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SMIDDY V. VARNEY: THE BRAVE NEW WORLD OF POLICE IMMUNITIES UNDER SECTION 1983

I. INTRODUCTION

When the United States Congress enacted section one of the Civil Rights Act of 1871,¹ it created a federal damage remedy for individuals who suffer violations of their constitutional rights at the hands of persons acting under color of state law.² The statute remained relatively dormant until 1960 when the United States Supreme Court, in *Monroe v. Pape*,³ held that a plaintiff whose constitutional rights had been violated by law enforcement officers⁴ acting under color of state law⁵

1. The Civil Rights Act, 17 Stat. 13 (1871), originally entitled the Klu Klux Act, was intended by Congress as a method of enforcement of the provisions of the fourteenth amendment through the power vested in it by section 5 of that amendment. Section one of the Act became, with minor rephrasing, § 1979 of the Revised Statutes. R.S. § 1979, now codified at 42 U.S.C. § 1983 (Supp. 1979) [hereinafter cited as 1983] provides:

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

2. Note, *Immunizing the Investigation Prosecutor: Should The Dishonest Go Free or The Honest Defendant?*, 48 FORDHAM L. REV. 1110 (1980) [hereinafter cited as *Immunizing the Prosecutor*] (discussion of prosecutorial immunity to section 1983 suits).

3. 365 U.S. 167 (1961). In *Monroe*, the plaintiff sued 13 Chicago police officers who broke into his home, searched it, and took him to the police station for 10 hours without a search or arrest warrant and without lodging charges against him. The Supreme Court framed the issue in *Monroe* narrowly: "[W]hether Congress, in enacting § 1979 [§ 1983] meant to give a remedy to parties deprived of Constitutional rights, privileges and immunities by an *official's abuse of his position*." *Id.* at 172 (emphasis added). After thoroughly analyzing the legislative history of § 1983, the Court held that in enacting § 1983, Congress intended to rectify just the sort of wrong perpetrated in *Monroe*; i.e., to provide a remedy to individuals deprived of constitutional rights by state or local law enforcement officers acting under "color" of state authority. *Id.* The Court further held that it was irrelevant whether state law, custom or usage actually authorized the acts in question. *Id.* at 184-87. The Court also held that specific intent to deprive a person of a federal right was unnecessary to state a claim under § 1983. *Id.* at 187.

Although § 1983 was enacted over 100 years ago, it remained dormant for many years. The *Monroe* decision breathed new life into the Act.

4. Throughout this Note, the terms law enforcement officers and police officers are used interchangeably and refer to all state law enforcement personnel.

5. To recover in a civil action for deprivation of rights under § 1983, a plaintiff must show that defendant acted "under color of state law," i.e. that defendant has deprived plaintiff of a right secured by the constitution or laws of the United States under color of statute, ordinance, regulation, custom or usage of any state or territory. *Davis v. Paul*, 505 F.2d 1180 (6th Cir. 1974), *rev'd on other grounds*, 424 U.S. 693, *reh'g denied*, 425 U.S. 985 (1976).

could bring a federal cause of action for damages under section 1983. Since 1960, section 1983 has become an important vehicle by which individuals, deprived of constitutional rights by police misconduct, may seek redress by suing the individual officer for damages.⁶ This recovery of damages serves two important functions: (1) to *deter* police misconduct and (2) to *compensate* the victims of such misconduct.⁷

In August, 1981, in *Smiddy v. Varney*,⁸ the Ninth Circuit held that in section 1983 actions, absent malicious or reckless conduct on the part of investigating officers, the "[f]iling of a criminal complaint *immunizes* . . . [the] officers . . . from [liability for] damages suffered thereafter"⁹ For the plaintiff to succeed in an action for damages accruing after the filing of a complaint, the court required rebuttal of a presumption that the prosecutor, in filing the complaint, exercised independent judgment in determining that there was probable cause for the arrest.¹⁰

This note will examine the Ninth Circuit's reasoning in *Smiddy*

6. See WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE 12 (1978) [hereinafter cited as "WHITEBREAD"].

7. WHITEBREAD, *supra* note 6, at 14. In this respect, § 1983 has been viewed as both a corollary and an alternative to the exclusionary rule.

Purposes of two remedies are not the same [E]ach remedy has other purposes which are not fulfilled by the other: the exclusionary rule cannot compensate victims for the monetary loss; and a suit for damages does not enable the judiciary to overcome the 'tainting effect' of convicting persons for crime on the basis of evidence seized illegally, the very seizure of which is the basis for the damage suit.

WHITEBREAD, *supra* note 6, at 14; see also, Newman, *Suing the Law Breakers: Proposals to Strengthen the Section 1983 Damage Remedy For Law Enforcers Misconduct*, 87 YALE L. J. 447 (1978). For the section 1983 damage suit to achieve its potential as an effective deterrent and compensating remedy, it "must be substantially restructured to afford the injured victim a better chance of success." *Id.* at 453. See also Nahmod, *Section 1983 and The Background of Liability*, 50 INDIANA L. J. 15 (1974) [hereinafter cited as *Nahmod*]; Bivens v. Six Unknown Named Agents of The Federal Bureau of Narcotics, 403 U.S. 388 (1971) (*see infra* note 80).

8. 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 65 (1982).

9. *Id.* at 266 (emphasis added). The court also held: (1) the evidence supported the finding that a polygraph examination administered by one defendant proximately caused plaintiff's false arrest for murder, resulting in his damage; and (2) the jury instructions that a defendant police officer who acts in good faith and with reasonable belief that his conduct is constitutional could be found liable under the statute, put the issues to the jury fairly. The court noted, however, that the instruction did not sharply define the "two-hurdle" requirement that the officers lack both probable cause for arrest and a reasonable good faith belief that probable cause existed. *Id.* at 265-67.

10. *Id.* at 266-67. The court noted that a plaintiff could rebut this presumption by: (1) demonstrating that the investigating officers pressured or caused the district attorney to act contrary to his/her independent judgment; (2) showing that the officers presented the district attorney with information which they knew to be false, or (3) showing that the prosecutor relied on the police investigation and arrest in filing the complaint, instead of making an independent judgment on the existence of probable cause for the arrest. The court indicated

vis-a-vis the traditional rationale for allowing immunities from liability under section 1983. It is suggested that in creating this immunity the Ninth Circuit radically departed from the policies underlying section 1983 and from a line of cases which had carefully carved out limited immunities from section 1983 liability.¹¹ Further, this note questions whether, in establishing a rebuttable presumption that the prosecutor exercises independent judgment, the *Smiddy* court properly analyzed and relied on common law tort principles of proximate causation, and whether the court's holding is supported by the decisions on which it relies. Finally, this note discusses competing policy considerations underlying the issues involved in *Smiddy*, and concludes that in *Smiddy*, the Ninth Circuit ignored the language and spirit of section 1983 and diminished the utility of that section as a deterrent to police misconduct.

that these examples were not exclusive, and that "[p]erhaps the presumption may be rebutted in other ways." *Id.* at 267.

Later in the opinion the court characterized this presumption as a disappearing presumption; i.e., the defendant has the burden of proof in asserting that an immunity attaches. The plaintiff, however, has the burden of *introducing evidence* to rebut this presumption. When the plaintiff has introduced such evidence, the burden remains on the defendant to prove that an "independent intervening cause cuts off his tort liability." *Id.* at 267 (citing FED. R. EVID. 301).

In effect, the Ninth Circuit carved a type of hybrid or "quasi" immunity for law enforcement officials under § 1983. Prior to *Smiddy*, courts generally recognized two distinct types of § 1983 immunity: (1) absolute immunity, whereby an individual, simply by virtue of his title, is immune from liability for damages under the Act for all acts performed within the scope of official duty, and (2) qualified immunity, whereby an official's liability depends on the particular facts of the case; qualified immunity places the burden on the official to defend the questionable actions. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974); *see also Immunizing the Prosecutor*, *supra* note 2, at 111. *Compare* *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators enjoy absolute immunity when acting within scope of duty) *with* *Wood v. Strickland*, 420 U.S. 308 (1975) (school officials enjoy qualified good faith immunity from damages under § 1983).

The prosecutor enjoys absolute immunity from § 1983 suits. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (prosecutor acting within the scope of prosecutorial duties enjoys absolute immunity); *see also* *Fanale v. Sheehy*, 385 F.2d 866, 868 (2d Cir. 1967); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); *Carmack v. Gibson*, 363 F.2d 862, 864 (5th Cir. 1966); *Tyler v. Witkowski*, 511 F.2d 449, 450-51 (7th Cir. 1975); *Barnes v. Dorsey*, 480 F.2d 1057, 1060 (8th Cir. 1973); *Kostal v. Stoner*, 292 F.2d 492, 493 (10th Cir. 1961), *cert. denied*, 369 U.S. 868 (1962); *c.f.* *Guerro v. Mulhearn*, 498 F.2d 1249, 1255-56 (1st Cir. 1974) (under section 1983 police officers not immune from liability merely because state statute provided for indemnification of officers by their public employers); *Weathers v. Ebert*, 505 F.2d 514, 515-16 (4th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976).

11. Courts create such limited immunities only in extremely narrow circumstances. *See infra* notes 39-52 and accompanying text.

II. FACTS OF THE CASE

On November 15, 1973, defendants Varney and Nuckles, experienced homicide investigators, arrested Gary Smiddy for the murder of Linda Miller.¹² The day after Smiddy's arrest, defendant Inglin, president of the California Association of Polygraph Examiners, gave Smiddy a polygraph examination. The police had made a deal with Smiddy's attorney, whereby they agreed to release Smiddy if he passed the test.¹³ Inglin concluded that Smiddy had responded deceptively to the exam questions. A committee of past presidents of the Association evaluated Smiddy's polygraph examination, however, and concluded that the test had been administered deficiently.¹⁴

On November 19, 1973, four days after the arrest, the district attorney for the County of Los Angeles filed a criminal complaint charging Smiddy with the murder of Linda Miller.¹⁵ On December 14, 1973, a preliminary hearing was held in municipal court, and Smiddy was bound over to superior court. Smiddy posted bail and was released the following day, having spent approximately four weeks in jail.¹⁶ On January 23, 1974, the superior court dismissed the complaint for insufficient evidence of probable cause.¹⁷

On October 15, 1976, Smiddy filed suit for damages under section 1983 in federal district court, alleging that his arrest and incarceration violated his civil rights.¹⁸ In a lengthy jury trial in 1978, Smiddy argued that Varney and Nuckles conducted their investigation negli-

12. 665 F.2d at 263; *see also* Brief for Appellant at 1, *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981) [hereinafter Appellant's Brief].

13. 665 F.2d at 264.

14. *Id.* The committee conducted the evaluation at Inglin's request after Inglin had received complaints that he had conducted the examination improperly. The Association subsequently censured Inglin. *Id.*

15. The appellants in *Smiddy* made the following statement of facts:

On Monday, November 19, 1973, Sgts. Varney and Nuckles worked from 8:00 A.M. to 5:30 P.M. [citation omitted]. They took their case file out to Deputy District Attorney Elvira Mitchell [citation omitted]. She agreed to file a criminal complaint [citation omitted]. According to Sgt. Varney, from this point on the District Attorney's Office was in control of the investigation [citation omitted].

Appellant's Brief, *supra* note 12, at 38.

16. *Id.* Appellant's Brief, *supra* note 12, at 43. The opening brief stated that on December 15, 1973, Sgts. Varney and Nuckles received word that Smiddy had posted bail and was out of jail.

17. 665 F.2d at 264. This dismissal was pursuant to a § 995 motion. *See* CAL. PENAL CODE § 995 (West 1970). Section 995 requires that upon a defendant's own motion the court in which the defendant was arraigned must set aside an information, if that court determines that the defendant was committed without reasonable or probable cause.

18. 665 F.2d at 264.

gently.¹⁹ He persuasively demonstrated that the police officers failed to investigate adequately other suspects.²⁰

At the close of the trial, the defendants moved for a partial directed verdict on the ground that they were not liable for any damages suffered after November 19, 1973 because the filing of the criminal complaint by the district attorney insulated them from liability for damages subsequently suffered.²¹ Defendants repeated this argument in a motion for judgment notwithstanding the verdict and for a new trial.²² The defendants also requested that the jury be instructed that the district attorney bears responsibility for gathering evidence to convict or exonerate an arrested person after the filing of the complaint.²³ The district court denied both motions and the proposed jury instructions.²⁴

The jury awarded Smiddy \$250,000 in damages from Varney, Nuckles, and Inglin. In addition, the district court awarded Smiddy \$250,000 in attorney's fees under the Civil Rights Attorney's Fees Act

19. Appellant's Brief, *supra* note 12, at 1.

20. 665 F.2d at 261, 264. Varney and Nuckles did not investigate men who had threatened Miller. For example, one factor which led to the arrest of Smiddy was information that Miller had referred to him as "John" at a coffee shop where she had been seen for the last time before her death. Although the police had further information that she was afraid of a man named John, they did not investigate two former boyfriends named John. Smiddy presented evidence at trial that both of these former boyfriends had harassed and threatened her and that one had beaten her. Additionally, once Smiddy was arrested, investigation of other suspects stopped. *Id.*

21. 665 F.2d at 266.

22. *Id.*

23. *Id.*

24. During trial at the close of the evidence, Varney and Nuckles requested a directed verdict. They argued that the evidence showed that probable cause existed for Smiddy's arrest as a matter of law. 665 F.2d at 265. Inglin requested a directed verdict on the theory that his polygraph examination was not a proximate cause of Smiddy's damages. *Id.* The defendants renewed these requests and motions for judgments notwithstanding the verdict. *See supra* note 20 and accompanying text. The Ninth Circuit held that the district court correctly denied these motions. 665 F.2d at 265. The court noted that the existence of probable cause for Smiddy's arrest was a close issue. The court also noted, however, that its role in reviewing the denial of a directed verdict in favor of a defendant was limited by the standard set forth in *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 464 (9th Cir. 1977) (in reviewing denial of a directed verdict in favor of defendant, the reviewing court must view the evidence in a light most favorable to plaintiff). 665 F.2d at 266. The court pointed out that there was conflicting evidence concerning the police officers' knowledge and what other leads they could have pursued. *Id.* The court emphasized that a recent decision had indicated that if "reasonable persons might reach different conclusions about the facts, the establishment of those facts is for the jury, and the existence of probable cause is likewise for the jury, upon a proper instruction about the law." *Id.* (quoting *Gilker v. Baker*, 576 F.2d 245 (9th Cir. 1978)).

of 1976.²⁵ Varney, Nuckles, and Inglin appealed.²⁶ The Ninth Circuit affirmed the district court's judgment of liability, but vacated the amount of judgment.²⁷ The *Smiddy* court remanded the case for a new trial on the issue of the amount of damages; it held that the defendants were liable for damages suffered from the time of Smiddy's arrest until the district attorney filed charges.²⁸ The defendants, however, were found not liable for Smiddy's damages attributable to his incarceration between the filing of the complaint and his release on bail after the preliminary hearing, unless Smiddy could rebut the presumption of independence on the part of the district attorney.²⁹

III. REASONING OF THE COURT

The Ninth Circuit framed its analysis of police liability under section 1983 in terms of the common law tort concept of proximate causation.³⁰ The court cited three cases from other circuits to support its

25. 665 F.2d at 264-66. The Civil Rights Attorney's Fee Act of 1976, 42 U.S.C. § 1988 (West Supp. 1981) permits courts to award reasonable attorney fees to the prevailing party in § 1983 actions.

26. 665 F.2d at 265.

27. *See supra* note 24 and accompanying text. The *Smiddy* court stated that the district court had erred in denying defendant's motion for a partial directed verdict and judgment notwithstanding the verdict on the ground that defendants were not liable for damages suffered after November 19, 1973. 665 F.2d at 266. Similarly, the court held that the district court had erred in denying the jury instruction request. *See supra* text accompanying note 24.

28. 665 F.2d at 268.

29. *Id.* The court noted that on remand the trier of fact must resolve the issue of whether the loss of job opportunity was proximately caused by the arrest and whether the arrest proximately caused any psychological damage.

30. For a general discussion of proximate causation in civil rights actions the *Smiddy* court cited *Arnold v. International Business Mach. Corp.*, 637 F.2d 1350, 1355-58 (9th Cir. 1981) (definition of proximate causation in civil right actions); *see also* *Martinez v. State of California*, 444 U.S. 277 (1980); *Hoffman v. Halden*, 268 F.2d 280, 296 (9th Cir. 1959) (In alleged conspiracy resulting in the wrongful incarceration of plaintiff in a state hospital for the mentally ill, where "the injury complained of is commitment to an institution by a court order, this order of the Court, right or wrong, is ordinarily the *proximate cause* of the injury." Preliminary steps that occur *before* the court order, such as filing petitions or clerical and procedural activities leading to the order are *remote*, rather than *proximate*, causes of the injury); *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978) (holding that *inaction* of county sheriff, who was obliged by statute and regulations to appoint classification committee to consider ordering plaintiff's transfer from honor camp to county jail, might have proximately caused the plaintiff's loss of accumulated earnings from work performed at the honor camp and thus subjected sheriff to liability under § 1983); *Duncan v. Nelson*, 466 F.2d 939, 942 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972) (extraction of involuntary confession by defendant police officers did not entitle plaintiff to recover damages for his conviction and incarceration because defendants knew, or should have known, that the confession was inadmissible and, therefore, it was not foreseeable that the judge would erroneously admit this unlawful confession); *Johnson v. Greer*, 477 F.2d 101, 107 (5th Cir. 1973) (an officer

proposition that "the filing of charges under certain circumstances does break the chain of causation between an arrest and prosecution."³¹ The court indicated that the filing of a complaint is, in the terminology of tort law, a superseding intervening cause which insulates the original actor's conduct from section 1983 liability.³²

The Ninth Circuit reasoned that this result was "just" because the other individuals within the chain of causation who continued to hold Smiddy³³ were immune from liability under section 1983.³⁴ The court announced that because police officers are the only actors in the chain of decision who are subject to liability under section 1983, public policy supports cutting off such liability for damage that is the result of the intervening fault of the others in the chain.³⁵ Additionally, the court noted that the possibility of absolute liability on the part of the municipality or other local government units further justifies limiting the lia-

acting under color of law without malice should be liable only for injuries reasonably foreseeable; but officers acting with malice or bad intent should be liable for injuries having a more attenuated causal relationship); *see infra* note 132 and accompanying text.

31. 665 F.2d at 267. The three cases the court cited were *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979); *Dellums v. Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977); *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc). The court, however, failed to analyze these cases, mentioning them only briefly in a footnote. 665 F.2d at 267 n.2. The *Smiddy* opinion prior to modification read: "Authorities from other circuits *support* this position." Nos. 79-3078, 79-3480, slip op. at 3843 (Aug. 7, 1981) (emphasis added), *modified*, 665 F.2d 261 (9th Cir. 1981). The modified opinion reads, "[a]uthorities from other circuits *lend some support for this position*." 665 F.2d at 267 (emphasis added). The original opinion then stated: "Thus, it has been held that the filing of charges breaks the chain of causation between an arrest and prosecution after the filing." Slip op. at 3843. The opinion now reads: "Thus it has been held that the filing of charges *under certain circumstances* does break the chain of causation between an arrest and prosecution." 665 F.2d at 267 (emphasis added).

It is not clear why the court modified the language in this way. The court might be indicating that the cases it relied on in arriving at its decision do not provide direct precedential authority for the precise factual situation before the court in *Smiddy*.

32. 665 F.2d at 267. In the original opinion, prior to modification, the court's language lacked precision. However, this was the apparent meaning of the court's message in stating that "[w]e need not make [the policeman's lot] more unfortunate by holding the officer liable for damage that is the result of the *intervening fault of others in the chain*." Nos. 79-3078, 79-3480, slip op. at 3844 (Aug. 7, 1981), *modified*, 665 F.2d 261 (9th Cir. 1981) (emphasis added). In the modified opinion, the court used more precise tort terminology in discussing the presumption. The court stated: "Where the plaintiff has introduced evidence to rebut the presumption, the burden remains on the defendant to prove that an *independent intervening cause cuts off his tort liability*." 665 F.2d at 267 (emphasis added); *see* PROSSER, LAW OF TORTS 834-50 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 653 comment d (1977); Annot., 21 A.L.R. 2d 643, 647-717 (1952).

33. Other individuals in the chain might include, for example, the district attorney and the municipal court judge.

34. 665 F.2d at 267. *See infra* note 49 and accompanying text.

35. *Id.*

bility of the police officers.³⁶ Apparently, the court reasoned that such liability on the part of the municipality offers an injured plaintiff sufficient redress.³⁷

In essence, the *Smiddy* court effectively "immunized" law enforcement agents from liability for damages under section 1983 incurred subsequent to the initiation of legal process.³⁸ Accordingly, it is necessary to scrutinize this new immunity against the background of the pol-

36. The court cited Comment, *Strict Liability Under 1983 for Municipal Deprivation of Federal Rights?: Owen v. City of Independence*, 55 ST. JOHN'S L. REV. 153 (1980). The article discusses *Owen v. City of Independence*, 445 U.S. 622 (1980), which denied municipalities a qualified immunity from § 1983 suits. The author asserted that the *Owen* decision was in line with prior authority and with the intent of the framers of the Civil Rights Act of 1876, 17 Stat. 13 (1871). However, the author questioned the *Owen* court's apparent sanction of strict municipal liability for § 1983 violations.

37. In *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 690-95 (1978), the Court held that a municipality is a "person" within the meaning of § 1983 and thus subject to liability under the Act. However, the *Monell* court held that a municipality *cannot* be held liable on a *respondeat superior* theory. To recover, a plaintiff must prove that the alleged unconstitutional action was an implementation of an official municipal policy or custom. While under *Monell* it is not necessary for a plaintiff to prove that the municipality formally approved the custom, the plaintiff's hurdle in demonstrating that such a custom did exist should not be underestimated.

If § 1983 is to serve as a remedy for a wronged plaintiff, making a plaintiff resort to an action against a municipality would often prove futile because of the additional burden of proving custom. By the same token, if § 1983 is to serve as a deterrent, cutting off police liability in the hopes of holding the municipality liable certainly will not effectively deter police. Moreover, it will often be so difficult to prove "custom" that the deterrent value of § 1983 will be meaningless.

38. See *supra* note 10 and accompanying text for a discussion of the definition of immunities. The immunity proposed by the *Smiddy* court was limited in scope because it was only *presumed* and could be *rebutted*. *Id.* According to the *Smiddy* court, however, the plaintiff bears the initial burden of producing some evidence to rebut the presumption of independence on the part of the prosecutor. *Id.* Although the defendant is generally required to plead immunity as an affirmative defense under § 1983, *Smiddy* seems to indicate the contrary. *Id.* at 267-68.

The plaintiff argues that even if the filing of the criminal complaint normally insulates police officers from liability for subsequent damages, the defendants have waived the argument in this case because they failed to plead it as an affirmative defense as required by Rule 8 of the Federal Rules of Civil Procedure. We disagree. In California, 'Once the district attorney has filed a complaint, it is his responsibility to gather and present such evidence as will convict the guilty or exonerate the innocent.' [citation omitted]. There is a presumption of independence on the part of the district attorney where plaintiff has not presented evidence to challenge that presumption. For example, plaintiff might contend that the prosecutor acted under pressure from the police or relied on the police investigation and arrest when he filed the complaint, instead of making an independent judgment on the existence of probable cause for the arrest. [citation omitted]. Where the plaintiff has introduced evidence to rebut the presumption, the burden remains on the defendant to prove that an independent intervening cause cuts off his tort liability. Fed. R. Evid. 301. If for reasons of privilege or otherwise the relevant evidence is not available, no presumption will arise.

icies underlying section 1983 and the historical development of judicially created immunities under the Act.

IV. ANALYSIS

A. *The Historical Precedent for Immunities Under Section 1983*

1. Background of immunities

The scope of a law enforcement officers' immunity from liability under section 1983 is determined by statutory interpretation.³⁹ Thus, the analysis begins with the statute itself.⁴⁰ It is apparent that in enact-

665 F.2d at 267-68, *quoting* *Tribulski v. County of Los Angeles*, 83 Cal. App. 3d 828, 831, 146 Cal. Rptr. 229-30 (1978).

In the original opinion, prior to modification, the last sentence of the above quotation read: "Since there is a presumption of independence on the part of the district attorney, it is appropriate to place the burden on the plaintiff to overcome that presumption." Nos. 79-3078, 79-3480 slip op. at 3844 (Aug. 7, 1981), *modified*, 665 F.2d 261 (9th Cir. 1981).

The language of the original opinion evinces a stronger intention by the court to place the initial burden on the plaintiff. Hence, it would be unnecessary for the defendant to plead immunity as an affirmative defense. Despite the change, the modified opinion still lends itself to the interpretation that this immunity need not to be pled as an affirmative defense.

An alternative conclusion may be reached by reading both the original and modified opinions. Arguably, the court may not be eliminating the necessity of pleading immunity as an affirmative defense. Rather, the court could simply be rejecting the plaintiff's contention that, under Rule 8, a defendant waives the right to assert immunity as an affirmative defense by failing to plead it originally. FED. R. CIV. PROC. 8 provides: "c) *Affirmative Defenses*. In pleading . . . a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense."

Under either interpretation, the immunity created in *Smiddy* may present more of a hurdle for a plaintiff than does the traditional qualified immunity available to police officers. Normally, the defendant is required to plead to a *qualified* immunity as an affirmative defense. *See generally* *Gomez v. Toledo*, 446 U.S. 635 (1980), where the Court held that in a 1983 action against a public official whose position might entitle him to *qualified immunity*, the plaintiff need not allege that defendant acted in bad faith in order to state a claim for relief; rather, the burden is on defendant to plead good faith as an affirmative defense. In contrast to *Gomez*, the *Smiddy* court placed the initial burden on the plaintiff to produce some evidence that the prosecutor exercised independent judgment in filing a criminal complaint, thus qualitatively changing the defendant's burden.

39. *Owen v. City of Independence*, 445 U.S. 622 (1980) (a municipality has no immunity under § 1983 from liability flowing from its constitutional violation, and may not assert the good faith of its officers as a defense to such liability). Since § 1983 contains no specific provisions for immunities, courts have looked to the congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the forerunner of § 1983, to determine whether Congress intended to create any immunities. The Supreme Court has held that although § 1983 does not refer to immunities, the law "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976); *see* *Tenny v. Brandhove*, 341 U.S. 367, 376 (1951); *see also* *Owen v. City of Independence*, 445 U.S. 622, 666 (1980) (Powell, J. dissenting).

40. Section 1983 is set forth *supra* note 1.

ing section 1983 Congress intended to create a broad remedy for violations of federally protected civil rights.⁴¹ Recently, in *Gomez v. Toledo*,⁴² the Supreme Court reaffirmed that section 1983 must be construed liberally to further the primary remedial purpose of vindicating important human rights.⁴³ By its terms, section 1983 "creates a species of tort liability that on its face admits of no immunities and some courts have suggested that it be applied as stringently as it reads."⁴⁴

Accordingly, the courts must not create a new immunity under section 1983 cavalierly. Despite the sweeping language of section 1983 and the statute's silence regarding the incorporation of common law immunities, the United States Supreme Court has occasionally carved out either absolute or qualified immunities from liability in section 1983 suits.⁴⁵ The Court has done so, however, only upon a finding that the immunity was firmly rooted in the common law and was supported by strong policy reasons.⁴⁶ The Court has reasoned that in enacting section 1983, Congress was well aware of the general body of common law immunities which existed at that time, and the public policy behind them.⁴⁷ Thus, Congress would have specifically provided for the abrogation of these common law immunities had it so intended.⁴⁸ While in some cases the Supreme Court has found that there may be immunities under section 1983, in every case it has (1) engaged in lengthy discussion of the policies behind section 1983; (2) inquired into the existence

41. *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1977).

42. 446 U.S. 635 (1980).

43. *Id.* at 638-39. In *Gomez*, the Supreme Court stated: "This statute, enacted to aid in the 'preservation of human liberty and human rights' . . . reflects a congressional judgment that a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Id.* (citation omitted); see also *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1977); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

44. *Imbler v. Pachtman*, 424 U.S. 409 (1976); see also *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). In *Owen*, the Supreme Court stated:

Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon "every person," who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Id. at 635.

45. For the definition of absolute immunities and qualified immunities see *supra* note 10. For examples of such judicially carved immunities see *infra* note 49 and accompanying text.

46. See *Imbler v. Pachtman*, 424 U.S. 409, 412 (1976); *Gomez v. Toledo*, 446 U.S. 635, 639 (1980); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

47. *Pierson v. Ray*, 386 U.S. 547, 555 (1967); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

48. *Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

of a common law immunity of the relevant official; and (3) examined the policy behind the common law immunity.⁴⁹

Finally, in each case the Court has determined whether the policies behind such common law immunities were compatible with the policies of section 1983. Only after finding such compatibility has the Court recognized parallel immunities under section 1983.⁵⁰ In establishing immunities under section 1983, the Court has asked two questions: (1) Did the immunity exist at common law; and (2) Do the same considerations of public policy countenance recognition of the immunity under section 1983?⁵¹ This two-part test has resulted in the Court's

49. *Gomez v. Toledo*, 446 U.S. 622, 634 (1980), citing *Pierson v. Ray*, 386 U.S. 547, 555 (1967); see, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (after tracing the development of absolute legislative privilege from its source in 16th Century England to its inclusion in the federal and state constitutions, the Supreme Court concluded that Congress would not impinge on a "tradition so well grounded in history and reason by covert inclusion in the general language . . . [of § 1983]"); see also *Owen v. City of Independence*, 445 U.S. 622 (1980); *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

For examples of the creation of other immunities under § 1983, see *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (holding that *absolute* immunity, traditionally accorded judges, and *qualified* immunity for police were preserved under § 1983 and noting that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . ."); see also *Procunier v. Navarelle*, 434 U.S. 555 (1978) (*qualified* immunity for prison officials and officers); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (*absolute* immunity for prosecutors initiating and presenting the state's case); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (*qualified* immunity for superintendent of state hospital); *Wood v. Strickland*, 420 U.S. 308 (1975) (*qualified* immunity for local board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (*qualified* "good faith" immunity for state governor and other executive officers for discretionary acts performed in the course of official conduct).

But see Comment, *A New Perspective on Legislative Immunity in Section 1983 Actions*, 28 U.C.L.A. L. REV. 1087 (1981) [hereinafter cited as *New Perspectives*]. The comment discusses the policies behind § 1983 as read against the judicially created immunities. The author specifically discusses the recent development of legislative immunities under § 1983, focusing on the United States Supreme Court's recent decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Noting a trend by the United States Supreme Court to expand common law legislative immunity to § 1983 actions, despite the potential impact on civil right litigants, the author notes that this expansion of immunity conflicts with both the language and the spirit of § 1983. The author further notes that this current trend may "render unenforceable the rights protected by § 1983, thus giving rise to the very result which the 42nd Congress sought to avoid." *New Perspectives*, *supra* at 1090.

50. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980). Although the *Owen* Court insisted that it had only granted immunities when they existed at the time of the enactment of the statute, this has not actually been the case. For example, in *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court looked at common law for a history of prosecutorial immunity, and found such an immunity rooted in common law tradition. However, that immunity dates back only to 1896, almost two decades *after* the enactment of § 1983. Thus, it is possible to view the decision in *Imbler* as an expansion of the common law immunity concept by fashioning an immunity that does not pre-date § 1983.

51. *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976).

refusal to accord all officials the same immunity which was allowed at common law.⁵²

The *Smiddy* court does not appear to have applied this two-part test in creating a new immunity for police officers under section 1983. The court never addressed the first prong of the test; the opinion is void of any analysis of common law police immunities. As for the second prong, the court, in its discussion of the unfortunate lot of the policeman,⁵³ did advance policy reasons for cutting off police liability after the filing of a complaint. The court failed, however, to relate these policies to the policies underlying section 1983. In fact, in the only instance where the court discussed the policies of "immunizing" the police in terms of section 1983, it merely concluded that police officers are entitled to such immunity because they are the "only actor[s] in the chain of decisions leading to prosecution who [are] subject to section 1983 liability;"⁵⁴ therefore, it would be unfair to hold them "liable for damage that is the result of the intervening fault of others in the chain."⁵⁵ Comparison of the *Smiddy* opinion with prior judicial consideration of police immunity under section 1983 demonstrates the *Smiddy* court's failure to relate its policy considerations to the policies behind section 1983.

2. The first recognition of a qualified immunity for police officers.

In *Pierson v. Ray*⁵⁶ the Supreme Court applied its two-part test to determine whether police officers are entitled to immunity under section 1983. In *Pierson*, three police officers had arrested the petitioners for attempting to use segregated facilities at an interstate bus terminal in Jackson, Mississippi. The petitioners were charged and convicted of violating a Mississippi law, later held invalid.⁵⁷ One petitioner was

52. *Immunizing the Prosecutor*, *supra* note 2, at 1115. For example, in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court held that executive officials, who are absolutely immune at common law, were only entitled to qualified immunity under section 1983. This immunity attached on the "existence of reasonable ground for belief formed at the time and in light of all circumstances, coupled with a good faith belief" that their behavior complied with constitutional constraints. *Id.* at 247-48. See generally, *Immunizing The Prosecutor*, *supra* note 2, at 115, 116; Note *Section 1983 and the Limits of Prosecutorial Immunity*, 56 CHI. KENT L. REV. 1029, 1032 (1980) (discussion of prosecutorial immunity in terms of the Seventh Circuit's decision in *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *cert. denied in part*, 446 U.S. 754 (1980).

53. See *supra* notes 32-35 and accompanying text.

54. *Smiddy v. Varney*, 665 F.2d 261, 267 (1981).

55. *Id.*

56. 386 U.S. 547 (1967).

57. *Id.* The petitioner had been arrested and charged with breach of the peace in viola-

granted a trial *de novo* resulting in a directed verdict. The charges against the others were dropped. Petitioners then brought suit in federal district court alleging that the police officers violated section 1983.⁵⁸

The Court held that the defenses of good faith and probable cause, which were available to police officers in common law actions for false arrest and false imprisonment, were also available to them in an action under section 1983.⁵⁹ In reaching this conclusion, the Court first established that the common law had never granted police officers an absolute or unqualified immunity.⁶⁰ The Court, however, then analogized the section 1983 tort claim to the common law tort of false arrest. The Court noted that "[u]nder the prevailing view in this country, a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved."⁶¹ To support this analogy of section 1983 actions to common law tort actions, the *Pierson* Court quoted from its holding in *Monroe v. Pape*:⁶² Section 1983 "should be read against the background of tort liability"⁶³

Moreover, the Court found significant policy reasons for extending common law qualified immunity for police officers to actions under section 1983: "A police officer'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."⁶⁴ Thus, in arriving at its decision to grant police officers a qualified immunity under section 1983, the Supreme Court cautiously measured its decision against common law immunities.

Without undertaking a similarly careful analysis,⁶⁵ the *Smiddy* court appears to have announced that police officers enjoy an immunity from liability even absent the defenses of good faith or probable cause necessary to the immunity created in *Pierson*.⁶⁶ Never pointing to a

tion of § 2087.5 of the Mississippi Code. The United States Supreme Court granted certiorari and reversed the judgments in *Thomas v. Mississippi*, 380 U.S. 524 (1965).

58. *Id.* at 550.

59. *Id.* at 557. The *Pierson* Court also established an immunity for judges.

60. *Id.* at 555.

61. *Id.* (citing *Ward v. Fidelity Deposit Co.*, 179 F.2d 327 (8th Cir. 1950); RESTATEMENT (SECOND) OF TORTS § 121 (1965)).

62. 365 U.S. 167 (1961); see *supra* note 3 and accompanying text.

63. 386 U.S. at 556-58.

64. *Id.* at 555.

65. See *supra* notes 31-38 and accompanying text; see also *infra* notes 68-74 and accompanying text; *supra* notes 9-10 and accompanying text.

66. See *supra* note 38 and accompanying text.

parallel type of police immunity under the common law torts of false arrest and false imprisonment, the *Smiddy* court created an immunity under section 1983 that was different from either the *absolute* or *qualified* immunity heretofore recognized by the Supreme Court. By creating a *rebuttable presumption*, the *Smiddy* court granted police officers something less than absolute immunity; yet, by placing the burden on the plaintiff to produce some evidence to rebut the presumption that the prosecutor exercised independent judgment, the court granted police officers something more than a qualified immunity.⁶⁷ Whether the *Smiddy* court properly recognized such an immunity for police, which exists even absent good faith and probable cause, is a question answerable only by careful scrutiny of common law tort principles of proximate cause and precedents applying those principles to section 1983 actions.

3. The *Smiddy* court's authority for creation of immunity

The *Smiddy* opinion must be measured against the backdrop of judicial reluctance to expand immunities under section 1983, absent already existing common law immunities and strong policy considerations.⁶⁸ The *Smiddy* court did not analyze prior immunity precedents, common law tradition, or section 1983 policy concerns. The court merely stated that "[a]uthorities from other circuits lend some support for this position. Thus, it has been held that the filing of charges under certain circumstances does break the chain of causation between an arrest and prosecution."⁶⁹ Specifically, the court cited three cases: *Ames v. United States*,⁷⁰ *Dellums v. Powell*,⁷¹ and *Rodriguez v. Ritchey*.⁷² Without analyzing those cases,⁷³ the court announced:

67. See *supra* note 38 and accompanying text.

68. See *supra* notes 45-52 and accompanying text.

69. 665 F.2d 261, 267 (9th Cir. 1981). Prior to modification the opinion read: "Authorities from other circuits support this position. Thus it has been held that the filing of charges breaks the chain of causation between an arrest and prosecution after the filing. Nos. 79-3078, 79-3480, slip op. at 3843 (August 7, 1981) (citation ommitted) (emphasis added), modified 665 F.2d 261 (9th Cir. 1981).

In comparing the original opinion with the later modification, the court appears to concede that there is no precedent directly supporting this new immunity. By changing the first sentence from "authorities from other circuits support this position" to "authorities from other circuits lend some support to this position," the court equivocated. Furthermore, the addition of "under certain circumstances" in the second sentence indicates the court's uncertainty as to whether there is any real support for the proposition it has created.

70. 600 F.2d 183 (8th Cir. 1979).

71. 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978).

72. 556 F.2d 1185 (5th Cir. 1977) (en banc).

73. The court briefly relates the facts of the case in a footnote. 665 F.2d 261, 267 n.2.

Thus, we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted.⁷⁴

In light of prior Supreme Court decisions, however, an analysis of the three cases that the *Smiddy* court cited is crucial to a critical understanding of the opinion.

In *Rodriguez*,⁷⁵ the plaintiff sued the arresting officers for false arrest pursuant to a grand jury indictment. A criminal investigation had focused on the plaintiff as a result of a series of bizarre coincidences and "innocent mistakes."⁷⁶ Because of mistaken identity, investigators brought Ms. Rodriguez before a grand jury which indicted her on gambling charges. Arrest warrants were immediately issued and two police

That note is the extent of the court's discussion of these cases. See *supra* note 31 and accompanying text.

74. 665 F.2d at 267. The opinion prior to modification read: "We join these circuits by holding that police officers are not liable for damages suffered by an arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted." Nos. 79-3078, 79-3480, slip op. at 3844 (Aug. 7, 1981), *modified*, 665 F.2d 261 (9th Cir. 1981).

By changing the beginning of the sentence to "thus we hold" in the modification, the court again seems to concede that rather than relying on precedent it has merely analogized to "similar" holdings in other circuits in an effort to support its holding. These "similar" holdings are based on facts which are readily distinguishable from the *Smiddy* case. See *supra* note 69. When this failure to rely on precedent is coupled with the modifications discussed in this Note, it appears that the *Smiddy* court has resorted to bootstrapping to achieve the result it wanted — the limitation of police liability.

In modifying its opinion the court excluded police conduct that is malicious or that displays reckless disregard for the rights of an arrested person from its new immunity. The court seems to be suggesting that for constitutional purposes, the immunity will apply to those acts which could be classified as negligent, as opposed to those that are intentional.

75. 556 F.2d 1185 (5th Cir. 1977) (en banc).

76. *Id.* at 1187-88. The FBI, conducting a massive investigation into illegal gambling activities in Florida, placed a judicially sanctioned tap and pen register on the suspect's telephone. During the period of the wiretap the suspect telephoned the number 935-0024 and spoke with a woman named "Margo" about gambling activities. The pen register malfunctioned and incorrectly recorded the number dialed as 935-9024. The FBI assigned agent Arnwine to identify "Margo." An officer of General Telephone Company identified the subscriber of 935-9024 as the plaintiff, Margaret S. Rodriguez. The number was actually that of a pay phone. Arnwine, not knowing of the error, believed that he had identified "Margo." *Id.* at 1187. He discovered that Margaret S. Rodriguez operated a home-conducted business called "Margo's Beauty Salon." Upon asking a Tampa vice squad detective if he had ever encountered a Margaret or "Margo" Rodriguez in any of his gambling investigations, the detective stated that he had investigated a Margaret Rodriguez who owned a beauty parlor. This person was *not* the plaintiff, but a namesake who was facing state criminal charges for gambling.

agents arrested Ms. Rodriguez. Five hours later, she obtained release on bail. A year later, during pretrial discovery, Ms. Rodriguez' attorney discovered the mistake, and the government dismissed the indictment against her.⁷⁷ Ms. Rodriguez then filed suit in federal court against the arresting officers and other known investigative agents claiming a violation of her fourth amendment rights. She claimed there was no probable cause for her arrest because her indictment had resulted from negligent police conduct.⁷⁸ The district court granted the defendant police officers' motion for summary judgment, and found that the officers had acted in good faith and with probable cause.⁷⁹

On appeal, a divided panel affirmed the lower court in part. The majority determined that a *Bivens* type⁸⁰ action had successfully been alleged, but agreed with the district court that the defendants were entitled to a good faith defense. The majority conceded, however, that a triable issue of fact existed as to whether one of the agents had acted in good faith.⁸¹

On rehearing *en banc*, a plurality remanded with directions to dismiss.⁸² The *Rodriguez* court first noted that while Ms. Rodriguez' complaint alleged only a constitutional claim, a fourth amendment violation, a federal common law claim of false arrest or false imprisonment implicitly existed from the facts cited in her complaint. Therefore, the court undertook a two-part analysis asking (1) whether the complaint stated a cause of action under the constitution, and (2) whether the plaintiff had successfully alleged a claim under federal common law.⁸³

The plurality found that the complaint failed to allege a constitutional violation and held that *an arrest pursuant to an indictment issued by a properly constituted grand jury did not violate the fourth amendment*

77. 556 F.2d at 1188. Ms. Rodriguez's attorney learned of the mistake during pretrial discovery when he was permitted to listen to the tape conversations. At that point he realized that the female voice recorded was not that of his client. *Id.*

78. *Id.*

79. *Id.*

80. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* involved a damage action based on unconstitutional search and seizure by federal narcotics agents. In *Bivens*, the Supreme Court created a cause of action against individuals acting under color of *federal authority* parallel to the statutory cause of action created by § 1983 against individuals acting under color of *state* authority. *Id.* at 397. This cause of action is commonly known as a *Bivens* cause of action.

81. 556 F.2d at 1189.

82. *Id.* at 1194.

83. *Id.* at 1189.

or federal common law.⁸⁴ The *Rodriguez* court reasoned that a grand jury indictment conclusively determined the existence of probable cause and provided authority for the issuance of an arrest warrant.⁸⁵

The *Rodriguez* holding contrasts sharply with the *Smiddy* decision, which found a fourth amendment violation, but cut off liability after a certain point.⁸⁶ The *Rodriguez* court did not develop a new immunity from constitutional tort claims, but rather, relied on the recognized common law immunities of good faith and probable cause in false arrest actions and concluded that a grand jury's independent determination of probable cause provided authority for the arresting officer.⁸⁷ Unlike *Rodriguez*, the *Smiddy* court appears to have developed a new immunity which attaches *after* the determination of a constitutional violation.

In fact, the *Rodriguez* court's discussion of the causation presumption, upon which the *Smiddy* court relied, did not come into play until

84. *Id.* (emphasis added).

85. *Id.* at 1191 (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 612 n.11 (1974); *United States v. Green*, 499 F.2d 538, 540-41 (1974); *United States v. Perkins*, 533 F.2d 1182, 1187 (1970); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950); *United States ex rel. Kassir v. Mulligan*, 295 U.S. 396 (1935); *Ex parte United States*, 287 U.S. 241, 249-51 (1932)).

The court stated that "the conclusion to be drawn is readily apparent: Since there was no unconstitutional arrest, no claim has been stated under the *Bivens* rationale." 556 F.2d at 1191 (citing *La Bar v. Royer*, 528 F.2d 548 (5th Cir. 1976)).

Indeed, the Court in *Rodriguez* noted that Ms. Rodriguez's complaint should have been dismissed for want of jurisdiction or failure to state a claim. 556 F.2d at 1192 (discussing *Bell v. Hood*, 327 U.S. 678 (1946)).

86. 665 F.2d at 265-67.

87. In a concurring opinion, Justice Hill agreed with the conclusion that an indictment by a grand jury conclusively determines the existence of probable cause and provides authority for the arrest warrant to issue. However, Justice Hill cautioned against the possibility of drawing an inference from the *Rodriguez* holding that "indictment by a properly constituted grand jury immunizes all precedent conduct of investigative and prosecutorial authorities." *Id.* at 1194-95 (concurring opinion). While Justice Hill agreed that an officer who executes an arrest warrant that is issued by a properly constituted grand jury cannot later be held liable for an unconstitutional arrest, he cautioned against allowing an officer who *maliciously* or in *bad faith* sought to obtain such a grand jury indictment to escape responsibility simply by showing that he did "such a good job that the grand jury indicted." *Id.* at 1195.

Six justices on the Fifth Circuit joined in a scathing dissent. The dissent first took issue with the view that the grand jury indictment was independent, and thus cut off liability on the part of the police for an unconstitutional arrest. *Id.* at 1201 (Goldberg, J., dissenting). The dissent also disagreed with the plurality's exemption of negligent acts committed by the investigating official from constitutional liability. *Id.* at 1202. Further, the dissent took issue with the plurality's "unbounded deference" to a grand jury's determination of probable cause. *Id.* at 1204. Finally, the dissent questioned the plurality's lack of concern about the agent's conduct antecedent to the arrest. *Id.* at 1205.

the *Rodriguez* court concluded that the plaintiff had failed to allege a constitutional violation. That presumption was discussed only in terms of plaintiff's claim for relief under federal *common law*. The *Rodriguez* court held, however, that the "common law false imprisonment theory [was] *not* applicable to the activity of either the investigative or the arresting agents" in the case before it because (1) a valid arrest is not a *false* arrest; (2) if the facts supporting the arrest are put before an intermediate, such as a magistrate or a grand jury, the intermediate's decision breaks the causal chain and insulates an initiating party; and (3) one engaged in investigatory work is not generally liable for false arrest.⁸⁸

The entire *Rodriguez* discussion of the common law false arrest cause of action is irrelevant to *Smiddy* because the plaintiff in *Smiddy* alleged, and the jury found, a constitutional violation arising from a warrantless arrest without probable cause.⁸⁹ Thus, even if tort concepts were applicable, the *Rodriguez* principles do not apply to *Smiddy* because of the distinguishable facts. Additionally, the *Rodriguez* plurality indicated that general state tort law is not always directly applicable to constitutional torts.⁹⁰ Moreover, the precedential value of *Rodriguez* is further diminished because *Rodriguez* is a plurality opinion with a vigorous dissent.⁹¹

The second case that the *Smiddy* court relied upon, *Dellums v. Powell*,⁹² is similarly distinguishable and thus unsupportive of the *Smiddy* holding. In *Dellums*, a group of demonstrators who had been arrested during a demonstration on the steps of the United States Capitol building, and the congressman who was addressing them at the time of the arrest, brought a *Bivens*⁹³ cause of action against Police Chief Powell for a fourth amendment violation, i.e., an illegal seizure. Their complaint also contained pendant claims for false arrest, false imprisonment and malicious prosecution.⁹⁴ After the arrest, Chief Powell attended a meeting with three assistant United States attorneys, one of whom, Zimmerman, had been an eyewitness to the event precipitating the arrests. Powell and Zimmerman related their story, and on that

88. *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978).

89. *Smiddy v. Varney*, 665 F.2d 261, 267 (9th Cir. 1981).

90. 556 F.2d at 1193 n.35 (citing *Katz v. United States*, 389 U.S. 347 (1961)). "[G]eneral tort law and the fourth amendment cannot be perfectly equated . . ." *Id.*

91. See *supra* note 87 and accompanying text.

92. 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

93. See *supra* note 80.

94. 566 F.2d at 175.

information, the assistant United States attorneys decided to prosecute a test case against eight of the arrestees. The test case failed, and the prosecutor dismissed charges against the others.⁹⁵

In a subsequent civil suit against Chief Powell arising from the arrests of the demonstrators, the jury found him liable for false arrest, false imprisonment, malicious prosecution, and for a *Bivens* claim based on violations of the first and fourth amendments.⁹⁶ On appeal the court noted that "[t]he tort action of false arrest in both its common law and constitutional variants protects and vindicates the *interest in freedom from unwarranted interference with personal liberty*."⁹⁷ The court recognized that an officer is justified in making an arrest only if acting with probable cause or in good faith,⁹⁸ and held that under the facts before it the jury could properly conclude that Chief Powell had failed to establish adequately either defense. Accordingly, the court upheld the damage award for these violations.⁹⁹

The *Dellums* court then addressed plaintiff's claim against Chief Powell for malicious prosecution. The jury found against Chief Powell on the plaintiff's malicious prosecution claim and awarded \$3,000 to eight class members who stood trial on the criminal charges, and \$50 to all other class members. On appeal, Powell asserted that the evidence was insufficient to show that his actions caused the filing of criminal charges against the class of plaintiffs. He argued that the arrest did not constitute *institution of criminal charges* as defined in the law of malicious prosecution.¹⁰⁰ Rather, he asserted that it is the filing of a formal

95. *Id.* at 191-92.

96. *Id.* at 174, 175; *see supra* note 80 and accompanying text.

97. 566 F.2d at 175 (emphasis added).

98. *Id.* The court noted that this would be true under the *Bivens* cause of action as well as false arrest and false imprisonment causes of action. The court stated:

The mechanics of pleading and proof in a *Bivens* action for false arrest are in our judgment identical to those sketched [for false arrest and false imprisonment]. Although we know of no case delineating the parameters of a *prima facie* case under a *Bivens* false arrest theory, *Pierson v. Ray* . . . indicates that the details of constitutional tort actions should be shaped by reference to the parallel common law.

Id. at 175 (citations omitted).

99. 566 F.2d at 197 n.89.

100. *Id.* at 191. "Malicious prosecution has four elements: (1) the defendant must be found to have instituted a criminal action against the plaintiff; (2) [the] prosecution must have ended in the plaintiff's favor; (3) there must have been no probable cause to initiate the criminal proceeding[s]; and (4) the defendant must have acted maliciously." *Id.* at 191 n.65 (citing 1 F. HARPER AND F. JAMES, *THE LAW OF TORTS*, § 46 at 321 (1956)) [hereinafter HARPER & JAMES]. *See also* PROSSER, *LAW OF TORTS* 835-47 (4th ed. 1971) [hereinafter PROSSER]; RESTATEMENT (SECOND) OF TORTS § 653 (1965) [hereinafter RESTATEMENT (SECOND)].

information that triggers such tort liability.¹⁰¹

In analyzing Chief Powell's malicious prosecution argument, the court stated that the factors that led to the decision to prosecute¹⁰² raised an issue of causation of first impression in the District of Columbia.¹⁰³ The court first noted that the tort of malicious prosecution directly and primarily protects the "interest in freedom from *unjustifiable* and *unreasonable litigation*."¹⁰⁴ The tort protects only secondarily other interests, such as those in reputation, property, or liberty. The court then reasoned that an injury to those interests which are secondarily protected by the tort cause of action is insufficient to support liability for malicious prosecution absent injury to the interest primarily protected.¹⁰⁵ For example, despite the significant deprivation of liberty resulting from an arrest, a police officer who unreasonably or maliciously arrests an individual without an arrest warrant cannot be held for malicious prosecution unless an information or indictment was filed.¹⁰⁶

Thus, according to the court, the relevant question was whether Chief Powell was sufficiently involved in triggering the filing of the information to overcome a presumption of independent action by the United States attorneys.¹⁰⁷ The court held that although there was evidence from which the jury could have concluded that Chief Powell procured the filing of the information by making misrepresentations, Chief Powell was entitled to a new trial on the malicious prosecution claim. The court reached this conclusion by determining that the district court had erred in instructing the jury that it "must find that 'the defendant

101. 566 F.2d at 191.

102. For a discussion of the factors leading to the decision to file the information see 566 F.2d at 191-92.

103. 566 F.2d at 192.

104. *Id.* (quoting HARPER & JAMES, *supra* note 100, § 4.1 at 301) (emphasis added).

105. 566 F.2d at 192.

106. *Id.* & n.71 (citing Auerbach v. Freeman, 43 App. D.C. 176 (D.C. Cir. 1915)). Courts have also held that a private citizen who knowingly and maliciously presents false information to an official but who fails to cause process to issue cannot be held liable for malicious prosecution. *Id.* at 192. See also Melvin v. Pence, 130 F.2d 423, 425 (D.C. Cir. 1942); RESTATEMENT (SECOND) *supra* note 100, comment c.

107. 566 F.2d at 192; see *supra* note 104 and accompanying text. Additionally, the court stated:

The law is clear that the chain of causation between Chief Powell and the filing of the informations against plaintiffs is broken — thereby defeating tort liability — if the decision made by attorney Moore [assistant United States attorney] was independent of any pressure or influence exerted by Chief Powell and of any knowing misstatements which Powell may have made at the meeting on the evening of May 5.

Id. at 192-93.

instituted a criminal proceeding.'"¹⁰⁸ The court held that this was error because the district court failed to instruct the jury on the definition of the limited meaning of the word "instituted" in the context of the case.¹⁰⁹

The part of the *Dellums* opinion on which the *Smiddy* court relied involved only the common law tort of malicious prosecution.¹¹⁰ In *Smiddy*, however, the plaintiff claimed an invasion of a constitutionally protected interest, his fourth amendment right to be free from unreasonable arrest.¹¹¹ These torts protect distinct interests and involve concepts which are mutually inconsistent.¹¹² The distinction between the torts lies in the "regularity of the legal process under which the plaintiff's interests have been invaded."¹¹³ When a plaintiff is arrested and confined without a warrant or a legal authority apart from the warrant, the essence of the tort is the perversion of legal procedure and the remedy is false imprisonment. Conversely, if there is a *valid process* or due authority apart from it, "the arrest is not 'false'" and the action must be for malicious prosecution.¹¹⁴

Thus, in *Dellums*, while the court recognized a presumption of independence on the part of the prosecutor, it did not speak of this presumption in terms of immunizing Police Chief Powell from damages which flowed from the constitutional tort of arrest without probable cause. Rather, the court spoke of this presumption *only* for the purpose of facilitating Chief Powell's defense to the common law tort action of malicious prosecution.

108. 566 F.2d at 193.

109. *Id.*

110. See *supra* note 100 and accompanying text.

111. 665 F.2d at 264. Courts have noted that an illegal arrest in violation of the fourth amendment, and common law torts of false arrest and false imprisonment invade identical interests, i.e., freedom from unwarranted interference with personal liberty. 566 F.2d at 175; see *supra* note 98 and accompanying text.

112. Prosser has contrasted the torts of false arrest/false imprisonment with the tort of malicious prosecution, stating:

The distinction between [malicious prosecution and false arrest] lies in the existence of valid legal authority for the restraint imposed. If the defendant complies with the formal requirements of the law, as by swearing out a valid warrant, so that the arrest of the plaintiff is legally authorized, the court and its officers are not his agents to make the arrest, and their acts are those of the law in the state, and not to be imputed to him. He is therefore liable, if at all, only for a misuse of legal process to effect a valid arrest for an improper purpose The weight of modern authority is that where the defendant has attempted to comply with legal requirements, and has failed to do so through no fault of his own, false imprisonment will not lie and the remedy is malicious prosecution.

PROSSER, *supra* note 100, at 49 & 835.

113. PROSSER, *supra* note 100 at 49.

114. *Id.*

Policy reasons may, however, exist for extending the causation presumption created by *Dellums* for malicious prosecution torts to constitutional torts. The presumption would thus limit police liability in section 1983 tort actions.¹¹⁵ For example, a California appellate court recently announced a policy of automatically cutting off police liability after the beginning of the process in actions under the California Tort Claims Act. In so doing the court effectively subordinates the hardships suffered by some individuals "in favor of 'promoting the fearless and effective administration of the law for the whole people by protecting public officers from vindictive and retaliatory damage suits'. . . ."¹¹⁶ This policy avoids the chilling effect and impediments to law enforcement which would result if public officers and public prosecutors were to be held liable for their official conduct.¹¹⁷ Yet, the *Smiddy* court failed to discuss these possible policy reasons and to measure them against the policies behind section 1983. The precedential value of *Dellums*, therefore, is diminished in reference to section 1983 cases which require a careful consideration of policy before providing such immunization.

Finally, the *Smiddy* court's reliance upon *Ames v. United States*¹¹⁸ is misplaced. In *Ames*, the plaintiff brought an action for abuse of process, false arrest, and false imprisonment, alleging illegal acts and omissions of agents and employees of the Department of Justice, the Internal Revenue Service, the Federal Bureau of Investigation, and the United States Attorney. The district court dismissed the complaint.¹¹⁹ The Eighth Circuit affirmed, holding that (1) the abuse of process, false arrest, and false imprisonment actions were barred by the Federal Tort

115. See *infra* note 144 and accompanying text.

116. *Jackson v. City of San Diego*, 121 Cal. App. 3d 579, 586, 175 Cal. Rptr. 395, 399 (1981) (quoting *Collins v. City of San Francisco*, 50 Cal. App. 3d 671, 678-79, 123 Cal. Rptr. 525, 529 (1975)); *White v. Towers*, 37 Cal. 2d 727, 729, 235 P.2d 209, 212 (1951)). But see Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 CAL. LAW REVISION COM. REP. 406-15 (1963) (a study conducted by Professor Van Alstyne prior to the California legislature's adoption of the California Tort Claims Act, CAL. GOV'T CODE §§ 810-996.6 (West 1980)). In his report, Professor Van Alstyne asked the legislature to consider "the interest in protecting an innocent citizen against the expense, inconvenience and disgrace of being forced to defend against unjustified . . . charges of crime." *Id.* at 413. The California Law Revision Commission accordingly recommended liability for public entities under such malicious prosecution situations. However, the Legislature rejected the creation of such liability; rather it enacted GOV'T CODE §§ 821-26 creating absolute liability for the tort of malicious prosecution. See *infra* notes 143-44 and accompanying text.

117. *Jackson v. City of San Diego*, 121 Cal. App. 3d 579, 582, 175 Cal. Rptr. 395, 396 (1981).

118. 600 F.2d 183 (8th Cir. 1979).

119. *Id.* at 184.

Claims Act,¹²⁰ and (2) plaintiff's claim for malicious prosecution failed to state a cause of action in the absence of allegations that the defendants *initiated* or *procured* the institution of the grand jury indictment against the plaintiff.¹²¹

The court stated that "[t]he tort of malicious prosecution is triggered by institution of criminal proceedings," i.e., the return of the grand jury indictment.¹²² The court reasoned that the acts allegedly committed by the defendants without probable cause and with malice—arresting Ames, confining him, and placing a lien upon his property—all occurred subsequent to the grand jury indictment.¹²³ Thus, they could not be construed as initiating or procuring criminal proceedings. Moreover, the court, relying on *Rodriguez*¹²⁴ and *Dellums*,¹²⁵ held that absent specific allegations of the presentation of false evidence or the withholding of evidence from the grand jury, "the grand jury indictment breaks any chain of causation linking the employees' activities to the institution of criminal proceedings, thus insulating the F.B.I. and Justice Department employees . . ."¹²⁶

As in *Dellums*, the discussion of liability in *Ames* involved the tort of malicious prosecution.¹²⁷ Since the *Smiddy* court failed to articulate policies for extending the malicious prosecution rationale to fourth amendment violations, the *Smiddy* court's reliance on *Ames* is misplaced. Moreover, the *Ames* court's discussion of causation has a logical consistency lacking in *Smiddy*. Because the arrest and confinement in *Ames* took place after the grand jury proceeding, it would be illogical to say that these actions "caused" the institution of criminal proceedings. By contrast, in *Smiddy*, there is no question that *Smiddy's* illegal arrest was at least a "but for" cause¹²⁸ of his confinement, not

120. *Id.* at 184-85 (citing 28 U.S.C. § 2680(h) (amended 1974)). The plaintiff's complaint was barred by the Act because the only acts and omissions upon which liability could be based occurred prior to the effective date of an amendment to the Act which allowed recovery for false imprisonment, false arrest, malicious prosecution and abuse of process. *Id.* at 185.

121. *Id.*

122. *Id.* (citing RESTATEMENT (SECOND), *supra* note 100, at §§ 653(a)(b) comment c.

123. *Id.*

124. 556 F.2d 1185 (5th Cir. 1977). See *supra* notes 72, 75-91 and accompanying text.

125. 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). See *supra* notes 92-117 and accompanying text.

126. 600 F.2d at 185.

127. See *supra* notes 100 & 112 and accompanying text.

128. Prosser defines "but for" causes as follows:

The defendant's conduct is not a cause of the event, if the event would have occurred without it. At most this must be a rule of exclusion: if the event would not have occurred "but for" the defendant's negligence it still does not follow that there is liability, since considerations other than causation, which remain to be discussed,

only before the District Attorney's filing of the complaint, but after it as well.

B. Do Common Law Tort Principles Support the Smiddy Holding?

1. The proper application of state and common law in section 1983 cases.

Although this Note suggests that *Smiddy* did not provide an adequate rationale for creating a new immunity under section 1983, such a rationale may exist in common law tort principles of causation. Courts have generally read section 1983 against the background of common law tort concepts.¹²⁹ One commentator has stated that the federal courts have looked to three areas of state tort law to define section 1983 actions: (1) state secondary rules, i.e., those governing limitations, survival and immunities; (2) state tort principles to define the elements necessary to a plaintiff's section 1983 action; and (3) state tort law to define the scope of constitutional interest in cases arising under the due process clause.¹³⁰

Courts have generally adopted state law principles for two reasons. First, Congress has specifically provided in 42 United States Code section 1988,¹³¹ "that a court hearing a Civil Rights claim shall apply the

may prevent it. It should be quite obvious that, once events are set in motion, there is, in terms of causation alone, no place to stop.

PROSSER, *supra* note 100, at 239.

129. *Monroe v. Pape*, 365 U.S. 167 (1961). See *supra* note 3 and accompanying text. In *Monroe* Justice Douglas stated: "Section 1979 [now 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187. But see NAHMOD *supra* note 7. Professor Nahmod suggests that courts should go beyond tort law in applying § 1983 and look to the federal policies behind § 1983 for guidance. He blames this "narrow vision" in part on Douglas' dicta in *Monroe*, stating:

Unfortunately, many 1983 cases applied tort law as if with blinders respecting federal policies involved, seemingly making tort law determinative of 1983 liability. It is clearly unfair to blame Justice Douglas' dictum for this, but it is apparent courts have seized upon the 'background of tort liability' catch phrase with little consideration given to the background of 1983 liability.

NAHMOD, *supra* note 7, at 12-13. Cf. *Monroe*, 363 U.S. at 191-202 (Harlan, J., concurring). Harlan suggested that Congress may have thought "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." 365 U.S. at 196 (Harlan, J., concurring).

130. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 15 (1980) (hereinafter *Constitutional Torts*). However, Professor Whitman also suggests that constitutional tort actions are not coextensive with actions under state tort law. *Id.* at 14. She notes that in defining a constitutional tort it is often necessary to draw upon a body of general law, rather than the law of a particular state. *Id.*

131. 42 U.S.C. § 1988 (1980) provides in part:

The jurisdiction in civil . . . matters conferred on the district courts by the provi-

law of the state in which that court sits when federal law is 'deficient.'"¹³² More frequently, courts have used section 1988 to sanction the application of state tort law for secondary rules, specifically, those governing limitations, survival and immunities, which are absent from section 1983.¹³³ Courts have, however, looked to general common law principles in addition to the law of a particular state for such secondary rules.¹³⁴

In defining the elements¹³⁵ of a plaintiff's section 1983 claim, courts have rarely relied exclusively on section 1988.¹³⁶ Courts have also looked to general concepts regarding personal obligations developed over the past century in common law actions for damages.¹³⁷

sions of this Title, and of Title "CIVIL RIGHTS," . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or 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 . . . 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 (1980) (emphasis added).

132. *Constitutional Torts*, *supra* note 130, at 15. According to Professor Whitman, the meaning of "deficient" is unclear. *Id.* (citing Eisenberg, *State Law and Federal Civil Rights Cases: The Proper Scope of section 1988*, 128 U. PA. L. REV., 449, 508-15 (1980) [hereinafter Eisenberg]). Eisenberg contends that § 1988 was not intended to apply in § 1983 actions. Eisenberg's premise is that § 1988 can be logically interpreted only if it is applied solely to actions that are removed from state to federal courts under 28 U.S.C. § 1443 (1976), the civil rights removal provision. Eisenberg, *supra* at 500, 525-32.

133. Notwithstanding Eisenberg's contention, *see supra* note 132, federal courts, relying on § 1988, have generally followed the state statute of limitations and survival rule of the states in which they sit. *Constitutional Torts*, *supra* note 130, at 16; *see also* Board of Regents v. Tomanio, 446 U.S. 478, 492 (1980) (applied state tolling rules); Robertson v. Wedgmann, 436 U.S. 584, 594-95 (1978) (applied state survival rules); O'Sullivan v. Felix, 233 U.S. 318, 323-25 (1914) (applied state statute of limitations); Almon v. Kent, 459 F.2d 200, 203 (4th Cir. 1972) (applied state statute of limitations); Rondelli v. County of Pima, 120 Ariz. App. 483, 586 P.2d 1295, 1297 (1978) (applied state statute of limitations).

134. *Constitutional Torts*, *supra* note 130, at 16. In the cases defining immunities available to § 1983 defendants, *see supra* notes 39-67 and accompanying text, the courts invoked principles from general common law to arrive at their holdings. Thus, in *Pierson v. Ray*, 386 U.S. 542 (1967), *supra* notes 56-67 and accompanying text, the Court justified its extension of common law defenses of good faith and probable cause to police officers sued under § 1983 for an allegedly unconstitutional arrest by referring to general common law sources, including RESTATEMENT (SECOND), *supra* note 100, HARPER & JAMES, *supra* note 100, PROSSER, *supra* note 100; and *Constitutional Torts*, *supra* note 130, at 16.

135. These elements include causation, compensable injury, and the requisite state of mind of the defendant. *Constitutional Torts*, *supra* note 130, at 18.

136. *Constitutional Torts*, *supra* note 130, at 18. Whitman suggests that the use of common law seems to occur because § 1983 is unclear about the basis of liability that it imposes.

137. *Id.* Professor Whitman states: "Thus, it is not surprising that judges who are re-

This reliance on a general body of common law has occurred because section 1983 is vague about the basis of liability that it imposes. The Act merely creates a cause of action for damages; it does not create any substantive rights.¹³⁸ However, this void in the Act assumes there is some way of deciding if an individual is responsible for the deprivation of constitutional rights.¹³⁹ In another context, Justice Harlan supported use of common law concepts to define the elements of section 1983 cases "in framing principles 'concerning causation and magnitude of injury necessary to accord meaningful compensation.'"¹⁴⁰

By discussing the tort principles of proximate cause as applied to the *Smiddy* facts, the distinction between a general body of common law and specific state law becomes significant. Although California law on proximate cause in false arrest actions still appears to be contrary to *Smiddy*,¹⁴¹ a recent California case, *Jackson v. City of San Diego*,¹⁴² suggests a trend toward limiting law enforcement agents' liability to the period before indictment or arraignment. The *Jackson* court reasoned that the concept of proximate cause involved policy considerations and looked to section 117(c) of the California Tort Claims Act¹⁴³ for guidance. It noted that the legislature's grant of ab-

quired to define this responsibility fall back on the concepts of personal obligations devolved over the centuries in common law actions for damages."

138. *Id.*; see e.g. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

139. *Constitutional Torts*, *supra* note 130, at 18.

140. *Id.* at 19 (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring)).

141. *Gill v. Epstein*, 62 Cal. 2d 611, 401 P.2d 397, 484 Cal. Rptr. 45 (1965). The California Supreme Court created a rule of law contrary to the presumption created in *Smiddy* stating:

Although a chain of causation may be broken by an independent intervening act which is not reasonably foreseeable . . . plaintiff's arraignment was not such an act. It was clearly a foreseeable result of the arrest and was actually contemplated by defendants.

Under the circumstances, the arrest was a proximate cause of plaintiff's imprisonment both before and after the arraignment and he is entitled to recover damages for physical and mental suffering during the entire period he was confined.

Id. at 617-18, 401 P.2d at 401, 484 Cal. Rptr. at 48-49 (citations omitted).

The rule announced in *Gill* appears to be the controlling law in California. Since the facts of *Smiddy* are identical to those in *Gill*, under California law, *Smiddy* would be able to recover for the entire term of his imprisonment both before and after process began. *But see Jackson v. City of San Diego*, 121 Cal. App. 3d 579, 175 Cal. Rptr. 395 (1981); see *infra* note 144.

142. 121 Cal. App. 3d 579, 175 Cal. Rptr. 395 (1981); see *supra* note 116 and accompanying text.

143. CAL. GOV'T. CODE § 821.6 (West 1980) provides: A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

solute immunity in malicious prosecution actions indicated an intent to expand immunities for law enforcement agents in the interest of protecting the public.¹⁴⁴ Whether the policies announced in *Jackson* are to be given force in section 1983 actions depends upon whether federal courts are limited to looking to state law to fill the substantive gaps in section 1983. The United States Supreme Court addressed this precise issue in *Martinez v. California*.¹⁴⁵

In *Martinez*, the survivors of a fifteen year old girl murdered by a recently released parolee brought an action under section 1983, claiming that the State Parole Board's action in releasing the parolee deprived the decedent of life without due process. The Supreme Court

144. *Jackson v. City of San Diego*, 121 Cal. App. 3d 579, 175 Cal. Rptr. 395 (1981). In *Jackson*, the plaintiff had been arrested without a warrant by a city police officer for murder and robbery. Fifteen days later the grand jury returned an indictment against him and he was rearrested on a bench warrant pursuant to the indictment. He was convicted of robbery and murder and spent ten months in custody. Plaintiff was released from prison after another man was tried and convicted for the same murder. Upon his release from prison, plaintiff sued the City of San Diego for false imprisonment. A jury awarded him \$280,000 damages.

On appeal, the court chose to look to the California legislature for guidance. It noted that in enacting the California Tort Claims Act, CAL. GOV'T CODE § 810 *et seq.* (West 1980), the legislature recognized the difference between the torts of malicious prosecution and false arrest and enacted distinct provisions for each tort. The Act provided immunity from malicious prosecution, but did not provide such an immunity for the torts of false arrest and false imprisonment. CAL. GOV'T CODE § 820.4 (West 1980), provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. *Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.*" (emphasis added). The court reasoned that had the petitioner's restraint started *after his indictment*, i.e. lawful process, he would be unable to recover since his action would be one for *malicious prosecution* not false imprisonment.

The court held that the Act limited the damages which could be awarded for false imprisonment to the period of incarceration beginning with the false arrest and ending when lawful process was initiated. Therefore, the plaintiff was entitled to the damages he suffered during the period from his warrantless arrest to the date he was rearrested pursuant to the grand jury indictment, fifteen days. The judgment was reversed and the case was remanded for retrial on the issue of damages only.

It is important to note that *Jackson* based its decision completely on the *intent* of the California Legislature. It carefully analyzed this intent, citing to debates and articles. See *A Study Relating to Sovereign Immunity, No. 1 -- Tort Liability of Public Entities and Pub. Employees*, 4 CAL. LAW. REV. COM. REP. 817 (1963). Based on legislative intent the court announced a policy of cutting off liability after a certain point.

The plaintiff in *Smiddy* invoked § 1983, a federal statute. Even if the *Jackson* approach is adopted by the California Supreme Court and California courts begin to expand official immunity to cases analogous to *Smiddy* under the California Tort Claims Act, the supremacy clause of the Constitution would preclude a strict reliance on the policies announced in *Jackson*. See *infra* notes 144-49 and accompanying text. The *Smiddy* court, however, could have similarly analyzed § 1983 in an effort to establish policies relating to official liability.

145. 444 U.S. 277 (1980).

held that the girl's death was too remote a consequence of the parole officer's action to hold the parole officer liable.¹⁴⁶ In so holding the Supreme Court did not have to decide whether a California immunity statute applied.¹⁴⁷ The Court announced in dicta, however, that the California immunity statute did not apply even though the federal action (section 1983) was originally asserted in the state court. The Court reasoned that the supremacy clause of the Constitution¹⁴⁸ precludes a state immunity defense to control the effect of a federal statute. The Court noted that such a construction "would transmute a basic guarantee into an illusory promise."¹⁴⁹ The foregoing discussion indicates that the general body of common law tort concepts should apply in resolving issues of proximate causation in section 1983 actions.

2. Proximate cause in section 1983 actions

In *Martinez* the United States Supreme Court established that a plaintiff's section 1983 action must fail if the injury alleged is "too remote a consequence" of the challenged government action.¹⁵⁰ Thus, the plaintiff must prove that defendant's conduct proximately caused his or her injury. Although the *Smiddy* court framed its holding in terms of chain of causation, it failed to discuss underlying principles of tort law. Under general principles of tort law, once the plaintiff has established that defendant's conduct has in fact been one of the causes of the plaintiff's injury (a "but for" cause), the question of whether the defendant should be legally responsible for what he or she has caused must still be resolved. Thus, the question of whether the defendant's conduct proximately caused the plaintiff's injury remains to be resolved.¹⁵¹

In *Smiddy*, the police officer's conduct unquestionably "caused" the plaintiff's injury. The court recognized that the police officers were

146. *Id.* at 285.

147. CAL. GOV'T CODE § 845.8 (West 1980) provides in pertinent part:

Neither a public entity nor a public employee is liable for:

(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.

148. U.S. CONST. art. VI, § 2.

149. 444 U.S. at 284 n.8 (citing *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); *McLaughlin v. Tilandis*, 398 F.2d 287, 290 (7th Cir. 1968) (immunity claim raises question of federal law)).

150. 444 U.S. at 285. See *supra* note 146 and accompanying text; see *supra* note 30 for other cases involving proximate cause as applied to § 1983 actions.

151. PROSSER, *supra* note 100, at 244.

a "but for"¹⁵² cause of the injuries by upholding the damage award for the time that Smiddy spent in jail before the district attorney filed a complaint. The court, however, concluded that the police officer's conduct was *not* the proximate cause of damages suffered subsequent to the filing of criminal charges. In holding that the filing of criminal charges broke the chain of causation, the *Smiddy* court appears to have made a determination that the prosecutor's action was a "superseding intervening cause" which shielded the defendant from liability for subsequent damage suffered by the plaintiff.¹⁵³

According to an accepted definition of superseding cause, two basic elements must be present to find that an intervening action is a superseding cause which cuts off the liability of the original actor: (1) the intervening action must be independent¹⁵⁴ of the original actor's wrongful conduct, and (2) it must be an unforeseeable¹⁵⁵ consequence of the original actor's conduct. In determining the issue of causation in section 1983 actions, the Ninth Circuit adopted a similar test of reasonable foreseeability in *Johnson v. Duffy*.¹⁵⁶

Anyone who "causes" any citizen to be subjected to a consti-

152. See *supra* note 32 and accompanying text.

153. See PROSSER, *supra* note 100, at 270-71; RESTATEMENT (SECOND), *supra* note 100, at 440. The *Smiddy* court states: "Where the plaintiff has introduced evidence to rebut the presumption, the burden remains on the defendant to prove that an independent intervening cause cuts off his tort liability." 665 F.2d at 267 (citing FED. RULE EVID. 301) (emphasis added). RESTATEMENT (SECOND), *supra* note 100, at § 440 defines *superseding cause* as follows: "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

The RESTATEMENT OF TORTS lists the following considerations as important in a determination of whether an intervening force is a superseding cause of harm to another:

(a) The fact that its intervention brings about harm is different in kind from that which would otherwise have resulted in the actor's negligence; (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence or, on the other hand, is or is not a normal result of such a situation; (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act; (e) the fact that the intervening force is due to the act of the third person which is wrongful toward the other and as such subjects the third person to liability to him; (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Prosser states that "the questions are always one of whether [the defendant] is to be relieved of responsibility and his liability superseded, by the subsequent event." PROSSER, *supra* note 100, at 173.

154. See PROSSER, *supra* note 100, at 173.

155. See *id.* at 84.

156. 588 F.2d 740 (9th Cir. 1978); see *supra* note 30 for other § 1983 proximate cause cases; see also text accompanying notes 118-20 for general discussion of proximate causation in § 1983 actions.

tutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also *by setting in motion a series of acts by others* which the actor knows or reasonably should know would cause others to inflict the constitutional injury.¹⁵⁷

Applying this proximate cause analysis to the facts of *Smiddy*, it is apparent that the *Smiddy* court's determination that the filing of a complaint is a superseding cause of the injuries endured thereafter suffers from two analytical flaws. First, a recent study of criminal procedure practice in this country¹⁵⁸ indicates that with respect to prosecutorial-police relations, the prosecutorial decision to charge, rather than being presumptively independent is actually so intertwined with the actions of police officers as to render the interrelationship inseverable.¹⁵⁹ The police officers investigate, prepare and present a case for filing.¹⁶⁰ While in theory, the prosecutor has tremendous discretion in screening cases and deciding whether to file charges,¹⁶¹ the study reveals that in 51% of the offices in the jurisdictions studied, the police control the initial charging decision.¹⁶²

The facts of *Smiddy* indicate that the police presented the prosecutor with a case file. If the police had been negligent in pursuing their investigation, as they appear to have been in *Smiddy*, the prosecutor

157. 588 F.2d at 743 (emphasis added).

158. See generally Miller, *Prosecution: The Decision to Charge A Suspect with A Crime; Police-Prosecutor Relations in the United States: Executive Summary*, (1981) (Institute of Criminal Law and Procedure, Georgetown University Law Center) [hereinafter *Police-Prosecutor Relations*]; KAMISAR, LAFAYE AND ISRAEL, *MODERN CRIMINAL PROCEDURE* (5th ed. 1980).

159. See generally PROSSER, *supra* note 100, at 316-20 for discussion of apportionment of damages among joint tortfeasors. But see *Jackson v. City of San Diego*, 121 Cal. App. 3d 579, 588-89, 175 Cal. Rptr. 395, 400-01 (1981) which suggests that in situations such as *Smiddy*, it is possible to apportion damages, holding police responsible for injuries suffered before process and the D.A. responsible for damages suffered thereafter. *Id.* Because the D.A. enjoys absolute immunity, liability would exist only for damages incurred prior to process.

160. See generally *Police-Prosecutor Relations*, *supra* note 158, at 28-32. A recent study of the relationship between police and prosecutors in jurisdictions with populations over 100,000 conducted by the Georgetown University of Criminal Law and Practice provides compelling insight into the intermeshing of the two law enforcement bodies with regard to the charging decision.

161. See generally *id.*

162. *Id.* at 43. For example, in one area of the country "very little pre-charging screening is done and only a small number of arrestees are released without charges being filed." KAMISAR, LAFAYE AND ISRAEL, *supra* note 158, at 176. But see *Police-Prosecutor Relations*, *supra* note 158, at 47. The study indicates that a trend toward more prosecutorial independence is gradually developing throughout the country.

had no way of knowing that the police information was incomplete or inaccurate. Thus, the prosecutor's decision to charge in this type of situation "*depends*" on erroneous police information.

The second flaw in the *Smiddy* court's determination of superseding cause was the court's failure to discuss the foreseeability element. While not all arrests lead to prosecution, it is reasonably foreseeable that prosecution might result from an arrest. It is unlikely that in arresting an individual the police do not foresee, and actually hope, that the prosecutor will file charges. Defendant Varney testified revealingly that "after Smiddy's arrest, he and defendant Knuckles [sic] had only 48 hours to 'put a case together' and bring it to the prosecutor for filing."¹⁶³

In deciding *Smiddy* the Ninth Circuit not only departed from a traditional common law approach to proximate cause, but also from its own section 1983 proximate cause test announced in *Johnson v. Duffy*.¹⁶⁴ In *Smiddy*, as in *Duffy*, the police caused the plaintiff "to be subjected to a constitutional deprivation . . . [and to set] in motion a series of acts by others which the actor *knows* or reasonably should know would cause others [the D.A.] to inflict the constitutional injury."¹⁶⁵ Because all of the *Duffy* requirements appear to be satisfied under the facts of *Smiddy*, it is unclear on what basis the *Smiddy* court arrived at its conclusion.

V. CONCLUSION

By virtually creating a new immunity for law enforcement agents under section 1983, the Ninth Circuit ignored applicable United States Supreme Court precedent and failed to give adequate weight to the policies behind section 1983. These policies militate against the creation of such an immunity. In addition the *Smiddy* court did not point to a single authority that directly supported its holding, thereby rendering its novel theory of immunity vulnerable to attack.

Moreover, the court's reliance on a proximate causation analysis is flawed. Admittedly, there may be times when the police conduct is not the proximate cause of incarceration after process. For example, if, after an arrest, police realize that probable cause is deficient and so inform the prosecutor, then the decision to charge would be a superseding cause which should cut off police liability. In almost every

163. Appellant's Brief *supra*, note 12 at 17.

164. See *supra* notes 156-57 and accompanying text.

165. 588 F.2d at 743-44.

other situation, however, under a traditional tort foreseeability approach, the police are the force that sets the chain of events in motion, and they should be liable for the natural consequences of the arrest. That would include at least damages resulting during the period of incarceration after the charging decision.

At a time when the public is demanding law and order — and the courts are questioning the exclusionary rule and narrowing its scope, section 1983 becomes more important as an alternative means of deterring unlawful police activity and providing a remedy for plaintiffs who have suffered from such unlawful activity. Although an imperfect alternative,¹⁶⁶ section 1983 provides a method of deterrence that should satisfy law and order proponents. Section 1983 does not provide a vehicle with which to “exonerate the guilty,” by overturning trials or excluding crucial bits of evidence because of “technicalities” caused by unlawful police activity. Rather, section 1983 enables innocent victims of unlawful police conduct who have *already been exonerated* to redress the violations of their constitutional rights. By expanding police immunity, the *Smiddy* court diluted the utility of section 1983. In view of its departure from Supreme Court authority, *Smiddy's* precedential value should be seriously questioned.

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166. Section 1983 actions are costly and time consuming and thus for the average citizen such actions are often impractical if not impossible to pursue. *See supra* note 7.