steps taken that would have prevented suicide. The general right to medical care, for example, is not sufficient to require a police officer to have known that he had to determine that [the plaintiff] was seriously contemplating suicide. . . .¹⁵²

Other rights, such as the right to counsel, have been held not to attach to pre-trial detainees until "at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information or arraignment."¹⁵³ Courts have also held that a thirty minute delay in making formal charges is not a constitutionally impermissible delay.¹⁵⁴

The jail cell suicide cases are especially useful for analyzing the interaction between the qualified immunity defense and the policies that underlie the defense. The "deliberate indifference" standard, under which most of these cases is decided, itself minimizes the involvement of federal courts in the supervision of state and local officials. Furthermore, as applied to the qualified immunity defense, the standard promotes federalism because courts generally conclude that there is no violation of clearly established law for most erroneous administrative decisions that may be tangentially related to a jail cell suicide. The courts appear to require that prison officials ignore a known, substantial suicide risk that has clearly manifested itself to them. Similarly, by minimizing the intrusion of federal courts in jail cell suicide

152. *Id.* at 1243-44.

153. *Strandberg v. City of Helena*, 791 F.2d 744, 747-48 (9th Cir. 1986) (citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

154. *Id.* See also *United States v. Karr*, 742 F.2d 493, 495 (9th Cir. 1984) (same holding); *Liscio v. Warren*, 901 F.2d 274 (2d Cir. 1990) (pretrial detainee brought section 1983 state law claims against wardens of two correctional facilities and physician at one facility, alleging deliberate indifference to his medical needs while he was suffering from alcohol and heroin withdrawal; the Court of Appeals held that where genuine issues of material fact existed as to whether physician's conduct was deliberate indifference, and not mere negligence, summary judgment was precluded in pretrial detainee's civil rights action); *Ryan v. Burlington County, New Jersey*, 889 F.2d 1286 (3d Cir. 1989) (holding members of county board of freeholders were not entitled to qualified immunity from civil rights liability to pre-trial detainee who was rendered quadriplegic when attacked by fellow inmate; board knew that county jail was overcrowded, and that no inmate classification system separating known dangerous inmates from others was in place at jail, and could not reasonably have believed that its refusal to supply county jail with additional security personnel was lawful).

cases, the qualified immunity defense reduces the threat of overdeterrence and eases the load such cases might otherwise place on overburdened federal dockets.¹⁵⁵

Most importantly, the qualified immunity defense, as applied to the jail suicide cases, serves to prevent the trivialization of the Constitution. These cases always involve personal tragedy. Furthermore, the jail suicide cases always involve judgments that in perfect hindsight appear erroneous. Sadly enough, they occur relatively often.¹⁵⁶ Usually, however, these cases involve mistaken judgments by persons who are not trained psychiatrists or social workers. The enormity of the result combined with the poor judgment sometimes displayed by the officials involved in such suicide cases often makes for an easy prediction as to what the liability would be in a negligence action. It is much less clear, in our opinion, however, that such cases frequently implicate concerns of constitutional magnitude. It follows then, that the qualified immunity standard as applied to jail suicide cases effectively prevents would-be plaintiffs from merely involving the Constitution as a formality of notice pleading.

4. *Malicious Prosecution*

The First Circuit Court of Appeals has recently held that "to state a claim of [malicious prosecution] under section 1983, the complaint must assert that the malicious conduct was so egregious that it violated substantive or procedural due process rights under the Fourteenth Amendment."¹⁵⁷ In a later case, *Morales v. Ramirez*,¹⁵⁸ the First Circuit stated:

It follows that to invoke the Due Process Clause, the complaint must do more than prove in common-law terms that [he] was harassed and prosecuted in bad faith and without probable cause by government officials acting under color of their authority. The "more" comprises an ability to show that defendants' conduct was "so egregious as to

155. It is assumed here that docket pressure is eased somewhat even where the application of the qualified immunity defense results in the dismissal of some, but not all, defendants. See, e.g., *Elliot v. Cheshire County*, 940 F.2d 7 (1st Cir. 1991).

156. *Id.*; see *infra* note 209 for a list of cases that appear erroneous in hindsight.

157. *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 409 (1st Cir. 1990).

158. 906 F.2d 784, 788 (1st Cir. 1990) (citations omitted).

subject the individual to a deprivation of constitutional dimension." In other words, the challenged behavior, before becoming constitutionally actionable, must, substantially, 'shock the conscience,' or, procedurally, 'deprive[] plaintiff of liberty by distortion and corruption of the processes of law.'

Thus, although instituting or continuing a criminal prosecution against a person may form the basis of a common law tort, it is not cognizable under section 1983 unless it implicates Fourteenth Amendment protections of substantive liberty interests.¹⁵⁹ Similar reasoning was used in *Carey v. City of Fall River*.¹⁶⁰ There, the police chief and one of his lieutenants, were granted qualified immunity because they did not clearly lack probable cause in seeking a criminal complaint against a former police officer, despite the former officer's claim of retaliation for his part in investigating criminal allegations against other members of the police force.¹⁶¹ The Court held that, the defendants could not be held liable for violating the former officer's substantive due process rights on a malicious prosecution theory.

In *Imbler v. Pachtman*,¹⁶² a concurring Justice White outlined the policy basis for granting absolute immunity to prosecutors:

[T]he risk of injury to the judicial process from a rule permitting malicious prosecution suits against prosecutors is real. There is no one to sue the prosecutor for an erroneous decision *not* to prosecute. If suits [against prosecutors] for malicious prosecution were permitted, the prosecutor's incentive would always be not to bring charges.¹⁶³

That policy rational applies, at least to some extent, to officials who must determine whether to bring or file charges but who are not entitled to absolute immunity. A higher substantive stan-

159. See, e.g., *Whatley v. Philo*, 817 F.2d 19, 22 (5th Cir. 1987) (holding in § 1983 "misuse of process" claim, plaintiff must base claim on egregious conduct in order to be actionable); *Johnson v. Barker*, 799 F.2d 1396, 1399-1400 (9th Cir. 1986) (applying Fourteenth Amendment fundamental fairness standard in section 1983 malicious prosecution action); *Kay v. Bruno*, 605 F. Supp. 767, 774 (1985) (holding action for malicious prosecution "requires proof that the plaintiff was subjected to a criminal prosecution instituted by the defendant without probable cause and with malice, and that the criminal proceeding terminated in his favor.")

160. 870 F.2d 40 (1st Cir. 1989).

161. *Id.*

162. 424 U.S. 409 (1976).

163. *Id.* at 438. (White, J., concurring).

dard for the underlying tort furthers such a policy, which translates into greater protection when the qualified immunity defense is involved.

The analysis adopted by the First Circuit in *Morales* effectively parallels the substantive due process test.¹⁶⁴ That analysis fully protects the policies that Justice White outlined and those that underlie the qualified immunity defense. It promotes federalism and relieves federal courts of the chore of overseeing state officials' conduct in all but the cases where there is a showing that official conduct was egregious. Moreover, by refusing to turn basic common law malicious prosecution cases into constitutional torts, the standard prevents the trivialization of the Constitution.

Claims for malicious prosecution, like other claims where the defendants official's subjective state of mind is an element of the claim, present an additional challenge to the rational application of the *Harlow* qualified immunity standard, especially since the motive or purpose of an official is frequently an essential element of a claim under section 1983.¹⁶⁵ The *Harlow* test, it will be remembered, requires evaluation of the objective reasonableness of an official's action in light of clearly established law.¹⁶⁶ The challenge for courts and lawyers is to make that evaluation when malice is an element of the underlying constitutional tort.

In some cases, the application of the qualified immunity test becomes unnecessary where the court declines to rule on the question of summary judgment, and rules instead on a different ground, such as the failure of the plaintiff to state a valid claim.¹⁶⁷ Courts appear to resort to such devices because a plaintiff's allegation that a defendant acted with bad motive greatly complicates the qualified immunity analysis.

164. 906 F.2d at 788. See also *Rochin v. California*, 342 U.S. 165, 172 (1952); *Furtado v. Bishop*, 604 F.2d 80, 95 (1st Cir. 1979), cert. denied, 444 U.S. 1035 (1980).

165. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239, (1976) discriminatory intent is required to establish a violation of the equal protection guarantee; *Estelle v. Gamble*, 429 U.S. 97, 104-05, (1976) "deliberate indifference" is required to show a violation of the prohibition against cruel and unusual punishment.

166. *Harlow*, 457 U.S. at 818; see also *Davis v. Scherer*, 468 U.S. 183, 194-95 (1984).

167. See, e.g., *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1990) (claim that chairman of licensing board maliciously sent notice of licensing hearing to chill licensee's exercise of First Amendment rights; held that no constitutional violation occurred, and thus, no claim was stated where board did not actually hold disciplinary hearing).

The best approach is to treat such allegations of bad motive in malicious prosecution cases as irrelevant to whether a particular right is "clearly established," but as relevant in determining whether the plaintiff has stated a claim.¹⁶⁸ Some courts, however, analyze a government official's allegations of good motive in support of qualified immunity, but permit the plaintiff to come forward with "direct evidence" of an official's motivation and thereby avoid dismissal on summary judgment.¹⁶⁹ Still others treat the issue not as a matter to be resolved with "direct" evidence, but rather, through a form of burden shifting. In this fashion, a plaintiff's allegation of bad motive will not defeat the official's claim to qualified immunity unless the bad motive was the "motivating factor" in an official's action.¹⁷⁰

The difficulties with these latter approaches to deciding an official's claims to qualified immunity in malicious prosecution cases where bad motive is an element of the underlying claim can be readily seen. The far reaching discovery permitted under a "direct evidence" approach destroys the usefulness of summary judgment and defeats the underlying purpose of qualified immunity: to dispose of the meritless cases before an official incurs the costs and burdens of litigation. Moreover, it is frequently unclear in practice exactly what constitutes "direct evidence" of bad motives. Indeed, it often must be proven through the use of circumstantial evidence.

The difficulty with the "motivating factor" approach is that creative pleading and argument can often make bad motive ap-

168. *Suriema v. Rice*, 895 F.2d 338, 341-42 (7th Cir. 1990) (claims for racially motivated demotion, demotion for exercise of First Amendment rights; held, where intent is an element of a constitutional claim, court considers intent in analyzing whether constitutional violation occurred, but not in analyzing *whether rights were clearly established*). See also M. SCHWARTZ & J. KIRKLAND, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES § 9.18 (2d ed. 1991).

169. See *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1432-35 (D.C. Cir. 1987), *reh'g en banc granted* 817 F.2d 144 (D.C. Cir. 1987), *order granting reh'g en banc vacated and original order reinstated*, 820 F.2d 1240 (D.C. Cir. 1987). The tortured procedural history and stinging dissents of *Martin* illustrates that the wisdom of permitting plaintiffs an opportunity to obtain "uncircumscribed discovery" is not unchallenged.

170. See *Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 45-46 (1st Cir. 1988) (holding *Harlow* does not bar analysis of motive, but plaintiff has burden to show that protected conduct was "motivating factor" in official's action claim that plaintiff was demoted for First Amendment conduct). But see *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir. 1989) (plaintiff held not to state a claim where he alleged that notice of disciplinary proceedings was sent to him because of his protected exercise of speech rights).

pear to motivate an official's conduct even when the conduct would have occurred whether or not the bad motive ever existed. Furthermore, such an approach encourages outwardly seductive arguments that the jury really must decide whether certain motives were "motivating," a result that *Harlow* sought to avoid by placing the outcome of the qualified immunity test in the hands of the judge.

B. *Qualified Immunity and Correctional Officials*

A great number of civil rights cases also rise in the context of actions brought by inmates against correctional officials. The four section 1983 policy concerns furthered by the defense of qualified immunity and applied in the law enforcement context above are equally vital in the dominion of corrections. The United States can ill afford a system which ignores, or worse yet, encourages officially sanctioned abuse of our convicted prisoners. However, society cannot afford the creation of a correctional system in which officials are unable to maintain control and safety in overcrowded prisons due to the fear of being subjected to groundless lawsuits.

As with law enforcement officials, correctional officers claiming a qualified immunity from suit are not held responsible for keeping up with every changing legal nuance; rather, qualified immunity is waived only when the defendant has violated federal statutory or constitutionally protected rights of the plaintiff of which a reasonable law enforcement official would have known. However, correctional officials are presumed to know the law, and are expected to remain current on changing legal developments. Often the criteria for the successful use of a qualified immunity defense will depend entirely upon the particular events surrounding the alleged deprivation. The following cases discuss some of the recurring themes in civil rights actions aimed at correctional officials, and will attempt to determine whether the four policy concerns outlined above are sufficiently maintained by the safety net afforded these actors through the defense of qualified immunity.

1. Negligence, Medical Care and Physical Protection

Parratt v. Taylor,¹⁷¹ is a Supreme Court due process case involving prison administrators' negligent loss of an inmate's hobby materials worth \$23.50. The Court held that:

Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation. Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.'¹⁷²

Because the tort remedies provided by the State of Nebraska provided a means of redress for property deprivations which satisfied the requirements of procedural due process, a section 1983 cause of action was held to be an inappropriate remedy.¹⁷³

The Court went on to state that to accept the respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would "necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under section 1983."¹⁷⁴ Such reasoning, held the court, "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."¹⁷⁵

Parratt is an excellent example of the often misguided attempt by certain plaintiffs to turn even the most mundane tort action into a constitutional breach. The American taxpayer is the only loser when courts allow such claims to proceed under section 1983. To protect against such trivialization, the United States Supreme Court has established that merely negligent con-

171. 451 U.S. 527 (1981).

172. *Id.* at 537.

173. *Id.*

174. *Id.* at 544.

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

duct does not implicate the due process clause and is therefore not actionable under section 1983.¹⁷⁶

Even where the results have been far more drastic, the Supreme Court has been unwilling to hold that the due process guarantee means that a state must ensure due care on the part of its employees. *Davidson v. Cannon*¹⁷⁷ is such a case. In *Davidson*, a state prison inmate was assaulted by a fellow inmate after he had sent a note to prison officials advising them that he had been threatened. The official who received the note simply passed it along because he did not regard it as serious and another officer forgot about it entirely. The plaintiff sued the officials under section 1983.¹⁷⁸ The Court held that although:

[R]espondents' lack of due care in this case led to serious injury, . . . that lack of due care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent. . . . The guarantee of due process has never been understood to mean that the state must guarantee due care on the part of its officials.¹⁷⁹

In *Cortes-Quinones v. Jiminez-Nettleship*¹⁸⁰ the outcome was much different, however. There, the court denied qualified immunity to prison officials because they were found to be "deliberately indifferent" to the safety of the plaintiff. In *Quinones*, the decedent was under the treatment of a prison psychologist. The psychologist had diagnosed decedent as a psychopath and possibly schizophrenic. There was also a federal court decree which had found the entire prison system of Puerto Rico unconstitutionally unsafe and medically deficient. Accordingly, the district court ordered that mentally ill inmates be segregated. After being transferred from one facility to another where he remained unsegregated, the decedent was killed by other inmates.

176. *Daniels v. Williams*, 474 U.S. 327, 334 (1986) (overruling *Parratt* in part and holding that the due process clause is not implicated by merely negligent acts of state officials which cause unintended loss or injury, as these do not deprive a person of life, liberty, or property under the Fourteenth Amendment; the Court stressed that the due process clause was "intended to secure the individual from the arbitrary exercise of the powers of government," not official oversights or mistakes which are merely negligent in nature).

177. 474 U.S. 344 (1986).

178. *Id.* at 346.

179. *Id.* at 347-48.

180. 842 F.2d 556 (1st Cir.), cert. denied, 488 U.S. 823 (1988).

The First Circuit ruled that the officers ought to have been "increasingly sensitive to the need to avoid those acts or omissions, within their control, that might make matters worse."¹⁸¹ Holding that deliberate indifference "encompasses acts or omissions so dangerous . . . that a defendant's 'knowledge of [the] . . . risk can be inferred,'" the court denied qualified immunity to the officers.¹⁸²

A similar analysis was used in *Santiago v. Lane*.¹⁸³ In *Santiago*, prison officials were held not entitled to qualified immunity when they allegedly assigned a prisoner who had been transferred from another prison because of threats made by members of a prison gang to the section of the prison where the most hardened criminals were held and assigned him to a roommate who was allegedly a gang member. The prisoner was subsequently assaulted by the gang. The court held that such conduct, if established, would violate the clearly established constitutional rights of a prisoner to be protected against a strong likelihood of attack from other prisoners.¹⁸⁴

The cases outlined above reflect the fact-specific approach which courts must use when deciding whether or not to grant summary judgment to a section 1983 defendant. Even with this approach, courts may feel pressured to refuse summary judgment on the grounds that a jury determination is the best way

181. *Id.* at 562.

182. *Id.* at 558; *see also* *Fielder v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) (award of damages was upheld where prisoner acted in a visibly bizarre manner and the sheriff was warned by relatives of the prisoner's sickness and refused to take preventive actions even when warned by deputies of the decendent's strange behavior); *Cooper v. Dyke*, 814 F.2d 941 (4th Cir. 1987) (failing to treat wounded detainee is evidence of deliberate indifference); *Sosebee v. Murphy*, 797 F.2d 179 (4th Cir. 1986) (deliberate indifference by prison personnel could be a constitutional violation, but medical officials responded promptly to the medical emergency at hand and therefore committed no constitutional violation); *Ancata v. Prison Health Services*, 769 F.2d 700 (11th Cir. 1985) (failing to take proper medical tests after being aware of the prisoner's need for tests can rise to the level of a constitutional violation); *Mullen v. Smith*, 738 F.2d 317 (8th Cir. 1985) (ignoring the serious back pain of a prisoner with derision is an Eighth Amendment violation); *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981) (judgment against warden for failure to take action after receiving a detailed doctor's diagnosis calling for further treatment for prisoner). *But see Burns v. Head Jailer of LaSalle County Jail*, 576 F. Supp. 618 (N.D. Ill. 1984) (giving wrong medication to a prisoner is not a constitutional violation); *Daniels v. Gilbreath*, 668 F.2d 477 (10th Cir. 1982) (no willful failure in treatment of mentally disturbed prisoner leading to his death).

183. 894 F.2d 218 (7th Cir. 1990).

184. *Id.*

to determine if the defendant's actions constituted deliberate indifference. The qualified immunity defense as applied to correctional officials in section 1983 cases does, however, seem to uphold most of the important policy considerations identified by Nahmod. Because of the guidelines laid out by the Court, cases such as *Parratt*¹⁸⁵ are less likely to continue unchecked, easing the dockets in federal courts and promoting federalism. The current enunciation of the qualified immunity standard in these cases would also seem to allay concerns of overdeterrence, since exactly what constitutes constitutional negligence in correctional facilities seems to have attained a much clearer definition.

2. *The Deliberate Use of Force, Emergency Situations and Strip Searches*

Because of the frequently explosive character of certain correctional facility environments, the applicability of qualified immunity is starkly highlighted with respect to prison emergency situations where correctional officials may be called upon to use considerable levels of force. While the Fourth Amendment applies to claims of physical abuse against free citizens, after conviction the primary source of substantive protection in cases where the deliberate use of force is challenged as excessive is the Eighth Amendment.¹⁸⁶ Despite the different approach, much about the qualified immunity defense as it applies to correctional officials is analogous to the law enforcement standard. For instance, *Anderson v. Creighton*,¹⁸⁷ with its emphasis on a "fact specific" approach when determining whether clearly established law was violated, has produced a basis for granting summary judgment on qualified immunity grounds in jail cell excessive force cases. In order to establish a qualified immunity defense when facing a charge of excessive force, a correctional official must show either that his or her conduct did not violate the clearly established rights of which a reasonable officer would have known or that it was objectively reasonable under the Eighth Amendment for the official to believe that his or her acts

185. 451 U.S. 527 (1981).

186. See *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (holding that the Fourth Amendment prohibition against unreasonable searches is inapplicable to an inmate's prison cell).

187. 483 U.S. 635.

did not violate clearly established rights. As might be expected, the courts appear willing to grant wide deference to the judgment of correctional officials when those officials are confronted with situations in which the use of force is perceived as necessary.

A good example of the deference granted to correctional officials in emergency situations is *Hoitt v. Vitek*.¹⁸⁸ *Hoitt* concerned a determination by prison officials at the New Hampshire State Prison that an emergency situation existed which required an immediate lockup. The majority of inmates were released from this lockup after approximately three weeks.¹⁸⁹ The inmate plaintiffs in *Hoitt* contended that no emergency existed.

The court held that it would not second guess a good faith determination by prison officials that an emergency situation existed. Holding that the decision of prison officials was not subject to judicial review, the Court stated that "[t]his deference to the judgment of prison officials in perceiving what they consider to be an emergency situation and unilaterally acting to quell or prevent it has been recognized by the federal judiciary and reflects a proper understanding of a prison's need for description, safety, and security."¹⁹⁰

In *Ryan Robles v. Otero deRamos*,¹⁹¹ the court held that a prison guard could have reasonably believed it lawful to shoot a prison escapee after the escapee tried to attack the guard with a spear, and where the guard attempted to physically prevent the escape and had fired a warning shot prior to shooting the escaping prisoner.

However, in *Bonitz v. Fair*,¹⁹² the Supreme Court denied the defendants' request for qualified immunity arising out of actions taken while conducting a strip search in which female prison inmates were exposed to the view of male guards. No medical personnel were present despite the fact that the searches involved touching of body cavities; furthermore, the searches were conducted in an unhygienic manner; finally, al-

188. 361 F. Supp. 1238 (D.N.H. 1973).

189. *Id.* at 1240, 1241 n.3.

190. *Id.* at 1242.

191. 729 F. Supp. 920, 922-26 (D. Puerto Rico 1989); *see also Henry v. Perry*, 886 F.2d 657 (3d Cir. 1989) (there was no Eighth Amendment violation where the police used force to apprehend a convicted escapee).

192. 804 F.2d 164 (1st Cir. 1986).

though the searches were performed by female guards, the inmates were visible to male guards who looked through open doors or openings in closed doors.¹⁹³ The body cavity searches were actually conducted in violation of prison instructions; while officials had obtained a search warrant to search the prison, no emergency situation existed that would have justified the body cavity searches. Indeed, under the circumstances, such searches were proscribed.¹⁹⁴ In denying qualified immunity to the officers, the court was particularly influenced by the fact that the searches involved touching of the female inmates rather than mere visual inspection.¹⁹⁵

The deliberate use of force, strip search and prison emergency cases illustrate the great value which the qualified immunity defense provides for state actors. It reduces the overdeterrence that the threat of civil liability often produces, yet is sufficiently flexible to permit cases to proceed to trial when a court finds that it is clearly established that the conduct complained of has been proscribed by the Constitution. Similarly, the defense works to winnow out many meritless cases that would otherwise swell the federal docket. It protects those interests previously identified as "constitutional" in dimension while not overwhelming officials and courts with cases that demean the idea of "constitutional interests." Furthermore, the usefulness of the defense as grounds for a summary judgment greatly enhances its value to courts and defendants alike.

3. *Prisoner Suicide*

Unlike pre-trial detainee suicide cases, which receive Fourteenth Amendment analysis, prisoner suicide cases receive Eighth Amendment analysis. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." The Supreme Court has held that deliberate indifference on the part of prison personnel to the "serious medical needs" of an inmate constitutes cruel and unusual punishment because it "offends evolving

193. *Id.* at 169.

194. *Id.*

195. *Id.* at 172; see *Hudson v. Goodlander*, 494 F. Supp. 890, 894-95 (D. Mo. 1980) (holding prison officials entitled to qualified immunity where female officers assigned to duties which permitted regular viewing of male inmate using toilet, undressing and showering).

standards of decency that mark the progress of a maturing society.”¹⁹⁶

The Supreme Court has held that the established law in such cases is the deliberate indifference standard enunciated in *Estelle v. Gamble*.¹⁹⁷ In *Estelle*, the court held that medical malpractice toward a state prisoner does not give rise to a section 1983 cause of action. The Court stated that “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence of deliberate indifference to serious medical needs.”¹⁹⁸ The prisoner suicide cases thus mirror the *Estelle* test to the extent that a mere showing of negligence is not enough to avoid summary judgment.

For example, in *Edwards v. Gilbert*,¹⁹⁹ a juvenile tried as an adult hanged himself with a bed sheet while awaiting sentencing. The court stated that in the case of a section 1983 claim resulting from a prisoner suicide, the plaintiff must not only show that officials were deliberately indifferent to the possibility of suicide, but that once the defense of qualified immunity is raised, the plaintiff must persuade the court that the law was clearly established that the defendant’s conduct under the circumstances amounted to “deliberate indifference.”²⁰⁰ The court held that:

In the absence of a previous threat of or an earlier attempt at suicide, we know of no federal court in the nation or any other court within this circuit that has concluded that official conduct in failing to prevent a suicide constitutes deliberate indifference.²⁰¹

The outcome was similar in *Dobson v. Magnusson*.²⁰² There, the First Circuit Court of Appeals was confronted with a section 1983 action brought by the state of the deceased suicide victim

196. *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 106).

197. 429 U.S. 97 (1976).

198. *Id.* at 106.

199. 867 F.2d 1271 (11th Cir. 1989).

200. *Id.* at 1274-75.

201. *Id.* at 1275 (footnote omitted). See, e.g., *Cabral v. County of Los Angeles*, 864 F.2d 1454 (9th Cir. 1988) (denying defendants’ motion for JNOV where jailers had rescued decedent from previous suicide attempt).

202. 923 F.2d 229 (1st Cir. 1991).

against officers of the Maine State Prison. The prisoner was placed on a fifteen minute watch because of the possibility of self injury, but the prison psychologist expressly discounted the possibility of a suicide attempt. When the guards let forty-five minutes pass between checks because of a disturbance in the prison, the decedent killed himself.

In upholding the defendants' qualified immunity from suit, the Court held that a mere failure to put a suicide watch on the prisoner where the officers were given no history of plaintiff's suicidal tendencies did not amount to deliberate indifference. Furthermore, the court held that the plaintiff's attempt to claim one of the guards guilty of reckless indifference in not depriving the prisoner of sheets was "frivolous in the extreme."²⁰³

Likewise, in *Torraco v. Maloney*,²⁰⁴ the mother of an inmate who committed suicide sued prison officials alleging that the suicide was caused by officials' deliberate indifference to the inmate's serious mental health and safety needs in violation of the Eighth Amendment. The court held that, "[b]ecause appellant has offered no evidence that defendants' failure to provide psychiatric, as opposed to psychological, care was sufficiently dangerous or inadequate to support a finding of deliberate indifference, we find without merit her claim regarding defendants' failure to provide Torraco with psychiatric care."²⁰⁵ Furthermore, the court held that "[a]lthough the record contains sufficient evidence suggesting that Torraco presented a risk of suicide, we find that defendants' failure to take protective action such as placing Torraco in a 'suicide cell' neither renders the actions taken 'so inadequate as to shock the conscience,' nor constitutes an omission 'so dangerous (in respect to health or safety) that a defendant's knowledge of a large risk can be in-

203. *Id.* at 231; see also *Popham v. City of Talladega*, 908 F.2d 1561, 1563-64 (11th Cir. 1990) (holding that "deliberate indifference" is the appropriate "barometer" by which suicide cases involving convicted prisoners should be tested; as such, an allegation of deliberate indifference in such a case must be considered in light of the level of knowledge which the prison officials possessed, as to the inmate's suicidal tendencies); *Relleger v. Cape Girardeau County, Mo.*, 724 F. Supp. 662, 667 (E.D. Mo. 1989) (defendants received qualified immunity in prisoner suicide case even though they were aware that the inmate had previously attempted suicide; the court held that, while prisoners who show suicidal characteristics must be reasonably protected from themselves for humane reasons, a "suicide-proof facility" is not constitutionally required).

204. 923 F.2d 231 (1st Cir. 1991).

205. *Id.* at 235.

ferred.' A finding of deliberate indifference requires a strong likelihood, rather than a mere possibility, that self-infliction of harm will occur."²⁰⁶

However, where prison personnel are directly responsible for inmate care, and possess knowledge that an inmate has attempted or threatened suicide, their failure to take steps to prevent that inmate from committing suicide can amount to deliberate indifference for the purposes of qualified immunity from suit.²⁰⁷

As in pre-trial detainee suicide cases, the "deliberate indifference" standard, under which most of these cases are decided, itself minimizes the involvement of federal courts in the supervision of state and local officials. Thus, as applied to the qualified immunity defense, the standard promotes federalism because courts generally conclude that there is no violation of clearly established law for most erroneous administrative decisions that may be tangentially related to a jail suicide. Rather, in denying the defense of qualified immunity, the courts appear to require that prison officials ignore a known, substantial suicide risk that has clearly manifested itself to them.

Similarly, by minimizing the intrusion of federal courts in correctional facility suicide cases, the qualified immunity defense reduces the threat of overdeterrence and eases the load such cases might otherwise place on overburdened federal dockets.²⁰⁸

Most importantly, the qualified immunity defense, as applied to the jail suicide cases, serves to prevent the trivialization of the Constitution. As noted in the pre-trial detainee section, *supra*, prisoner suicide cases always involve personal tragedy, as well as judgments that in perfect hindsight appear erroneous. Sadly enough, they occur relatively often.²⁰⁹ However, is it fair

206. *Id.* at 236 (citations omitted) (footnote omitted).

207. *Greasen v. Kemp*, 891 F.2d 829 (11th Cir. 1990).

208. As in the law enforcement example, it is assumed here that docket pressure is eased somewhat even where the application of the qualified immunity defense results in the dismissal of some, but not all, defendants. *See, e.g., Elliot v. Cheshire County*, 940 F.2d 7 (1st Cir. 1991).

209. *See, e.g., Torraco v. Maloney*, 923 F.2d 231 (1st Cir. 1991) (summary judgment); *Dobson v. Magnusson*, 923 F.2d 229 (1st Cir. 1991) (summary judgment); *Belcher v. Oliver*, 898 F.2d 32 (4th Cir. 1990) (summary judgment); *Williams v. Borough of West Chester*, 891 F.2d 458 (3rd Cir. 1989) (summary judgment); *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989) (summary judgment), *cert. denied*, 494 U.S. 1027 (1990); *Edwards*

or constitutionally permissible that such cases should frequently be held to implicate concerns of constitutional magnitude? We believe, along with the majority of courts hearing such cases, that it is neither fair nor constitutionally permissible. In this context, the qualified immunity standard as applied to jail suicide cases effectively prevents would-be plaintiffs from merely involving the Constitution as a formality of notice pleading, a situation likely to trivialize the Constitution.

CONCLUSION

After briefly retracing the development of litigation under 42 U.S.C. § 1983 and the emergence of the qualified immunity defense, the authors have analyzed the application of the defense to several types of cases that frequently arise under the federal civil rights statute in order to determine if the decided cases vindicate the policies that underlie the defense. We have found that the defense generally works well at promoting federalism, braking overdeterrence, slowing the often spectacular growth of section 1983 litigation on the federal court's docket and interrupting a trend toward trivializing the Constitution.

The defense generally appears to work best at achieving these goals in cases arising under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment where relatively strict substantive standards apply. On the balance, the test does not merit the condemnation heaped on it by its shrillest critics, and has promoted a more balanced development of the law under the federal civil rights statute.

v. Gilbert, 867 F.2d 1271 (1989) (summary judgment); Cabrales v. County of Los Angeles, 864 F.2d 1454 (9th Cir. 1988) (after jury trial) 490 U.S. 1087, (1989), *on remand*, 886 F.2d 235 (9th Cir. 1989); Estate of Cartwright v. City of Concord, 886 F.2d 235 (9th Cir. 1989); (judgment for defendants after bench trial); Freedman v. City of Allentown, 853 F.2d 1111 (3rd Cir. 1988) (motion to dismiss); Colburn v. Upper Darby Tp., 838 F.2d 663 (3rd Cir. 1988) (motion to dismiss) *cert. denied*, 489 U.S. 1065 (1989); Gagne v. City of Galveston, 805 F.2d 558 (5th Cir. 1986) (motion to dismiss) *cert. denied*, 483 U.S. 1021 (1987); Partridge v. Two Unknown Police Officers, 791 F.2d 1182 (5th Cir. 1986) (motion to dismiss); Roberts v. City of Troy, 773 F.2d 720 (6th Cir. 1985) (after jury trial); State Bank of St. Charles v. Camic, 712 F.2d 1140 (7th Cir.) (summary judgment) *cert. denied*, 464 U.S. 995 (1983).