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Constitutional Accountability in Section 1983 Litigation

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42 U.S.C. section 1983[1] gives individuals a cause of action for damages and injunctive relief against those who violate the fourteenth amendment[2] under color of state law.[3] Enacted by Congress in

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1. Section 1983 provides:

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

42 U.S.C. § 1983 (Supp. IV 1980).

2. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961). In effect, § 1983 incorporates the fourteenth amendment, which in turn incorporates most of the provisions of the Bill of Rights and applies them to the states. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

3. The fourteenth amendment's state action requirement and § 1983's "under color of law" requirement have been thought for all practical purposes to be the same. United States v. Price, 383 U.S. 787, 794 n.7 (1966). More recently, however, in Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 152 (1978), the Court suggested that a § 1983 plaintiff must separately establish both color of law and state action.

Had color of law ultimately been held to be narrower in scope than state action, such a result would have been, at least in part, inconsistent with the position of this Article. However, at the end of its 1981 Term, the Supreme Court held that when challenged conduct constitutes state action, it necessarily constitutes action under color of law as well. Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2753 (1982). This decision reversed a Fourth Circuit case which stated that in certain circumstances § 1983's color of law language is narrower than state action. Lugar v. Edmondson Oil Co., 639 F.2d 1058, 1064 (4th Cir. 1981) (en banc).

That the Court's decision supports this Article's proposed fourteenth amendment interpretation of § 1983, as developed later, is indicated by the following language in *Lugar*:

> To read the "under color of any statute" language of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the § 1983 cause of action would be wholly inconsistent with the purpose of § 1 of the Civil Rights Act of 1871 . . . . from which § 1983 is derived. The Act was passed "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.' " The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual. Perhaps the most direct statement of this was that of Senator Edmunds, the manager of the bill in the Senate: "[Section 1 is] is [sic] so very simple and really reenact[s]

1871,[4] section 1983 lay dormant for ninety years until 1961, when the Supreme Court held in *Monroe v. Pape*[5] that the language of section 1983 means what it says: government officials who act under color of state law may be liable for their fourteenth amendment violations even when their challenged conduct also violates state law.[6] Since then, numerous Supreme Court decisions have interpreted section 1983.

Some of these decisions have broadened the scope of section 1983 liability. For example, local government bodies may be liable for compensatory damages[7] and are unprotected by any kind of qualified immunity.[8] Section 1983 liability also extends to violations of certain federal statutes under color of state law.[9] In addition, every Supreme Court decision that extended the protections of the fourteenth amendment in effect broadened the scope of section 1983 liability.[10] On the other hand, some decisions have limited the scope of section 1983 liability. State legislators,[11] judges,[12] and prosecutors,[13] for example, are protected by absolute immunity from section 1983 damage liability; all other government employees are protected by the affirmative defense of qualified immunity.[14]

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the Constitution." Representative Bingham similarly stated that the bill's purpose was "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution."

102 S. Ct. at 2752-53 (citations and footnotes omitted).

4. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983 (Supp. IV 1980)).

5. 365 U.S. 167 (1961).

6. *Id.* at 183 ("[T]he fact that Illinois . . . outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court."). Not only is there no exhaustion of state *judicial* remedies requirement under § 1983, but the Court recently reaffirmed its rule that exhaustion of state *administrative* remedies similarly is not required under § 1983. Patsy v. Board of Regents, 102 S. Ct. 2557, 2568 (1982).

7. Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978) (municipalities are "persons" to whom § 1983 applies).

8. Owen v. City of Independence, 445 U.S. 622, 650 (1980) (§ 1983 does not accord municipalities qualified immunity for good-faith constitutional violations).

9. *See* Maine v. Thiboutot, 448 U.S. 1, 4 (1980). *But see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981) (qualifying *Thiboutot*); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 28 (1981) (qualifying *Thiboutot*).

10. *E.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973) (constitutional right of "privacy"); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (constitutional right of interstate movement). Because § 1983 incorporates the fourteenth amendment, any expansion of fourteenth amendment protection expands the scope of § 1983. *See* note 2 *supra*.

11. Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

12. Stump v. Sparkman, 435 U.S. 349, 356-57 (1978); Pierson v. Ray, 386 U.S. 547, 554-55 (1967). However, a judge will be subject to liability if he acts "in the 'clear absence of all jurisdiction.'" *Stump*, 435 U.S. at 356-57 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)).

13. Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

14. Harlow v. Fitzgerald, 102 S. Ct. 2727, 2734 (1982) (presidential aides); Procunier v. Navarette, 434 U.S. 555, 561 (1978) (prison officials); O'Conner v. Donaldson, 422

Local governments are not liable for punitive damages,[15] and states are absolutely immune under section 1983.[16] Furthermore, *respondeat superior* is not a proper basis for section 1983 liability.[17] Even with these judicial limitations, though, the section 1983 case load in the federal courts has increased dramatically since *Monroe v. Pape*.[18]

Although many difficult section 1983 issues have now been resolved, the issue of the proper basis of section 1983 liability—ranging from intent on the one hand to strict liability on the other—has percolated in the federal courts for years.[19] Specifically, the question whether negligence is actionable under section 1983 has caused much confusion.[20] The Supreme Court has twice sidestepped the issue in cases that questioned whether negligent

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U.S. 563, 564, 577 (1975) (mental hospital administrators); Wood v. Strickland, 420 U.S. 308, 321-22 (1975) (school board members); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (state executives); Pierson v. Ray, 386 U.S. 547, 557 (1967) (police officers).

However, *Harlow v. Fitzgerald* recently changed the qualified immunity test in its subjective part. *See* note 53 *infra*. *See generally* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 8.01-.15 (1979 & Supp. 1982) (discussion of qualified immunity for "persons": an affirmative defense).

15. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

16. Quern v. Jordan, 440 U.S. 332, 342 (1979).

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

18. Between 1961 and 1979, federal filings under § 1983 (not including prison inmate suits) increased from several hundred to over thirteen thousand; civil rights petitions of state prisoners increased from several hundred to over eleven thousand in the same period. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT, *printed in* JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEEDINGS 119, 222-23 (1979); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT, *printed in* JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEEDINGS 91, 194, 207 (1975).

In 1976 Congress enacted the Civil Rights Attorney's Fees Awards Act, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (Supp. IV 1980)), which authorizes federal courts to award fees to prevailing plaintiffs in § 1983 and other civil rights cases. Section 1988 provides in relevant part that "[i]n any action or proceeding to enforce [§ 1983 and certain other statutes] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (Supp. IV 1980). This Act is in all likelihood responsible for at least a portion of the recent § 1983 case load increase.

19. *See, e.g.*, Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980) (§ 1983 liability requires that defendant's act be intentional or in reckless disregard of plaintiff's constitutional rights); Beard v. Mitchell, 604 F.2d 485, 494 (7th Cir. 1979) (§ 1983 liability requires "the sort of abuse of government power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution").

20. *See generally* S. NAHMOD, *supra* note 14, § 3.01-.02, at 59-64; Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974).

This author has previously argued that putting the § 1983 basis of liability issue solely in negligence terms diverts attention from the inquiry into the existence of a fourteenth amendment violation and inevitably confuses the prima facie § 1983 cause of action with the affirmative defense of qualified immunity. *Id.* at 18 & n.59. As will be seen, the latter point is relevant to this Article as well. This Article, however, goes well beyond that argument to confront the more subtle and difficult issue of § 1983 liability when the person (or local government) sued does not himself or herself (or itself) violate the plaintiff's fourteenth amendment rights but causes another, acting under color of law, to do so.

conduct gives rise to a section 1983 action.[21] At the end of its 1980 Term, however, the Court finally addressed the issue in *Parratt v. Taylor*[22] and held that negligence may be actionable under section 1983.[23] The Court obviously hoped to resolve some of the previous confusion about the connection between negligence and section 1983 by its discussion in *Parratt*. Unfortunately it did not do so, except at a superficial level.[24]

This Article discusses an important section 1983 issue that the Supreme Court left unresolved in *Parratt*: the ultimate scope of section 1983 liability. After discussing the facts and ambiguities of the *Parratt* Court's decision,[25] a hypothetical is advanced in which a third party, acting under color of state law, intervenes between the defendant's alleged wrongdoing and the plaintiff's constitutional deprivation.[26] Two possible interpretations of the scope of section 1983 liability are then considered—a fourteenth amendment interpretation and a causation interpretation.[27] The choice between the two interpretations is particularly important in the above hypothetical; the choice determines the scope of liability. Case law in the circuits is next addressed.[28] Then, through examination of the statutory language of section 1983, the history and policy of the statute, and prior Supreme Court cases, this Article demonstrates that the fourteenth amendment interpretation is the appropriate choice.[29] Next, local government accountability is analogized to individual accountability, which further demonstrates that the fourteenth amendment interpretation is the correct choice.[30] Finally, a concept of fourteenth amendment duty is articulated, which is another way of focusing on the need to identify the criteria of fourteenth amendment accountability.[31]

I. *PARRATT v. TAYLOR* AND ITS AMBIGUITY

On its face, section 1983 is silent about the proper basis of liability. It speaks only of a defendant's conduct causing the deprivation of a plain-

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21. Baker v. McCollan, 443 U.S. 137, 139-40, 146-47 (1979) (defendant not denied due process of law); Procunier v. Navarette, 434 U.S. 555, 565-66 & n.14 (1978) (prison officials' acts protected by qualified immunity doctrine).

22. 451 U.S. 527 (1981).

23. *See id.* at 532-35.

24. Superficially, the Court has now clearly held that negligence may be a basis of liability for the § 1983 prima facie case. *Id.*

25. *See* text accompanying notes 32-61 *infra*.

26. *See* text accompanying notes 62-72 *infra*.

27. *See* text accompanying notes 73-79 *infra*.

28. *See* text accompanying notes 80-101 *infra*.

29. *See* text accompanying notes 102-44 *infra*.

30. *See* text accompanying notes 145-74 *infra*.

31. *See* text accompanying notes 175-88 *infra*. As this Article attempts to show, the concept of fourteenth amendment duty is coextensive with § 1983 duty in connection with the prima facie § 1983 cause of action.

Except insofar as some kind of personal involvement is one such criterion of fourteenth amendment duty or accountability, this Article does not deal with substantive constitutional law issues. However, it is the author's view that criteria of fourteenth amendment

tiff's fourteenth amendment or federal statutory rights, privileges, or immunities.[32] In *Monroe v. Pape*,[33] however, the Court spoke of interpreting section 1983 against the "background of tort liability."[34] The Court also asserted in *Monroe* that section 1983 was intended to prevent, among other things, governmental "neglect" in the enforcement of fourteenth amendment rights.[35] These considerations, coupled with lawyers' and judges' natural inclination to analyze the new in terms of the familiar, led to vigorous debate in the federal courts and elsewhere about the relationship, if any, between negligence and section 1983 and, more generally, about state-of-mind requirements for section 1983 liability.[36]

Courts were concerned that if negligence were indeed a proper basis of section 1983 liability, then section 1983 would in effect become a federal tort law, engulfing or making irrelevant that part of state tort law involving government employees as defendants.[37] The debate was further enlivened and confused by Supreme Court decisions in section 1983 cases that addressed the state-of-mind issue in connection with the particular constitutional provisions under discussion.[38] Different fourteenth amendment violations were held to require different states of mind. For example, "deliberate indifference" is necessary to make out an eighth amendment violation.[39] An equal protection violation requires that the defendant have a discriminatory purpose or intent.[40]

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accountability, as developed in § 1983 litigation, are indeed *constitutionally* based and are not so-called "constitutional common law." *Compare* Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975) (favoring the concept of "constitutional common law"), *with* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1118 (1978) (criticizing the concept of "constitutional common law").

32. *See* 42 U.S.C. § 1983 (Supp. IV 1980), *reproduced at* note 1 *supra*. Specifically, § 1983 refers only to the defendant subjecting the plaintiff, or causing the plaintiff to be subjected, to a constitutional violation.

33. 365 U.S. 167 (1961).

34. *Id.* at 187 ("[Section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.").

35. *Id.* at 180.

36. *See* notes 19, 20 *supra*.

37. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 699-701 (1976) (§ 1983 negligence liability would make fourteenth amendment a "font of tort law" to be superimposed over state systems); Bonner v. Coughlin, 545 F.2d 565, 566-67 (7th Cir. 1976) (en banc) (citing *Paul* with approval), *cert. denied*, 435 U.S. 932 (1978).

38. Because the Court in those cases typically found the constitutionally required state of mind to be absent, it did not have to decide whether an independent state-of-mind requirement stemmed from § 1983. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 279-80 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268-71 (1977). In other cases the Court found different reasons for concluding that no constitutional violations occurred. *E.g.*, Baker v. McCollan, 443 U.S. 137, 145-47 (1979) (wrongfully detained plaintiff not denied due process); Paul v. Davis, 424 U.S. 693, 711-14 (1976) (no deprivation of liberty or property resulting from defamatory publication circulated by police).

39. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

40. Personnel Adm'r v. Feeney, 442 U.S. 256, 276 (1979); Village of Arlington Heights

However, the Court avoided answering the negligence-section 1983 question[41] until *Parratt v. Taylor*.[42] *Parratt* involved a section 1983 suit for damages of $23.50 brought by a prison inmate against a warden and a hobby manager for their alleged negligence in causing the loss of certain hobby materials ordered by mail. The plaintiff alleged that the defendants deprived him of property without due process of law.[43] The district court granted the plaintiff's motion for summary judgment, holding that negligence can be a basis for a section 1983 action, and the Eighth Circuit affirmed in a per curiam order.[44]

The Supreme Court reversed in an opinion by Justice Rehnquist. The Court first noted, with considerable understatement, that its earlier decisions sidestepping the negligence-section 1983 question had

> not aided the various Courts of Appeals and District Courts in their struggle to determine the correct manner in which to analyze claims such as the present one which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts, but instead are couched in terms of a constitutional deprivation and relief is sought under § 1983.[45]

The Court next asserted that section 1983's language and legislative history do not limit its scope to coverage of intentional deprivations of constitutional rights; rather, the Court maintained that section 1983 does not contain an independent state-of-mind requirement for liability.[46] All that is required for the "initial inquiry" into section 1983 liability is: (1) whether the conduct complained of was under color of state law, and (2) whether that conduct deprived[47] a person of fourteenth amendment or federal statutory rights, privileges, or immunities.[48] Thus, the Court concluded

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v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

41. *See* Baker v. McCollan, 443 U.S. 137, 139-40 (1979); Procunier v. Navarette, 434 U.S. 555, 566 (1978). In *Baker* the Court commented briefly on the relationship between negligence and § 1983 by describing the question as "more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." 443 U.S. at 139-40. The Court further observed that even before this question is addressed, "it is necessary to isolate the precise constitutional violation with which [the defendant] is charged . . . . If there has been no such [violation], the state of mind of the defendant is wholly immaterial." *Id.* at 140. Finally, the Court asserted that a defendant's state of mind may be relevant to the very existence of a constitutional violation, quite apart from the § 1983 inquiry. *Id.* at 140 n.1.

42. 451 U.S. 527 (1981).

43. *Id.* at 529.

44. *Id.* at 529-30.

45. *Id.* at 533.

46. *Id.* at 534.

47. Insofar as this Article argues that § 1983 litigation requires the development of criteria of fourteenth amendment accountability, it thereby deals with the meaning of the word "deprive."

48. 451 U.S. at 535.

that negligent conduct could be a proper basis of liability in section 1983 cases.[49]

Nevertheless, the Court ruled against the plaintiff on the due process merits. The plaintiff's interest in his hobby materials was clearly a property interest under state law and, therefore, a property interest for due process purposes as well. In addition, his alleged loss, even though negligently caused, was a deprivation.[50] Still, due process was not violated because the State of Nebraska provided an adequate postdeprivation hearing in state court—a tort action against Nebraska that would fully compensate the plaintiff.[51] The plaintiff had not challenged an established state procedure under the state's control, but complained of negligent conduct, for which a predeprivation hearing would be impractical.[52]

The Court was clearly incorrect when it asserted that section 1983 has no state-of-mind requirement. A long line of Supreme Court decisions interpreting section 1983 and setting out the qualified immunity test for section 1983 liability definitely establishes that state of mind is relevant to section 1983 damages liability.[53] Perhaps Justice Rehnquist meant

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49. *Id.* at 532-35.

50. *Id.* at 536-37.

51. *Id.* at 543. Read narrowly, *Parratt*'s due process holding applies only to negligent deprivations of property. Read more broadly, however, the holding could apply to intentional deprivations of property and even to negligent and intentional deprivations of liberty as well. For example, a state official's deprivation of plaintiff's liberty interest would not give rise to a violation of the fourteenth amendment if *Parratt*'s due process holding were broadly interpreted, because a postdeprivation procedure might provide all the process due.

Thus, the broader the reading of *Parratt*'s due process holding, the narrower the scope of procedural and substantive due process and, consequently, the narrower the scope of § 1983. The concurring opinions of Justices Blackmun and Powell, however, indicate that the narrower reading of *Parratt*'s due process holding is what the Court intended. *Id.* at 545 (Blackmun, J., concurring), 553 (Powell, J., concurring). Further support for the narrow reading of *Parratt*'s due process holding is provided by Logan v. Zimmerman Brush Co., 102 S. Ct. 1148, 1157-58 (1982).

52. 451 U.S. at 537, 543.

53. *See* note 14 *supra*.

In a significant decision at the end of its 1981 Term, the Supreme Court modified the qualified immunity test in order to "permit the defeat of insubstantial claims without resort to trial." Harlow v. Fitzgerald, 102 S. Ct. 2727, 2737 (1982). *Harlow* involved causes of action for damages against White House aides to former President Nixon based on certain federal statutes and the first amendment. In ruling that these aides were protected only by qualified immunity, the Court went on to do away with what it called the subjective part of the test as derived from Wood v. Strickland, 420 U.S. 308, 320 (1975): acting "*with malicious intention* to cause a deprivation of constitutional rights or other injury." 102 S. Ct. at 2737 (quoting *Wood*, 420 U.S. at 321-22) (emphasis original in *Harlow*).

The Court first observed than an official's subjective good faith typically has been considered a disputed question of fact that should not be decided on motion for summary judgment. As a result, "substantial costs attend the litigation of the subjective good faith of government officials," including extensive judicial inquiries into subjective motivation that can be "peculiarly disruptive of effective government." *Id.* at 2738 (footnote omitted).

The Court then went on to say:

> [W]e conclude today that bare allegations of malice should not suffice to subject

that section 1983 itself does not require more than negligence for the prima facie cause of action. Even granting that, however, there are serious and difficult questions about the negligence-section 1983 relationship that remain even after *Parratt*.

As noted, *Parratt* involved a section 1983 due process claim premised on the alleged negligence of the warden and hobby manager in causing the loss of the plaintiff's hobby materials. The Court observed that the plaintiff never claimed that these defendants were personally involved in the handling of packages.[54] Also, there was no evidence in the record of negligence on their part.[55] According to the Court, the plaintiff's "basic allegation appears to be that subordinates of [the defendants] violated established procedures which, if properly followed, would have ensured the proper delivery of [the plaintiff's] packages."[56] This kind of allegation squarely raises the issue of *respondeat superior*, a basis of section 1983 liability expressly rejected by the Court in *Monell v. Department of Social Services*[57] several years earlier. Nevertheless, the Court in *Parratt* went on to emphasize that the defendants never argued that their negligence did not cause the loss of the plaintiff's property.[58] It then stated: "[W]e can only accept for purposes of this opinion the District Court's assumption that [the defendants] were negligent and that this negligence contributed to [the plaintiff's] loss."[59]

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government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold 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 would have known.

Id. at 2738 (citation omitted).

This change in the qualified immunity test, clearly intended to encompass § 1983 actions, *id* at 2738 n.30, may not be as radical as it initially appears. There may still be situations in which the defendant official's subjective state of mind, i.e., what he or she actually knew, is relevant to the now modified qualified immunity test. As Justices Brennan, Marshall, and Blackmun pointed out in their concurring opinion, the new standard "would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know." *Id.* at 2740 (Brennan, J., concurring) (emphasis original). They agreed, however, that such a subjective inquiry would only become relevant when the state of the law was sufficiently unambiguous at the time of the alleged violation that it could have been known.

Thus, even after *Harlow*, state of mind is relevant to § 1983 damages liability insofar as there is an inquiry into what the defendant actually knew or reasonably should have known as to the unconstitutionality of his or her conduct. However, this latter qualified immunity inquiry is "not constitutionally grounded [but is] essentially a matter of statutory construction" in § 1983 cases. Butz v. Economou, 438 U.S. 478, 497 (1978) (explaining Scheuer v. Rhodes, 416 U.S. 232 (1974)). *See generally* S. NAHMOD, *supra* note 14, § 8.01-.15.

54. 451 U.S. at 537 n.3.
55. *Id.*
56. *Id.*
57. 436 U.S. 658, 691 (1978).
58. 451 U.S. at 537 n.3.
59. *Id.*

Unfortunately, the Supreme Court's acceptance, without further analysis, of the assumption that the defendants were negligent and that their negligence caused the plaintiff's loss, undercuts much of *Parratt*'s value concerning the negligence-section 1983 relationship issue. Negligence, or unreasonable conduct, does not exist in the abstract: what exactly was it that the defendants in *Parratt* acted unreasonably with respect to? Was it their failure to supervise and prevent what happened? Was it their failure to adopt other procedures for handling packages? Also, what is the role of cause in fact?[60] To what extent must a negligent defendant "contribute to" the plaintiff's constitutional deprivation? Put another way, what is the relationship between negligent conduct and cause in fact, on the one hand, and the claimed constitutional deprivation, on the other?[61] All of these questions are important and should have been addressed by the Court in *Parratt*. The different ways the fact situation in *Parratt* can be analyzed have profound implications for the negligence-1983 relationship and the scope of section 1983 liability.

Suppose the defendants were not in fact personally involved in the handling of packages, but negligently failed to train their subordinates to use the proper package handling procedures. Assume further that the subordinates, acting under color of law, lost the plaintiff's package and that this somehow constituted a violation of due process on the part of the subordinates.[62] Is it enough for the defendants' section 1983 liability that they were negligent at common law because they unreasonably created the risk of losing property through the subordinates and that this negligence caused the resulting constitutional deprivation to the plaintiff at the hands of the subordinates?[63] Or, is the proper inquiry whether the defendants

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60. In the tort setting, for example, the two kinds of cause-in-fact tests used are "substantial factor" and "but-for." *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 238-41 (4th ed. 1971). Whatever the cause-in-fact test used, however, the requirement of a cause-in-fact relationship of some kind between a defendant's conduct and a plaintiff's injury is considered essential for individual responsibility. *Id.* at 236.

61. In negligence cases in which there is a negligent intervening actor, there still must be a duty and breach of duty by the primary defendant in order to render the latter liable for the negligence of the intervening actor. *See id.* § 44, at 274.

62. This assumption, of course, is inconsistent with the Court's holding in *Parratt* that no due process violation occurred. *See* text accompanying note 51 *supra*. It is nevertheless useful for purposes of analysis.

63. Imposing liability in such a situation is later referred to in this Article as the "causation interpretation" of § 1983. *See* text accompanying notes 73-79 *infra*. But compare the common-law tort liability of a primary defendant for negligently causing an intervening actor to act negligently and thereby injure the plaintiff. As to the latter, it has been said: "[T]he problem is not one of causation at all, since it does not arise until causation is established. It is rather one of the policy as to imposing legal responsibility." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 44, at 270 (4th ed. 1971).

The causation interpretation does *not* give rise to the same inquiry as the following: Must the defendants' negligence relate to the reasonably foreseeable deprivation by their subordinates of the plaintiff's constitutional rights? This latter inquiry clearly is not what the *Parratt* Court meant when it discussed negligence. More fundamentally, such an inquiry would inevitably blur the important distinctions between the § 1983 prima facie case and

themselves violated the constitutional rights of the plaintiff, it not being sufficient for the defendants' liability that they caused others—their subordinates—to do so?[64]

By way of further illustration, consider a fact situation based on *Roberts v. Williams*,[65] an earlier Fifth Circuit decision. In that case a prison guard shot a helpless and innocent prisoner.[66] Assume that the conduct and state of mind of the prison guard satisfied the Supreme Court's requirement for an eighth amendment violation—deliberate indifference to the prisoner's physical safety.[67] Consequently, the prison guard personally violated the prisoner's eighth amendment rights under color of law. Also, this eighth amendment violation caused actual damage to the plaintiff.[68] Inasmuch as *Parratt v. Taylor* indicates that even negligence may be actionable under section 1983, a prima facie section 1983 cause of action may be made out against the guard. Indeed, even before *Parratt* there would likely have been a prima facie cause of action, because the prison guard acted more than negligently: he acted recklessly.[69]

The difficulty arises when a further assumption is made that the prison guard's superintendent is properly charged with negligence in failing to train or supervise the guard in connection with the use of a deadly weapon. Is that negligence enough to render the superintendent liable under section 1983 because it brought about the violation of the prisoner's eighth amendment rights by the guard? Or, is it also necessary to inquire whether the superintendent himself violated the plaintiff's eighth amendment rights?

In *Parratt* the Court avoided these questions:[70] first, by assuming the

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the § 1983 qualified immunity—an affirmative defense—that quite properly focuses, in its objective part, on the question whether the defendant acted with the reasonable belief that his or her conduct was constitutional. *Cf.* Gomez v. Toledo, 446 U.S. 635, 641 (1980) (qualified immunity test requires objective and subjective belief). *See generally* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974).

64. Imposing liability only in this situation is later referred to as the "fourteenth amendment interpretation" of § 1983. *See* text accompanying notes 73-79 *infra*. This interpretation, insofar as it emphasizes policy and not causation, is analogous to the common-law tort liability of a primary defendant for negligently causing an intervening actor to act negligently and thereby injure the plaintiff. *See* note 63 *supra*.

65. 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971), *opinion modified in addendum*, 456 F.2d at 834 (1972).

66. *See id.* at 821.

67. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

68. That is, the eighth amendment violation caused compensable physical harm. *See* Carey v. Piphus, 435 U.S. 247, 257-58, 266 (1978) (actual harm must exist for compensatory damages in procedural due process cases; nominal damages allowed if no proof of actual injury).

69. *See* Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976) (en banc) (§ 1983 liability requires more than negligent conduct), *cert. denied*, 435 U.S. 932 (1978).

70. These questions do not, at first blush, address another important and frequently confusing aspect of the relationship between negligence and § 1983: the state-of-mind requirement of the particular constitutional provision implicated in a § 1983 case. While this aspect will emerge more fully later in this Article, for present purposes two observa-

existence of the defendants' negligence and a cause-in-fact relationship between that negligence and the plaintiff's constitutional deprivation;[71] and second, by deciding on the merits that the plaintiff's due process rights were not violated, even by the subordinates.[72] *Parratt* thus left considerable ambiguity in the scope of section 1983 liability.

A. Two Interpretations of the Section 1983 Prima Facie Case

Many of the continuing difficulties revolving around the negligence-section 1983 relationship stem from a failure to distinguish, for individual liability purposes, between those cases in which the section 1983 defendants brought about the violation of the plaintiff's constitutional rights by others—frequently their subordinates—and those cases in which the section 1983 defendants themselves violated the plaintiff's constitutional rights. As noted above, this distinction is ignored in *Parratt*. Moreover, the circuit courts overwhelmingly have taken the wrong position without addressing the issue.[73] Yet, the distinction is significant, as will be explained, in determining the scope of section 1983 liability.

For purposes of this analysis, the "causation interpretation" is that interpretation of section 1983 which imposes liability on a defendant who acted under color of law in bringing about the violation of a plaintiff's fourteenth amendment rights through another who also acted under color of law, even when the defendant did not personally violate the fourteenth amendment. The "fourteenth amendment interpretation" is that interpretation of section 1983 which imposes liability on a defendant who acted under color of law only when that defendant personally violated the plaintiff's fourteenth amendment rights. It is not sufficient under this interpretation that the defendant caused another, who also acted under color of law, to violate the plaintiff's fourteenth amendment rights.

The choice between the two interpretations becomes especially significant in the following fact situation. Suppose a defendant (*D*) does not possess the requisite state of mind for the constitutional violation but that state action is present. If *D*'s negligent conduct causes the intervening actor (*A*) to act unconstitutionally and thereby bring about the plaintiff's (*P*) constitutional deprivation, then it is unclear from *Parratt*, as demonstrated

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tions should be made. First, *Parratt v. Taylor* indicates that property interests can be negligently deprived, thereby triggering a due process inquiry. 451 U.S. at 536-37. Second, the Court asserted in Baker v. McCollan, 443 U.S. 137, 140 n.1 (1979), that the state-of-mind requirements for fourteenth amendment violations should be addressed *before* the § 1983 issues.

71. 451 U.S. at 536-37.

72. Plaintiff's due process rights apparently were not violated even by the subordinates who lost the hobby materials because it appears to have been assumed that their conduct, like that of their superiors, also was only negligent. A postdeprivation hearing in state court would fully compensate the plaintiff. *See* note 51 *supra* and accompanying text.

73. *See* text accompanying notes 80-101 *infra*.

earlier, whether a section 1983 cause of action is set out against *D*. What demands consideration is whether, for section 1983 individual liability purposes, *D* must personally violate the constitution as well as cause *P*'s constitutional deprivation through *A*'s intervening unconstitutional conduct. Under the causation interpretation, the answer is no; under the fourteenth amendment interpretation, the answer is yes.[74]

To put the matter another way: the real question is whether Congress *intended* to impose liability on *D* solely for *D*'s negligence and its cause-in-fact relationship through *A*'s unconstitutional conduct to *P*'s constitutional deprivation.[75] If so, then section 1983 does more than create

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74. In contrast, the distinction between the causation and fourteenth amendment interpretation does not lead to different results in the following kinds of fact situations:

(1) P *v.* D; *no intervening actor* A

If *D* does not possess the requisite state of mind for the alleged constitutional violation, then even if state action is present and *D*'s negligent conduct caused harm to *P*, no § 1983 cause of action is stated because no constitutional violation occurred. Here, the harm to *P* is not a constitutional deprivation because *D*'s conduct is not unconstitutional. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (requisite "deliberate indifference" for eighth amendment violation not present). Thus, the distinction between the two interpretations is irrelevant; the result is the same under either.

(2) P *v.* D; *no intervening actor* A

If *D* possesses the requisite state of mind for the alleged constitutional violation, if state action is present, and if *D*'s negligent conduct caused a constitutional deprivation to *P*, then a § 1983 cause of action is stated, and no additional state-of-mind requirement is imposed by § 1983. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961) (intent satisfied fourth amendment requirement). Note here that *D*'s challenged conduct is itself both unconstitutional and the cause of *P*'s injury. Consequently, the inquiries under both interpretations are collapsed and the result is the same under either.

(3) P *v.* D; *no intervening actor* A

If *D* possesses the requisite state of mind for the constitutional violation, and if state action is present, but *D*'s negligent conduct did not cause a constitutional deprivation to *P*, then no § 1983 cause of action is stated. *See* Parratt v. Taylor, 451 U.S. 527, 543 (1981) (negligence sufficient for deprivation of property, but due process not violated because state remedy available). Here, the distinction between the two interpretations is irrelevant and, as in (1), no cause of action is stated under either.

(4) P *v.* D; *intervening actor* A

If *D* possesses the requisite state of mind for the constitutional violation, if state action is present, and if *D*'s negligent conduct causes intervening actor *A* to act unconstitutionally and thereby bring about *P*'s constitutional deprivation, then a § 1983 cause of action is stated. *D* both violated the constitution and, through *A*, caused the constitutional deprivation to *P*. *See* Roberts v. Williams, 456 F.2d 819, 823 (5th Cir.) (deliberate indifference required and present as to *D*; recklessness required and present as to *A*), *cert. denied*, 404 U.S. 866 (1971), *opinion modified in addendum*, 456 F.2d 819, 834 (1972). Thus, under either interpretation the result is the same.

75. This question correctly assumes that Congress has the power under § 5 of the fourteenth amendment to impose liability on *D* in this kind of case. That Congress has this power is implicit in the *Monell* Court's discussion of *respondeat superior* liability. There was never any suggestion that Congress could not constitutionally impose *respondeat superior* liability for fourteenth amendment violations. *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (§ 5 of the fourteenth amendment grants same broad powers as the "Necessary and Proper Clause" of article 1, § 8).

a fourteenth amendment action for damages. Under the causation interpretation, a defendant would have a legal duty, imposed by section 1983, to refrain from negligently allowing others to infringe on a plaintiff's constitutional rights. The breach of this section 1983 duty would constitute a section 1983 cause of action, notwithstanding the lack of unconstitutional conduct by the defendant. Furthermore, under this approach, courts interpreting section 1983 might feel free to use tort concepts, such as compensation and loss spreading, as important factors in determining the scope of section 1983 liability.[76] The "background of tort liability"[77] would take on new significance.

Conversely, if Congress did not intend to impose such liability on *D*, then courts interpreting section 1983 would be limited to determining whether *D* personally violated the fourteenth amendment.[78] Tort concepts of compensation and loss spreading would not be determinative factors in establishing the scope of individual liability in such a case. Under this fourteenth amendment interpretation, liability under section 1983 for constitutional violations would primarily further an enforcement or regulation-of-conduct function.[79] It is the position of this Article that the fourteenth amendment interpretation is the better one.

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76. By compensation, this Article means simply the shifting of the loss from the injured person to make him or her whole. *See* note 79 *infra*. By loss spreading, this Article means the shifting of the loss from the injured person to another or to a group better able to bear or spread the loss.

77. Monroe v. Pape, 365 U.S. at 187.

78. Compare, as set out in S. NAHMOD, *supra* note 14, § 6.07, at 184-85, the interesting but short-lived development in the circuits of an implied cause of action for damages under the fourteenth amendment based on Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389 (1971) (implied cause of action for damages against federal officials under fourth amendment).

The Court has not as yet, in a *Bivens* setting involving *federal* officials, addressed the § 1983 issues analyzed here. However, it follows from the position of this Article that the judicial approach to such issues should be the same with respect to the need to focus on developing criteria of constitutional accountability.

79. It is not suggested that regulation of conduct and compensation are mutually exclusive functions of either tort or § 1983 liability. Frequently, both functions are furthered in a particular case by a damage award. However, the primary function of § 1983, "[a]n Act to enforce the provisions of the Fourteenth Amendment," 17 Stat. 13 (1871), is the regulation of official conduct pursuant to fourteenth amendment standards. The liability made possible by § 1983 for fourteenth amendment violations is essentially designed to encourage official conduct that complies with the fourteenth amendment, even though it also compensates.

This view is not inconsistent with Carey v. Piphus, 435 U.S. 247 (1978), which spoke of the importance of compensating persons for injuries caused by the deprivation of their constitutional rights. *Id.* at 254. For one thing, the Court also spoke of deterrence. *Id.* at 256. For another, *Carey* dealt with the question of the proper *damages* rule to be applied only *after* a constitutional violation has been found. *Id.* at 265. Nothing in *Carey* indicates that compensation is significant in determining the *existence* of a constitutional violation. *But cf.* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122-24 (1978) (taking versus regulation and "just compensation" under the fifth amendment).

B. The View in the Circuits

The choice between the two interpretations is also significant because a close reading of recent circuit court decisions involving an intervening actor *A* acting under color of law demonstrates that the causation interpretation predominates. However, no circuit court has meaningfully addressed its use of this interpretation; perhaps the courts are not aware that a choice between the causation and fourteenth amendment interpretations exists.[80]

In *Furtado v. Bishop*[81] the First Circuit affirmed a jury verdict against the defendants for the plaintiff-prisoners' wrongful segregated confinement.[82] The defendants were two prison guards and a deputy superintendent who made false reports and recommendations that led to the plaintiffs' wrongful confinement.[83] Even though the prison superintendent and commissioner of correction were actually the ones to advocate and order the transfer, the court emphasized that the defendants "foresaw and helped bring about the transfers to segregation."[84] The court did not inquire, however, whether the defendants themselves violated the plaintiffs' constitutional rights.

Similarly, the Fourth Circuit in *Davis v. Zahradnick*[85] did not ask whether the defendant-warden himself violated the plaintiff's constitutional rights when the warden allegedly failed to control his subordinates. That failure led to an assault against the plaintiff-inmate by a fellow inmate while a prison guard watched and also led to the subsequent denial by that guard of adequate and prompt medical care.[86] Reversing the district court's grant of summary judgment in favor of the defendant-warden, the court focused on the warden's breach of duty to supervise and control and the cause-in-fact relation between that breach and the plaintiff's injury.[87]

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80. The Fifth Circuit in Roberts v. Williams, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971), *opinion modified in addendum*, 456 F.2d at 834 (1972), implicitly followed the fourteenth amendment interpretation. *See* text accompanying notes 98-101 *infra*. However, most other circuit court decisions have implicitly followed the causation approach. *See* text accompanying notes 81-94 *infra*.

This absence of judicial awareness of a possible choice between interpretations might result in part from the concern with the propriety of negligence as a basis of § 1983 liability. Once the true issue of the scope of individual accountability under § 1983 is recognized for what it is—a fourteenth amendment inquiry with respect to the prima facie case—and is not obscured by negligence rhetoric, then meaningful analysis becomes possible.

81. 604 F.2d 80 (1st Cir. 1979).

82. *Id.* at 89.

83. *Id.* at 85-86.

84. *Id.* at 89.

85. 600 F.2d 458 (4th Cir. 1979). However, in Withers v. Levine, 615 F.2d 158 (4th Cir. 1980), the Fourth Circuit may have implicitly adopted the fourteenth amendment interpretation. *See* text accompanying notes 96-97 *infra*.

86. 600 F.2d at 459.

87. The court stated: "By alleging and swearing that warden Zahradnick had neglected his duty to supervise and control the prison guards, Davis proceeded upon a proper theory of § 1983 liability . . . ." *Id.* at 459 n.1.

Another example of a circuit court's use of the causation interpretation is *Wanger v. Bonner*.[88] In that case the Fifth Circuit, without addressing the constitutionality of a sheriff's affirmative policies regarding the manner in which arrest warrants were to be served, upheld a jury verdict against the sheriff. The affirmative policies caused the deputies to violate the plaintiff's fourth amendment rights. Putting the matter in terms of "personal involvement," the court declared that a section 1983 plaintiff "must establish a causal connection between an act of the supervisory official and the alleged constitutional violation."[89]

The Ninth Circuit did the same in *Johnson v. Duffy*,[90] which involved a sheriff's section 1983 liability for the allegedly unconstitutional conduct of a subordinate who took away the plaintiff-inmate's accumulated work earnings in violation of due process. The court held that the sheriff's failure to act, in violation of state statutory duties imposed on him, could serve as the basis of section 1983 liability.[91] The court asserted, emphasizing section 1983's "subjects" language, that

> [a] person "subjects" another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.[92]

The court did not inquire whether the sheriff's conduct itself was unconstitutional.

Still another example of the causation approach, this time from the Tenth Circuit, is *McClelland v. Facteau*.[93] Reversing the district court's grant of summary judgment in favor of the defendant-supervisory police officials, the court held that there was a genuine issue of fact regarding breach of the defendants' duty to correct misconduct of which they had notice. The court of appeals read section 1983's "subjects, or causes to be subjected to" language as being "broader than direct personal involvement; it includes failure to perform a duty if that failure causes deprivation of protected rights."[94] In its discussion of the defendants' standard of care, the Tenth Circuit declared the standard to be one of reasonableness.[95]

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88. 621 F.2d 675 (5th Cir. 1980); *cf.* Baskin v. Parker, 602 F.2d 1205, 1208 (5th Cir. 1979) (sheriff issued warrant but did not participate in the search; remanded to determine presence of a § 1983 violation). *But see* Vasquez v. Snow, 616 F.2d 217, 220 (5th Cir. 1980) (sheriff not liable for deputies' violations because no breach of duty by sheriff).

89. 621 F.2d at 679.

90. 588 F.2d 740 (9th Cir. 1978).

91. *Id.* at 744.

92. *Id.* at 743.

93. 610 F.2d 693 (10th Cir. 1979). In Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979), the Tenth Circuit may have implicitly adopted the fourteenth amendment approach. However, *Clappier* did not involve an intervening actor acting under color of law. Instead, the intervening actor was a fellow prisoner.

94. 610 F.2d at 696.

95. *Id.* at 697.

However, the court did not inquire whether the defendants' failure to correct misconduct was itself violative of the plaintiff's constitutional rights.

The above circuit court decisions thus adopt the causation interpretation; the cases all found the defendants subject to liability without specifically finding that they acted unconstitutionally. Note, however, that these decisions all involved an intervening actor who, under color of law, violated the plaintiff's constitutional rights. Although there are several recent circuit court decisions that appear, in contrast, to adopt the fourteenth amendment interpretation, on close examination these cases do not deal with the precise issue addressed in this Article. They do not involve an intervening actor acting under color of law. *Withers v. Levine*,[96] for example, involved an inmate complaint against prison officials for their failure to devise procedures to protect inmates from sexual assaults by other prisoners. The Fourth Circuit took the position that the officials would be liable only if the officials themselves violated the prisoners' constitutional rights.[97] However, the intervening actors who caused harm to the plaintiff in this case were prisoners who likely were not acting under color of law. Therefore, under either the causation interpretation or the fourteenth amendment interpretation, the prison officials would have to violate the constitution before a prima facie section 1983 case could be made out.

As of this writing, only *Roberts v. Williams*,[98] a Fifth Circuit decision in which there was an intervening actor acting under color of law, has adopted the fourteenth amendment interpretation. In that case the plaintiff-inmate sued a prison superintendent for injuries resulting from the accidental shooting of the plaintiff by an improperly selected and trained guard.[99] The court assumed, without discussion, that the superintendent's liability depended on his own violation of the eighth amendment. The court concluded that the continuing maintenance by the superintendent of a condition hazardous to the plaintiff constituted an eighth amendment violation.[100] Without ever addressing the issue of concern in this Article, however, the Fifth Circuit subsequently withdrew the eighth amendment violation portion of the opinion.[101]

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96. 615 F.2d 158 (4th Cir. 1980). *See also* Clappier v. Flynn, 605 F.2d 519, 522-23 (10th Cir. 1979) (intervening actor was fellow prisoner).

97. 615 F.2d at 162-63.

98. 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971), *opinion modified in addendum*, 456 F.2d at 834 (1972); *see* text accompanying notes 65-69 *supra*.

99. 456 F.2d at 821.

100. *Id.* at 827-28. Also at issue in *Roberts* was the § 1983 liability of the individual members of the county's board of supervisors for their alleged "gross nonfeasance" in not establishing regulations regarding convict safety and in acquiescing in the practices of the defendant-superintendent. The Fifth Circuit did not make entirely clear whether its focus was on the supervisors' fourteenth amendment duty or on their state law duty. In any event, the court affirmed the district court's finding of no liability for the supervisors, in part because there was no cause-in-fact relationship between what they did or did not do and the plaintiff's harm. *Id.* at 831.

101. *Id.* at 834-35. In an addendum that modified its earlier opinion on the eighth

As demonstrated, the choice of interpretation can affect whether a defendant is liable under section 1983. It is thus vitally important to determine which interpretation—fourteenth amendment or causation—is appropriate. The next section argues that the fourteenth amendment interpretation is the correct choice.

II. STATUTORY INTERPRETATION, SECTION 1983 PURPOSES, AND LOCAL GOVERNMENT LIABILITY: HEREIN OF FOURTEENTH AMENDMENT DUTIES

On its face, section 1983 is silent regarding any state-of-mind requirement. All that section 1983 requires is that *D* subject *P*, or cause *P* to be subjected, to a deprivation under color of law of *P*'s constitutional or federal statutory rights, privileges, or immunities.[102] This causation language is significant for two reasons. First, because section 1983 is interpreted against a background of tort liability,[103] concurrent causation is sufficient for section 1983 liability.[104] *D*'s conduct, not surprisingly, need not be a sole cause. Second, and more important for present purposes, it is in the *active* voice that *D* "subjects" *P* to a constitutional or statutory deprivation, while it is in the *passive* voice that *P* is "subjected" to a constitutional or statutory deprivation by *D*.[105] This choice of language could not have been accidental, for it covers situations in which *D*'s conduct brings about *P*'s constitutional or statutory deprivation through an intervening actor.

However, even if this reading of section 1983 is correct, it is still only the beginning of the inquiry. For, as stated earlier in connection with choosing between interpretations, the harder issue of statutory interpretation relates to whether the challenged conduct of *D* must itself be violative of the fourteenth amendment, or if it is sufficient that *D* negligently caused *A* to bring about *P*'s constitutional deprivation.[106] The position of this Article, as elaborated in the following sections, is that a defendant must personally violate the fourteenth amendment as a condition precedent to section 1983 liability. Under this fourteenth amendment interpretation, the challenged conduct of *D* must itself violate the fourteenth amendment as well as cause *P*'s constitutional deprivation. This is what section 1983 means when it speaks of *D*'s subjecting *P* to a constitutional deprivation.

It is in connection with fourteenth amendment violations that state

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amendment issue, the court based its decision on the supervisor's liability under Mississippi law as applied through pendent jurisdiction. The court's concern apparently was with the broad reach of its earlier eighth amendment approach.

102. *See* note 1 *supra*.

103. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961).

104. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (private citizens are liable under § 1983 if they acted in concert with state employee).

105. *See* note 1 *supra*.

106. *See* text accompanying notes 62-64 *supra*.

of mind becomes relevant to the section 1983 prima facie case. Different fourteenth amendment obligations or duties, when breached, give rise to section 1983 causes of action. These duties require separate inquiries into the actor's state of mind. "Deliberate indifference" is necessary for an eighth amendment cruel and unusual punishment violation,[107] for example, and an equal protection violation requires a discriminatory purpose or intent.[108] Section 1983 thus does not have its own state-of-mind requirement for the prima facie case; the requisite state of mind depends on the constitutional violation alleged.[109]

A. Requirements for the Section 1983 Prima Facie Case

1. The Fourteenth Amendment Interpretation

An examination of section 1983's language, legislative history, and purposes indicates that the challenged conduct of the defendant must itself be violative of the fourteenth amendment. At the outset, section 1983's causation language, on its face, admittedly does not require that *D* must personally violate *P*'s constitutional rights. This causation language, however, is at least not inconsistent with the fourteenth amendment interpretation.

Also, while the legislative history of section 1983 does not specifically address this issue, there are some indications that, as a condition precedent to section 1983 liability, a defendant must personally violate the fourteenth amendment. For example, section 1983 is described as a statute that "reenact[s] the Constitution,"[110] thus suggesting that section 1983 in effect creates a fourteenth amendment cause of action for

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107. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

108. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 276 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

109. As discussed at text accompanying notes 39-40 *supra*, state of mind is similarly relevant to the violation of certain constitutional provisions by local government bodies. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 242-45 (1976). Yet, proving the requisite purposeful discrimination by local government bodies is frequently not an easy matter because it is people who have states of mind, not local government bodies. This Article proposes that the official policy or custom requirement of Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978), for local government liability under § 1983 is an approach to local government accountability for constitutional violations that is comparable to the fourteenth amendment approach to individual accountability for constitutional violations. *See* text accompanying notes 145-74 *infra*.

For a very different view of the § 1983-fourteenth amendment relationship issue, see Cox, *Constitutional Duty and Section 1983: A Response*, 15 VAL. U.L. REV. 453 (1981) (response to S. NAHMOD, *supra* note 14). *Cf.* Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 475-82 (1982) (discussion of constitutional deprivations caused by an employee).

110. CONG. GLOBE, 42d Cong., 1st Sess. 569 (1871) ("[Section 1983 is] really reenacting the Constitution") (remarks of Sen. Edmunds).

damages.[111] In addition, Representative Bingham, the author of section 1 of the fourteenth amendment, stated that "[section 1983's purpose is] the enforcement of the Constitution on behalf of . . . every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution."[112] Similarly, Senator Thurman, a critic of section 1983, said that "[i]t authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the *wrong-doer* in the Federal courts . . . ."[113]

Moreover, negligence liability was the predominant basis of liability at that time;[114] yet, section 1983 does not use the word "negligence." This might suggest that section 1983 liability, as it relates to the prima facie case, does not depend on negligence at all. In this regard, recall Justice Douglas' description in *Monroe v. Pape* of the purposes of section 1983 as focusing on fourteenth amendment violations occurring through "neglect, intolerance or *otherwise*."[115] Also, the Court's insistence in *Parratt v. Taylor* that section 1983 independently imposes no state-of-mind requirement now makes sense.[116] That is, the true import of *Parratt* is *not* that negligence may be actionable under section 1983. Rather, negligence does not matter for the section 1983 prima facie case, although it may be relevant to the possible existence of a procedural due process violation, as in *Parratt*. What is important is the defendant's own violation of the fourteenth amendment.

Furthermore, and most important in light of the absence of legislative history on point, section 1983 purposes are furthered in a straightforward way by the fourteenth amendment interpretation. The enforcement of the fourteenth amendment is the primary purpose of section 1983, as declared by the very title of section 1983.[117] Holding *D* liable for his or her breach of fourteenth amendment duty to *P* through the conduct of another furthers that purpose admirably. Also, to the extent it may be important, the compensation function of section 1983 is advanced.[118]

The fourteenth amendment interpretation is also supported by the

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111. *See* text accompanying notes 117-34 *infra*. *See also* note 78 *supra*.

112. CONG. GLOBE, 42d Cong., 1st Sess. app. at 81 (remarks of Rep. Bingham).

113. CONG. GLOBE, 42d Cong., 1st Sess. app. at 216 (emphasis added) (remarks of Sen. Thurman).

114. *See generally* T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE (1869).

115. 365 U.S. at 180 (emphasis added).

116. *See* text accompanying note 46 *supra*.

117. "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13 (1871).

118. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981) (§ 1983 damages have purposes of deterrence and compensation); Carey v. Piphus, 435 U.S. 247, 255-56 (1978) (§ 1983 damages designed to compensate persons for injuries caused by deprivation of constitutional rights). *See also* note 79 *supra*.

Supreme Court's assertion in *Chapman v. Houston Welfare Rights Organization*[119] that section 1983 creates no new substantive rights:

> [Section 1983] did not provide for any substantive rights—equal or otherwise. As introduced and enacted, it served only to ensure that an individual had a cause of action for violations of the [fourteenth amendment to the Constitution]. . . . No matter how broad the [section 1983] cause of action may be, the breadth of its coverage does not alter its procedural character. . . . [Section] 1983 by itself does not protect anyone against anything.[120]

Because section 1983 creates no new substantive rights, but rather enforces the fourteenth amendment, the defendant must personally violate the Constitution to be liable under section 1983.

This interpretation explains the Court's approach in several important cases. *Monell*'s rejection of *respondeat superior* liability[121] means that while Congress might have based an individual's section 1983 liability on *respondeat superior*, thereby going beyond fourteenth amendment duty, it did not do so.[122] In *Rizzo v. Goode*[123] injunctive relief was sought against the defendant-supervisory police officers. However, the Court insisted that the defendants must have done something affirmative in order to be liable; this insistence is consistent with a fourteenth amendment interpretation.[124] The *Rizzo* Court held, in substance, that breach of a fourteenth amendment duty requires some kind of personal involvement as a condition precedent to section 1983 liability. Indeed, the *Rizzo* Court rejected the plaintiffs' proposed analogy to school desegregation cases as the basis for a constitutional duty to act affirmatively on the ground that, in those cases, the school officials themselves violated constitutional rights.[125] This, too, reflects a fourteenth amendment interpretation.

Baker v. McCollan[126] is also properly understood as a fourteenth amendment accountability or duty case. *Baker* involved a section 1983 complaint against a county sheriff in connection with the plaintiff's detention after being arrested pursuant to a valid warrant. The plaintiff had protested

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119. 441 U.S. 600 (1979).

120. *Id.* at 617.

121. 436 U.S. 658, 691 (1978).

122. Likewise, while Congress could have rendered a local government body liable for unconstitutional acts of its employees—again, *respondeat superior*—it did not do so. Rather, Congress insisted that the § 1983 liability of a local government be based on an official policy or custom that itself violates the fourteenth amendment when implemented by local government employees. *See* text accompanying note 148 *infra*.

123. 423 U.S. 362 (1976).

124. *Id.* at 375-77. Some of the Court's language in *Rizzo* may be read as speaking of a requirement of affirmative conduct derived from § 1983 itself. *E.g., id.* at 376. Still, the better reading is that the Court's analysis and conclusion ultimately were based on the fourteenth amendment.

125. *Id.* at 376-77.

126. 443 U.S. 137 (1979).

repeatedly, and correctly, that a mistake in identity had been made.[127] The Court ultimately held that the plaintiff's liberty interest had not been deprived in violation of due process.[128] More to the fourteenth amendment accountability or duty point, however, the Court stated: "[A] sheriff executing an arrest warrant is [not] required by the Constitution to investigate independently every claim of innocence. . . . Nor is the official charged with maintaining custody of the accused named in the warrant required . . . to perform an error-free investigation of such a claim."[129]

In *Monell, Rizzo*, and *Baker* the Court was in effect saying that the defendant must have some sort of personal involvement in the constitutional violation in order to be accountable under section 1983. Although different fourteenth amendment duties require different degrees of personal involvement for their breach or violation, all fourteenth amendment duties nevertheless require at least some personal involvement. To put the matter differently, the fourteenth amendment is *relational*; it creates duties for government employees and rights for individuals.[130] Before a section 1983 prima facie case based on a fourteenth amendment violation can be made out against an individual *D*, the precise legal relationship between *P* and *D*—specifically, *D*'s constitutional duty to *P*—must be established, and a breach of that duty must be shown. In this sense, there is no such thing as a fourteenth amendment violation "in the air."[131] Because the source of this legal relationship is the fourteenth amendment itself, section 1983 is merely the implementation statute that imposes liability for damages, with that liability being delimited by the various absolute and qualified immunity rules.

The fourteenth amendment interpretation, therefore, is analytically the correct choice. Insofar as there may be some unfairness to individual defendants because the fourteenth amendment conceivably may be violated without "fault"—for example, if not even negligence is required for a particular constitutional violation[132]—then that unfairness is ameliorated through the qualified immunity test. This test is designed as a matter of

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127. *Id.* at 141.

128. *Id.* at 145.

129. *Id.* at 145-46.

130. Compare Justice Brennan's analysis of fourteenth amendment rights "secured by the Constitution," and private interference therewith, in United States v. Guest, 383 U.S. 745, 777 (1966). In effect, Justice Brennan argued that there is a fourteenth amendment right-duty relationship between governments and individuals with respect to the use of certain public facilities and that Congress can protect this relationship by making any private interference with it a crime. *Id.* at 782.

131. *Cf.* Palsgraf v. Long Island R.R., 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928) (unreasonable conduct not actionable unless there is a duty to use reasonable care running from the defendant to the injured plaintiff).

132. As of this writing, the Court has not held, *in a § 1983 setting*, that the fourteenth amendment may be violated through a person's nonnegligent conduct. *Cf.* Parratt v. Taylor, 451 U.S. 527, 536-37 (1981) (negligent deprivation of property may violate due process clause).

section 1983 policy to accommodate the tensions between the vindication of fourteenth amendment rights and the need of government employees to act without undue fear of personal liability.[133] In addition, the fourteenth amendment interpretation retains the important differences beween the prima facie section 1983 cause of action and qualified immunity.[134] These differences and the importance of retaining them are explored in the next section, in connection with the causation interpretation.

2. *The Causation Interpretation*

The causation interpretation, it must be conceded, is not inconsistent with the "subjects, or causes to be subjected" language of section 1983. Also, the causation interpretation would clearly further compensation and loss-spreading functions, if those were functions of section 1983. Nevertheless, there are sound reasons for rejecting the causation interpretation.

First, this interpretation inevitably tends to confuse the section 1983 prima facie case with the qualified immunity test. The causation interpretation, with a common-law negligence component, would require an inquiry into the reasonableness of the defendant's conduct, first by the court and then by the jury. At the very least, this would create difficulty because the court and the jury thereafter would also have to inquire into the reasonableness of the defendant's conduct from a qualified immunity perspective. This latter inquiry focuses in part on the constitutional validity of the defendant's conduct: whether the defendant had an objectively reasonable belief that his conduct was lawful. It is seriously questionable whether the differences between a reasonableness inquiry for negligence purposes and an objectively reasonable belief inquiry for immunity could be applied effectively in the litigation process. Further, the same difficulty arises in connection with the relevant burdens of pleading and proof.[135] The plaintiff would be required to plead and prove unreasonableness with respect to the negligence inquiry, while the defendant would have to plead

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133. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967) ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."). *See also* note 53 *supra.*

134. *See* note 53 *supra.* Not only are the elements of the prima facie § 1983 cause of action different from those of the qualified immunity test, but the burdens of pleading and proof are on different parties. *See* Gomez v. Toledo, 446 U.S. 635 (1980). In *Gomez* the Court explained that the plaintiff must allege and prove deprivation of a constitutional right, *id.* at 640, and that the defendant has the burden of pleading qualified immunity as an affirmative defense. *Id.* at 640-41. While the Court did not have to reach the burden of proof issue on qualified immunity, its reasoning in *Gomez* indicates that the defendant has this burden as well. *See* DeVasto v. Faherty, 658 F.2d 859, 865 (1st Cir. 1981).

135. *See* note 63 *supra; cf.* Gomez v. Toledo, 446 U.S. 635, 640-41 (1980) (plaintiff must prove constitutional violation; defendant must prove qualified immunity); Gullatte v. Potts, 654 F.2d 1007, 1014-15 (5th Cir. 1981) (courts confused over qualified immunity).

and prove an objectively reasonable belief with respect to the immunity inquiry.

Second, the causation interpretation would make *D*'s liability to *P* depend not on *D*'s violation of the fourteenth amendment, but on either his state common-law negligence with respect to the supervision of *A*, or his breach of state statutory duty to supervise or control *A*.[136] However, this would make section 1983 liability depend on state law in one form or another, contrary to statements by the Supreme Court that the prima facie case and the qualified immunity test are matters of federal law.[137] Only with regard to statutes of limitations, survival, and wrongful death is state law applicable.[138] This is because 42 U.S.C. section 1988 requires state law to govern only in the absence of applicable federal law.[139] Even if common-law negligence were considered a kind of federal common law and not the common law of the forum state, the statutory duty component of the causation interpretation would still focus explicitly and improperly on the forum state's statutory law.[140]

Third, there is no principled basis under the causation approach for stopping with *D*'s negligence; cause in fact alone would appear to be sufficient under the language of section 1983. Yet, that would raise very troublesome questions about the scope of section 1983. Section 1983 liability for *D*'s non-negligent conduct would take the causation approach, the section 1983 prima facie case, and section 1983's cause-in-fact language as

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136. A good example of a breach of state statutory duty, with liability being based on the causation interpretation, is Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978); *see* text accompanying notes 90-92 *supra*.

137. *E.g.*, Carey v. Piphus, 435 U.S. 247, 258 (1978) (state common-law damage rules not determinative of § 1983 damage rules); Scheuer v. Rhodes, 416 U.S. 232, 248 (1974) (state absolute immunity rule for chief executives not determinative of applicable § 1983 immunity rule).

138. Board of Regents v. Tomanio, 446 U.S. 478, 492 (1980) (state's statute of limitations and tolling law apply to § 1983 actions); Robertson v. Wegmann, 436 U.S. 584, 594 (1978) (state survivorship statute applies to § 1983 actions).

139. Section 1988 provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts . . . for the protection of all persons in the United States in their civil rights . . . shall be exercised and enforced in conformity with the laws of the United States, . . . but in all cases where they are . . . deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

42 U.S.C. § 1988 (1976).

140. *See* note 136 *supra; see also* Douthit v. Jones, 641 F.2d 345, 357 (5th Cir. 1981) (per curiam) (applies Texas statutory law regarding sheriffs to impose duty); Dimarzo v. Cahill, 575 F.2d 15, 17 (1st Cir.) (applies Massachusetts statutory law regarding correctional facilities to impose duty), *cert. denied*, 439 U.S. 927 (1978).

far as they can possibly go. Such an approach to liability would attempt to focus on cause in fact, but, because of inevitable line drawing problems, it would tend to overload or overextend the cause-in-fact inquiry—one that should be straightforward and not very complex—with difficult issues of section 1983 policy.[141] Courts might determine the scope of liability through a vague section 1983 policy analysis and thereafter draw the cause-in-fact line around the already determined liability. In such cases liability would be determined not by the actor's negligence or cause in fact, but by the court's ad hoc determination of where the liability should lie.

Also, when *D* non-negligently causes *A* to violate *P*'s constitutional rights, the causation interpretation amounts to a form of strict liability. It is true that section 1983 on its face does not require negligence. However, while Justice Douglas in *Monroe v. Pape* spoke of there being no specific intent requirement for section 1983 liability, that language does not necessarily and inevitably include liability even for non-negligent conduct.[142] Moreover, Justice Douglas' description of the background of tort liability, as comprehending individual responsibility for the natural consequences of one's actions, seems to require something more than mere cause in fact.[143]

Language in Supreme Court decisions requiring personal involvement for individual liability in section 1983 cases further undercuts the causation interpretation as applied to non-negligent conduct.[144] This personal involvement requirement, as discussed next, has its analogue in *Monell*'s official policy or custom requirement for local government liability and *Monell*'s corresponding rejection of *respondeat superior* liability for individuals and local governments. It is not enough for local government liability that an employee violate *P*'s constitutional rights; such a violation must implement an official policy or custom. Cause in fact is therefore *not* synonymous with personal involvement. If it were, the fact of employment alone would satisfy the requirement of personal involvement. In other words, cause in fact is necessary for a finding of personal involvement, but it is not sufficient.

B. Individual Accountability Analogized to Local Government Accountability

The fourteenth amendment interpretation is preferable to the causation interpretation for yet another important reason. Unlike the fourteenth amendment interpretation, the causation interpretation is fundamentally inconsistent with the proper approach to local government accountability

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141. *Cf.* Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 72-75 (1956) (same point made about cause in fact and tort liability).

142. 365 U.S. at 187.

143. *Id.*

144. Rizzo v. Goode, 423 U.S. 362 (1976), *discussed at* text accompanying notes 123-25 *supra*, is a good example.

under section 1983. The Supreme Court's discussions in *Monell*,[145] *Owen v. City of Independence*,[146] and, most recently, *Polk County v. Dodson*,[147] of section 1983's legislative history and purposes in connection with local government liability, demonstrate convincingly that such liability depends on the unconstitutional conduct of the local government itself—i.e., the official policy or custom must be unconstitutional either on its face or as applied—and not solely on the cause-in-fact relationship between an official policy or custom and the plaintiff's constitutional deprivation.[148]

In *Monell* the Court held that local government bodies may be liable for the fourteenth amendment violations of their employees "when [the] execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury."[149] *Respondeat superior* liability was expressly rejected by the Court. Throughout the Court's consideration of section 1983's legislative history, references were made to the liability of municipalities for *their* violation of the Constitution;[150] to holding a municipality liable for "its own violations of the Fourteenth Amendment";[151] to official policy as the "moving force of the constitutional violation";[152] and to the proposition that municipalities must be discouraged from violating "constitutional rights indefinitely."[153] In a concurrence, Justice Powell spoke of formal written policies that conflict with due process.[154] He asserted that just as an individual is liable under section 1983 when the individual's actions violate constitutional rights, so too is a local government liable when implementation of its official policies or established customs inflicts the constitutional injury.[155]

Similar references to local government liability appear in the Court's opinion in *Owen v. City of Independence*,[156] which held that local govern-

145. 436 U.S. 658 (1978).

146. 445 U.S. 622 (1980).

147. 102 S. Ct. 445 (1981).

148. This Article later argues that the official policy or custom requirement is essentially a fourteenth amendment duty inquiry. Elsewhere, this author has argued that *Monell*'s emphasis on cause in fact obscures this important duty issue, S. NAHMOD, *supra* note 14, § 6.06, at 177-80, and has collected numerous official policy or custom cases decided in the circuits, *id.* § 6.07.

149. 436 U.S. at 694.

150. *Id.* at 680 ("[T]he doctrine of dual sovereignty apparently put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it.").

151. *Id.* at 683 ("[N]othing said in debate . . . would have prevented holding a municipality liable under [§ 1983] *for its own violations of the Fourteenth Amendment.*") (emphasis added).

152. *Id.* at 694 ("[T]his case unquestionably involves official policy as *the moving force of the constitutional violation* found by the District Court . . . .") (emphasis added).

153. *Id.* at 700 ("[M]unicipalities simply cannot 'arrange their affairs' on an assumption that *they can violate constitutional rights* indefinitely . . . .") (emphasis added).

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

155. *Id.* at 707-08 (Powell, J., concurring).

156. 445 U.S. 622 (1980).

ments are not protected from compensatory damages liability by any kind of qualified immunity.[157] In *Owen* the city's actions were described as having "deprived petitioner of liberty without due process of law."[158] The Court said that in section 1983 actions it ascertains whether a municipality has conformed to the requirements of the federal constitution;[159] injuries are characterized as being occasioned by a municipality's "unconstitutional conduct."[160] Finally, the Court spoke of situations "when it is the local government itself that is responsible for the constitutional deprivation"[161] and held that local governments have "no immunity from damages liability flowing from *their* constitutional violations."[162]

This fourteenth amendment interpretation of official policy or custom is even more explicitly supported by the Court's recent decision in *Polk County v. Dodson*.[163] The Court considered the plaintiff's section 1983 claim against Polk County and the Polk County Board of Supervisors and addressed the following allegations: (1) that the public defender "had injured [the plaintiff] while acting pursuant to administrative 'rules and procedures for . . . handling criminal appeals' and that her employers were therefore responsible for her actions"; and (2) "that the County 'retains and maintains, advocates out of law school' who have on numerous occasions moved to withdraw from appeals of criminal convictions."[164] Holding that neither allegation made out a prima facie section 1983 cause of action, the Court stated:

> In this case the respondent failed to allege any policy that arguably violated his rights under the Sixth, Eighth, or Fourteenth Amendments. . . . [A] policy of withdrawal from frivolous cases would not violate the Constitution. . . . [There was] no impermissible policy pursuant to which the withdrawals might have occurred. Respondent further asserted that he personally was deprived of a Sixth Amendment right to effective counsel. Again, however, he failed to allege that this deprivation was caused by any constitutionally forbidden rule or procedure.[165]

The Court's approach in *Polk County* makes it clear that a local govern-

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157. *Id.* at 638, 650.
158. *Id.* at 633 n.13.
159. *Id.* at 649.
160. *Id.* at 650.
161. *Id.* at 655 n.39.
162. *Id.* at 657 (emphasis added).
163. 102 S. Ct. 445 (1981). The opinion dealt primarily with the color-of-law issue implicated in public defender representation of an indigent criminal defendant and held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 453.
164. *Id.* at 453-54.
165. *Id.* at 454. Note especially the last sentence in which the Court insists that the plaintiff's sixth amendment deprivation must be caused by a "constitutionally forbidden rule or procedure." *Id.*

ment is liable under section 1983 only for deprivations caused by unconstitutional official policies or customs. That is, the official policy or custom requirement demands a fourteenth amendment interpretation.

The cause-in-fact relationship between a plaintiff's constitutional deprivation and a *valid* official policy or custom is therefore insufficient for section 1983 liability purposes. Put another way, *Monell, Owen*, and *Polk County* indicate that the official policy or custom requirement is necessary as a matter of fourteenth amendment analysis for the imposition of a fourteenth amendment duty on a local government.[166] This conclusion is similarly supported by several recent circuit court decisions that focus on the constitutional validity of the challenged official policy or custom.[167]

Thus, if local government liability under section 1983 is understood to be premised on the fourteenth amendment interpretation, then individuals likewise should be liable only when they have violated the fourteenth amendment themselves. Individuals are not as able as local governments to bear the costs of constitutional violations under the causation interpretation, which incorporates, if only implicitly, the tort concepts of compensation and loss spreading.

However, a contrary argument about the nature of local government liability under section 1983 has been made. At least one commentator argues that "policy need not itself be a violation of the Constitution."[168] This commentator claims that both Congress, in its use of section 1983's "causes to be subjected" language, and the Supreme Court, in its emphasis in *Monell* on the "independent significance" of this language, indicate that the "relationship between a policy and a constitutional violation [is properly put] in terms of causation rather than identity."[169] He then asserts:

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166. *Cf.* City of Memphis v. Greene, 451 U.S. 100, 120 (1981) ("The prohibitions of the [fourteenth amendment] apply only to official action, or, as implemented by 42 U.S.C. § 1983 . . . to action taken under color of state law.").

As to § 1983's "custom" language, the Court held in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), that this language does not reach a purely private custom, however pervasive the language may be. Rather, some state involvement must be present for fourteenth amendment state action purposes and thus for § 1983 accountability. *Id.* at 162-63, 167-68.

167. *See, e.g.*, Shamie v. City of Pontiac, 620 F.2d 118, 119-20 (6th Cir. 1980) (persistent refusal of city's licensing authorities to give plaintiff a liquor license held to be an official policy or custom not violative of the fourteenth amendment); Familias Unidas v. Briscoe, 619 F.2d 391, 403-04 (5th Cir. 1980) (school district's request to county judge for implementation of unconstitutional statute held to be official policy or custom violative of the first amendment); Dominguez v. Beame, 603 F.2d 337, 341-42 (2d Cir. 1979) (police department's official policy or custom respecting the arrest of suspected prostitutes held valid under the fourth amendment). *But cf.* Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (county could be liable if failure to supervise or train reached level of "gross negligence").

168. Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 234 (1979).

169. *Id.*

> The most plausible construction of the cause clause is that it includes official policies which entail an unreasonable foreseeable risk of causing a constitutional violation. What must have been foreseeable under this construction is the occurrence of the acts or omissions which constituted the violation . . . .[170]

Under this approach, local governments apparently would have section 1983 duties in certain circumstances that exceed the scope of their fourteenth amendment duties.

However, this approach relies on the common-law negligence concept of "unreasonable foreseeable risk," a concept that the Court in *Parratt v. Taylor*—decided two years after this commentator's argument was published—rejected for the prima facie section 1983 cause of action for individual liability. For the prima facie section 1983 cause of action, *Parratt* requires only that the conduct complained of be committed by a person acting under color of state law and that this conduct deprive a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.[171] More important, the commentator does not directly address the threshold question of the nature of the relationship between section 1983 and the fourteenth amendment, the question of primary concern in this Article. The fourteenth amendment interpretation advanced here does not under-emphasize the causation requirement. It simply asserts that causation, while necessary for section 1983 liability, is not sufficient.

Further, the commentator's own example can be handled well under a fourteenth amendment interpretation. He says:

> A city which authorized police officers to make searches without instructing them as to the warrant requirements of the fourth amendment would be as liable for ensuing unlawful searches as if it had an express policy of disregarding those requirements.[172]

Under the fourteenth amendment interpretation, the threshold inquiry is whether there is a fourteenth amendment duty on the city to train police officers in the warrant requirements of the fourth amendment. If so, the next question would relate to the city's breach of that fourteenth amendment duty and its liability under section 1983 to persons injured by that breach.

Interestingly, it could turn out, as a matter of fourteenth amendment analysis, that the "state of mind" required of local governments for a duty in this kind of case is the commentator's "unreasonable foreseeable risk." After all, different states of mind already are required for different constitutional duties imposed on local governments.[173] However, while it may be inevitable that fourteenth amendment analysis borrows tort-

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170. *Id.* at 235 (footnote omitted).

171. *See* text accompanying note 48 *supra.*

172. Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 236 (1979).

173. *See* text accompanying note 40 *supra.*

like concepts of accountability, those concepts should be molded constitutionally and not simply applied blindly to local governmental and individual liability under section 1983.[174]

III. FOURTEENTH AMENDMENT DUTIES IN GENERAL

Under the fourteenth amendment interpretation advanced here, it should not be surprising that the official policy or custom requirement, which this Article has characterized as a fourteenth amendment institutional accountability inquiry, is strikingly similar both to the purposeful discrimination requirement for holding a local government body accountable under the equal protection clause[175] and to the state action inquiry.[176] The purposeful discrimination inquiry has been characterized as a fourteenth amendment inquiry into the identification and evaluation of institutional policies.[177] Therefore, it is different from merely reading the minds of the members of the local government body themselves. Correspondingly, a typical state action question is whether a governmental body should be

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174. A second commentator wavers between treating the official policy or custom requirement as a § 1983 duty issue and as a fourteenth amendment duty issue. *See* Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304 (1979). Insofar as the commentator appears to argue that there is an equal protection duty of affirmative protection imposed by the fourteenth amendment on local governments and implemented by § 1983, *see id.* at 313-15, the position is at least partially consistent with this Article's analysis. However, the commentator also speaks occasionally of § 1983 duties imposed on local governments. *Id.* at 315, 317. Moreover, to add to the ambiguity of the commentator's position, there is a concession that the commentator's view of official policy or custom, as based on an equal protection duty of affirmative protection, seems inconsistent with the duties imposed on government officers by § 1983 when their action is ultra vires. *Id.* at 319 n.79. However, under the analysis proposed in this Article, there is no such inconsistency. The fourteenth amendment imposes constitutional duties on both local government bodies and their officers—as individuals acting under color of law—and § 1983 provides remedies when those fourteenth amendment duties are breached.

175. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (racially discriminatory intent or purpose required to violate equal protection clause).

176. By its terms, § 1 of the fourteenth amendment applies only to state action. Section 1 provides in part:

> No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

177. Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 333 (1976). The purposeful discrimination issue continues to trouble the Court in both a local government setting, *e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 66-74 (1980) (disproportionate effects do not establish claim of unconstitutional racial vote dilution), and a state legislative setting, *e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (discriminatory purpose requires more than awareness of consequences; statutory veteran's preference does not unconstitutionally discriminate on the basis of sex).

held accountable for the nominally private conduct of an individual.[178] What the inquiries into official policy or custom, institutional purposeful discrimination, and state action have in common is a fourteenth amendment basis of governmental accountability that must not be obscured.[179]

Similarly, the fourteenth amendment basis of *individual* accountability under section 1983 must not be obscured. Regretably, *Parratt v. Taylor* may tend to do just that, especially in view of the prevailing use of the causation interpretation in the circuits, a use that implicitly incorporates tort concepts of compensation and loss spreading. The foregoing analysis suggests that the fourteenth amendment interpretation for individual and local government liability is preferable as a matter of section 1983's language, legislative history, and policy. The causation interpretation improperly *broadens* section 1983 liability beyond the scope of the fourteenth amendment, while the fourteenth amendment interpretation properly *limits* section 1983's scope to the reach of the fourteenth amendment.

The Supreme Court's apparent tendency to play down the fourteenth amendment duty basis of section 1983 liability is related to the nature of the concept of fourteenth amendment duty. One aspect of this concept—an aspect *not* contributing to the Court's tendency to play down fourteenth amendment duty—is reflected in those situations in which the individual or government body sued has acted affirmatively. Here, the issues are the existence and scope of the fourteenth amendment duty and whether it has been breached by the challenged conduct. That is, the question is whether that conduct measures up to the requisite constitutional standard.

The second, and far more difficult, aspect arises in those situations

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178. See the state action cases collected and analyzed in S. NAHMOD, *supra* note 14, § 2.04-.09 (1979). The state action accountability question may also be described, by way of analogy, as a kind of proximate cause inquiry. *See also* Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2750 (1982), *discussed at* note 3, *supra*, in which the Court held that challenged conduct constituting state action thereby constitutes action under color of law as well. This holding supports the position of this Article.

179. In other words, these inquiries all raise closely related fourteenth amendment duty and scope of duty issues. For example, the Court's decision in Martinez v. California, 444 U.S. 277 (1980), rejected the § 1983 liability of parole board officials for the murder of a woman by a person allegedly wrongfully released on parole in violation of due process. *Id.* at 285. While not a local government liability case, *Martinez* may be analyzed both as a fourteenth amendment duty case and as a state action case. Although the precise ground for the Court's decision is not clear, it is noteworthy that the Court seemed to use a proximate cause approach to the individual accountability of the defendant-parole board members. *See id.* Analogously, in Harris v. McRae, 448 U.S. 297, 317-18 (1980), the Court held that governmental refusals to fund abortions do not constitute interference with the right to have an abortion. *Accord* Maher v. Roe, 432 U.S. 464, 474 (1977). Also, first amendment "chilling effect" cases appear to raise similar governmental accountability issues. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967). There is, of course, no magic in the word "duty" except insofar as its use may promote clarity of constitutional analysis.

in which the individual or government body sued has *failed* to act, and the issues are whether there exists a fourteenth amendment duty to act affirmatively and, if so, whether it has been breached by the challenged failure to act. These latter issues, which are arising with increasing frequency in the circuits,[180] were addressed in passing by the Court in *Monell*. There, the Court put section 1983 liability in cause-in-fact terms, cited *Rizzo v. Goode*, and simply asserted that "the mere right to control without . . . any failure to supervise is not enough to support 1983 liability."[181]

The Supreme Court's reluctance to put local government section 1983 liability and, more generally, *all* section 1983 liability, explicitly in fourteenth amendment duty terms probably derives in part from its discomfort with the imposition on governmental bodies and their employees of affirmative constitutional duties of a continuing nature.[182] It is true that certain affirmative constitutional duties are already an established part of our constitutional fabric.[183] Even some kinds of state action cases, especially those applying the symbiotic relationship test to find state action,[184] can be viewed as affirmative duty cases. However, the Court

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180. *See, e.g.*, Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) (county can be held liable under § 1983 for "gross negligence" or "deliberate indifference" in failure to supervise or properly train prison employees); Duchesne v. Sugarman, 556 F.2d 817, 832 (2d Cir. 1977) (action or inaction on the part of supervisory personnel can serve as basis for § 1983 liability); Norton v. McKeon, 444 F. Supp. 384, 388 (E.D. Pa. 1977) (failure by mayor and police commissioner to enforce state laws and regulations pertaining to police officers' use of force, which results in use of excessive force and violence, actionable under § 1983), *aff'd*, 601 F.2d 575 (3d Cir. 1979). For a collection of cases on this issue, see S. NAHMOD, *supra* note 14, §§ 3.12-.13, 6.06-.07.

181. Monell v. Department of Social Servs., 436 U.S. at 694 n.58.

182. The problems arising out of the continuing nature of the fourteenth amendment equal protection duty in a racial discrimination in education setting are demonstrated in Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537-40 (1979), and Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458-61 (1979). Essentially the question is: how long does the duty last?

183. Consider, for example, the affirmative constitutional duties of governments: to provide prisoners with adequate law libraries or legal assistance, Bounds v. Smith, 430 U.S. 817, 828 (1977); to provide to indigents for criminal appeals free counsel, Douglas v. California, 372 U.S. 353, 356-57 (1963), and transcripts, Griffin v. Illinois, 351 U.S. 12, 19-20 (1956); to appoint counsel for every indigent criminal defendant accused of a felony, Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); to provide to indigents meaningful access to the divorce courts, Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971); and to provide meaningful access to the political process for voters, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666-67 (1966), and candidates, Bullock v. Carter, 405 U.S. 134, 149 (1972). The due process obligation of government entities to provide a fair hearing in certain circumstances, *e.g.*, Goss v. Lopez, 419 U.S. 565, 579, 581 (1975), is still another example of an affirmative fourteenth amendment duty.

184. *E.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (restaurant located in public building considered so interdependent with state as to constitute state action).

in recent years has been very careful neither to expand these affirmative duties[185] nor to add new ones.[186]

Nevertheless, despite this recent Supreme Court retreat from expanding and declaring affirmative constitutional duties, this Article suggests that section 1983 liability for fourteenth amendment violations generally leaves the Supreme Court and federal courts with no choice but ultimately to confront difficult fourteenth amendment affirmative duty issues.[187] Fourteenth amendment accountability criteria will have to be developed in order to deal sensibly with existence of duty and scope of duty questions for both individual and local government liability under section 1983. While this has been done to some extent on an ad hoc basis, recognizing the fourteenth amendment accountability issue for what it is will necessarily result in greater clarity in the judicial decisionmaking process.

IV. CONCLUSION

In *Parratt v. Taylor* the Supreme Court answered the negligence-section 1983 relationship question superficially. While its answer may help the circuits somewhat in cases in which the issues focus on *D* alone, without an intervening actor *A* acting under color of law, the Court provided little guidance for situations in which *D*, without personally violating the fourteenth amendment, negligently or otherwise causes *A* to deprive *P* of constitutional rights. Worse, because of the case's procedural posture, the Court's opinion in *Parratt* gives rise to conflicting interpretations of section 1983. This conflict may well lead to different results in similar cases.

While Congress, in enacting section 1983, could have rendered *D* accountable even when his or her conduct is not itself unconstitutional, Congress did not do so. This conclusion is supported by section 1983's legislative history and purposes, as well as by the Court's decisions discussing and interpreting the official policy or custom requirement for local government liability. Rather, the fourteenth amendment must be violated by the defendant who is to be held accountable. More generally, state-of-mind inquiries are limited to the fourteenth amendment violation claimed, whether against an individual or a local government. When the prima facie case has been made out, the individual *D*'s state of mind, but not the local government's, will be relevant only to qualified immunity.

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185. *E.g.*, United States v. Kras, 409 U.S. 434, 450 (1973) (refusing to expand *Boddie*); *see also* Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (per curiam) (applying *Kras* standard to filing fee).

186. *E.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28, 37 (1973) (refusing both to treat wealth discrimination as a suspect classification and education as a fundamental interest).

187. In failure to act tort cases, courts similarly must first deal with the affirmative duty issue. *Cf.* Yania v. Bigan, 397 Pa. 316, 321-22, 155 A.2d 343, 346 (1959) (defendant has no legal duty to rescue unless he is responsible for placing plaintiff in the perilous position).

The negligence-section 1983 relationship issue should be put to rest and finally treated as what it always has been: at best, misleading and confusing; at worst, phony. It is true that under this analysis there may be some danger of judicial narrowing of fourteenth amendment protections in order to avoid imposing section 1983 damages liability.[188] However, this alone should not preclude the recognition that the fourteenth amendment creates duties, affirmative and otherwise, the existence and scope of which are the most significant aspects of the section 1983 prima facie case.[189]

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188. Examples of such narrowing include Baker v. McCollan, 443 U.S. 137, 146-47 (1979), and Paul v. Davis, 424 U.S. 693, 712 (1976). In both cases the Court held that no due process violations occurred, although there were persuasive arguments to the contrary. On the other hand, there is also the danger of *overloading* the fourteenth amendment duty approach so that it encompasses more than fourteenth amendment enforcement, but is also used, for example, to further a loss-spreading function. Such overloading would improperly tend to constitutionalize tort concepts.

189. For one thing, the now modified qualified immunity test provides even greater protection for § 1983 defendants than before. Harlow v. Fitzgerald, 102 S. Ct. 2727, 2737 (1982), *discussed at* note 53 *supra*. For another, potential § 1983 damages liability did not prevent the Court from recently holding that persons involuntarily committed to a state institution for the mentally retarded have "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." Youngberg v. Romeo, 102 S. Ct. 2452, 2463 (1982).