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ACCOUNTABILITY IN GOVERNMENT
AND SECTION 1983

Mark R. Brown*

INTRODUCTION

Oliver North rouses strong passions from all sides of the political spectrum. Some find that North evokes a message of patriotism, heroism, and all that is good with the United States. To these people he epitomizes the soldier who selflessly sacrifices himself for the safety and security of his country.1 For others, however, North projects a more sinister image.2 For these people North portrays secret government run amuck: government acting in disregard of its own laws with little accountability and without popular direction.3

North, of course, played a part in the infamous Iran-Contra scandal, where government agents allegedly dealt arms to Iran and unlawfully diverted the proceeds to the Nicaraguan

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1. See Patrick J. Buchanan, You've Won Mr. President; Now Pardon Ollie and John, WASH. POST, July 19, 1987, at C1 ("America [has] openly rooted for Ollie North, and against the Sanhedrin of hypocrites trying to tear him down.").

2. See Richard Lacayo, "A Partial Vindication": The North Trial Ends with an Equivocal Verdict—And Many Unanswered Questions, TIME, May 15, 1989, at 34, 35 ("The public has been sharply divided about North since the scandal burst into the headlines in 1986.... [M]any consider him a rogue who set out to thwart the lawful conduct of foreign policy....").

3. One commentator described the situation as follows:

The para-state had its own budget, raised from arms sales and hostage trading and drug dealing. It had its own foreign policy. It had its own air force and its own police. It had its own diplomats. It had commodious quarters in the Old Executive Office Building and in the White House. Its officials and its mercenaries lied to the elected representatives of the American people. It waged a war Congress did not declare. Most of all, the para-state had the same president as the legitimate state.

Christopher Hitchens, A Few Questions for Poindexter: He Could Have Much to Say About Iran-Contra, HARPER'S MAG., Jan. 1990, at 70, 75.

4. The Boland Amendments banned military aid to the Contras throughout much of the Nicaraguan civil war. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 4-4, at 222–23 (2d ed. 1988). The Boland Amendment in
Contras. But North, notwithstanding his pivotal role, was not the king of the operation, nor even a rook. He was a simple pawn—in the words of Judge Gesell, a “low-level subordinate working to carry out initiatives of a few cynical superiors.”


North was initially charged with conspiring to defraud the government by violating the Boland Amendments, see United States v. North, 708 F. Supp. 375, 377–78 (D.D.C. 1988), although he was actually tried only for the related offenses of (1) aiding and abetting an obstruction of Congress, (2) altering, concealing, and destroying National Security Council documents, (3) receiving an illegal gratuity, (4) obstructing and lying to Congress, (5) obstructing a congressional inquiry, (6) obstructing a presidential inquiry, (7) improper conversion of traveler’s checks, and (8) conspiring to defraud the government of tax revenue, see Lacayo, supra note 2, at 34. North was convicted of the first three listed charges, but all three convictions were reversed on appeal. United States v. North, 910 F.2d 843, 851–52, modified, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991). The court of appeals reversed because of a danger that the convictions were tainted by North’s immunized testimony. 910 F.2d at 852. Following remand, the independent prosecutor dismissed all charges against North. See Elaine S. Povich, Use of Immunity Leads to Dismissal of North Charges, Chi. Trib., Sept. 17, 1991, § 1, at 1.

Admiral John M. Poindexter, a national security adviser to Reagan, was charged with and convicted of conspiring to defraud the government and obstructing congressional inquiries. His convictions, however, were reversed on appeal. United States v. Poindexter, No. 90-3125, slip op. at 2, 4–5 (D.C. Cir. Nov. 15, 1991). Richard Secord, a former Air Force major general, pleaded guilty to lying to Congress about the Iran-Contra affair and is currently on probation. See Secord, Striking New Deal, Drops Appeal of Conviction, N.Y. Times, June 24, 1990, at A20. Robert C.
others in the Reagan Administration were involved. Whether and how far the investigation proceeds is yet to be seen. Much of the nation, however, appears weary of the expense and political divisiveness and is willing to accept the case as closed.

McFarlane, also a national security adviser to Reagan, pleaded guilty to four counts of withholding information from Congress. See The Iran-Contra Figures and Their Status, N.Y. TIMES, Apr. 8, 1990, at A24. Joseph F. Fernandez, a former CIA station chief in Costa Rica, was indicted twice for his alleged role in helping North establish a network to supply the Contras. See id. Charges against Fernandez were dropped, however, after Attorney General Richard Thornburgh refused to permit access to classified CIA information. See Walter Pincus, Walsh to Drop Prosecution of Former CIA Operative, Iran-Contra Documents Barred from Fernandez Trial, WASH. POST, Oct. 13, 1990, at A1. Alan D. Fiers, Jr., former chief of the CIA's Central American Task Force, pleaded guilty to misdemeanor charges of withholding information from Congress. See Iran Arms Case Given New Life in Plea Bargain, N.Y. TIMES, July 9, 1991, at A1. Elliott Abrams, former Reagan administration policy chief on Latin American affairs, pleaded guilty to two counts of withholding information from Congress. See Ex-Reagan Aide Guilty in Iran-Contra Case, CHI. TRIB., Oct. 8, 1991, § 1, at 2. Clair George, former deputy director of operations for the CIA, has been indicted for lying to three congressional panels and a federal grand jury investigating the Iran-Contra affair. See George Lardner, Jr. & Walter Pincus, Ex-CIA Covert Chief Indicted, WASH. POST, Sept. 7, 1991, at A1, A22. Finally, Duane R. Clarridge, a former CIA official, has been indicted for lying to congressional and presidential committees investigating the shipment of arms to Iran. See Ex-CIA Agent Indicted for Lying About Iran Deal, CHI. TRIB., Nov. 27, 1991, § 3, at 3.

8. Following North's trial one of the jurors told reporters: "I think there were people higher up who gave him the authority to do a lot of things, and then when he got caught out there high and dry, no one came to help him." Lacayo, supra note 2, at 35. Polls sponsored by Time Magazine and the Cable News Network suggest that a majority of Americans believe George Bush was personally involved in at least some of North's actions. Id. And, of course, many believe Ronald Reagan was personally involved in the entire affair. Lee Hamilton, chairman of the House Iran-Contra Committee, has stated: "My sense is that my colleagues are where an overwhelming majority of the American people are: They believe President Reagan and Bush were more deeply involved in Iran-contra than either of them have indicated." Christopher Madison, Iran-Contra Revisited, NAT'L J., May 27, 1989, at 1298, 1300. Gary Sick, a member of Jimmy Carter's National Security Council, recently reported that the roots of the Iran-Contra affair might reach all the way back to the 1980 presidential campaign. Sick has suggested that Reagan campaign officials in the fall of 1980 negotiated to provide arms to Iran in exchange for delaying release of American hostages. See Gary Sick, The Election Story of the Decade, N.Y. TIMES, Apr. 15, 1991, at A17.

9. A grand jury has been convened to further investigate the extent to which officials in the Reagan Administration helped to deceive Congress in connection with the sale of arms to Iran and covert aid to the Contras. North has testified before that grand jury. See North Testifies at Grand Jury, N.Y. TIMES, July 7, 1990, at A8. Although the grand jury's term was scheduled for only 18 months and should have now expired, it was still in session at the close of the year. See George Lardner, Jr., Iran-Contra Probe: Light at End of Tunnel, WASH. POST, Dec. 19, 1991, at A19.

10. See Hitchens, supra note 3, at 74 ("[S]o many professional Washingtonians will tell you that 'putting it all behind us' is better for the republic, for democracy."); Madison, supra note 8, at 1299 (reporting that a poll conducted by Louis Harris and
Regardless of whether its factual underpinnings are ever fully disclosed, Iran-Contra offers a dramatic paradigm for examining our philosophy of accountability in government. Granted, exploring the historical question of exactly who was involved might now be useless. We probably can never learn the answer and may not even want to know. So far as the exact details of the Iran-Contra affair go, it might be best to let sleeping dogs lie and move on.

But Iran-Contra, together with its fabled cast, can still teach us something about government accountability on a more abstract level. Act one presents the perennial fall-guy, Oliver North, claiming to have done only what he thought his superiors wanted. The second act offers several members of the National Security Council pleading the classical “I didn’t know” or “I wasn’t involved” defenses. And the epilogue sadly finds the audience, though perhaps not believing any of it, nodding and thinking, “Well, if they didn’t know, if they weren’t actually involved, then that’s okay.”

Associates, Inc. found “62 per cent of Americans agreeing that it was time for the country to give Reagan the benefit of the doubt and put the Iran-contra affair behind us”); Let the Iran-contra Story End, CHI. TRIB., May 31, 1991, § 1, at 20 (“Walsh should turn out the lights and go home.”).

11. See Madison, supra note 8, at 1298-1300.

12. According to one commentator:

We may have to wait years to learn exactly how it was that, in the age of piety and iron, a group of men short-circuited Congress, suborned the Justice Department, debauched the Treasury, all in order to strengthen the hand of the Ayatollah and to slay Nicaraguans they had never met or cared about and... but forget it. Forget it if you can.

Hitchens, supra note 3, at 75.

13. See Iran-Contra: North’s Trial Tests Defense of Obeying Higher-Ups, 47 CONG. Q. Wkly. 597, 597 (1989). North, however, failed to convince Judge Gesell that Reagan should be compelled to testify. Judge Gesell, following presentation of the independent counsel’s case against North, stated: “The trial record presently contains no proof that defendant North ever received any authorization from President Reagan to engage in the illegal conduct alleged, either directly or indirectly, orally or in writing.” Iran-Contra: Judge Refuses to Compel Testimony by Reagan, 47 CONG. Q. Wkly. 709 (Apr. 1, 1989).

14. See IRAN-CONTRA INVESTIGATION REPORT, supra note 4, at 273, 293-324 (majority report). See also Richard A. Brody & Catherine R. Shapiro, Policy Failure and Public Support: The Iran-Contra Affair and Public Assessment of President Reagan, 11 POL. BEHAV. 353, 358-59 (1989) (table 1) (providing a chronology of events of November 1986); Iran-Contra: Judge Refuses to Compel Testimony by Reagan, supra note 13, at 709-10 (“In 1987, Reagan told an inquiry commission chaired by former Sen. John Tower that ‘he did not know that the NSC staff was engaged in helping the contras,’ the board reported.”).

15. See, e.g., Hitchens, supra note 3, at 72 (“One of Reagan’s greatest triumphs was to transmute a seeming disadvantage—his stupidity—into a folksy trait and then, in his last two years in office, into what amounted to a plea bargain.”).
But is it? Who is responsible when government violates the law? Should only the perpetrator be held accountable, or should higher ranking officials, those "in charge," share responsibility? Assuming the search does not stop with the perpetrator, how far should it proceed? Specifically, should an official who truthfully pleads "I didn't know," or "I didn't do anything" escape responsibility? Are government officials who give their subordinates "blank checks" beyond reproach?

This Article surveys these questions in the particular context of state government and section 1983 of Title 42 of the United States Code. Section 1983 is perhaps the most potent civil weapon available for securing accountability in government. Of course, section 1983 is not applicable to federal officers and thus offers little assistance in the unique case of Oliver North. Still, it can be used successfully to combat the parallel problem involving state officials. In these all-too-frequent cases, "street-level" government officials

16. "Private blank check" was, ironically, the code word used by North to communicate directly with Poindexter. See Hitchens, supra note 3, at 72.
17. 42 U.S.C. § 1983 provides:

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

18. Section 1983 only applies to state officials. For actions against federal officials, one must proceed either under a more specific federal statute or attempt a Bivens-type action. See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 395-97 (1971) (allowing a direct action for damages against federal officials for violating constitutional rights); see also Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) (declining to provide Bivens remedies when Congress already provided remedial measures for constitutional violations that occurred in the administration of a government program). Though this Article concerns only § 1983, nothing precludes this analysis from being applied to federal officers through a Bivens-type action. See, e.g., Washington Square Post 1212 v. City of N.Y., 720 F. Supp. 337, 347-48 (S.D.N.Y. 1989) (discussing the potential for supervisory liability under Bivens in much the same way courts have addressed the liability of state officials under section 1983), rev'd on other grounds, 907 F.2d 1288 (2d Cir. 1990).
19. One commentator has defined "street-level bureaucrats" as "officials [who] share three common characteristics. They personally deliver basic governmental services directly to citizens. They occupy the lower rungs of their bureaucratic ladders. And despite low bureaucratic rank, they exercise substantial discretion in their daily work." Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs xvii (1983). See also Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Services (1980).
(like Oliver North) break the law either because they thought they were following orders or because they simply were never instructed to the contrary. Although these street-level officials are sometimes brought to justice,\(^{20}\) as in the Iran-Contra scandal, their superiors more often than not escape unscathed.\(^{21}\)

Society today appears too eager to accept defenses like "I didn't know" or "I wasn't involved" from those in government—excuses that one hundred years ago simply were not tolerated.\(^{22}\) Our modern ethos appears to expect little from public servants while tolerating much disservice. This attitude then reinforces the morality, apparently now shared by government officials, that responsibility only follows deliberate wrongdoing. Anything less, whether an indifferent failure or a careless act, is acceptable.

This Article, while not attempting to explain why this attitude has permeated our government ethic, pursues the goal of establishing section 1983 as an available means for remedying the problem. Specifically, it describes how section 1983 has been and can be used against upper-level government officials who are careless or derelict in their duties.\(^{24}\)
This discourse does not concern cases involving a high-ranking official's "direct" personal violation of federal law. For example, should an upper-level official discharge or order the discharge of a subordinate in violation of the Fourteenth Amendment, section 1983 clearly applies. 25 A high-ranking government official who perpetrates a constitutional wrong individually or in concert with others 26 is subject to liability under the same rules as any other state actor. 27

officials acting in their individual capacities, and thus will not directly assess injunctive relief nor will it consider actions against governmental agents acting in their "official" capacities. See generally Kentucky v. Graham, 473 U.S. 159 (1985).

25. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990) (noting that supervisory liability can be established through "personal direction" or "direct discrimination by the supervisor"); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A supervisor is . . . liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations . . . ."); Wulf v. City of Wichita, 883 F.2d 842, 864 (10th Cir. 1989) (finding liability where a supervisor recommended discharge in retaliation for First Amendment activity); Daniel v. Village of Hoffman Estates, 520 N.E.2d 754, 757 (Ill. App. Ct. 1987) ("If [the supervisor] directed or consented to plaintiff's dismissal, he is liable if that dismissal is held to be violative of her constitutional rights."), appeal denied, 522 N.E.2d 1242 (Ill. 1988).

26. By "in concert," I mean either by way of conspiracy theory or through traditional complicity doctrine. Purpose is required for both. See, e.g., Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988) ("In a § 1983 tort case . . . [t]he requirements for establishing participation in a conspiracy are the same . . . as in a case (criminal or civil) in which conspiracy is a substantive wrong."). Note that certain conspiracies to deprive persons of civil rights might also implicate 42 U.S.C. § 1985(3) (1988). See, e.g., National Org. of Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990) (per curiam) (affirming the lower court's injunction against an antiabortion group and its members, under § 1985(3), for interfering with abortion rights), cert. granted sub nom. Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (Feb. 25, 1991); Lewis v. Pearson Found., Inc., 908 F.2d 318, 322–23 (8th Cir. 1990) (finding allegations that the Missouri Attorney General participated in a private conspiracy to deprive women of abortion rights sufficient to state a claim under § 1985(3)), aff'd en banc, 917 F.2d 1077 (1991); Moore v. City of Columbia, 326 S.E.2d 157, 162–63 (S.C. Ct. App. 1985) (holding that the plaintiff failed to state a claim under § 1985(3) because she failed to "allege invidiously discriminatory animus").

27. See, e.g., Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989) ("Supervisors [are] liable for their own actions . . . ."); Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) ("A supervisor may be liable if there exists . . . his or her personal involvement in the constitutional deprivation . . ."); Shoekly v. City of Portland, 785 P.2d 776, 778 (Or. Ct. App.), review allowed, 785 P.2d 554 (Or. 1990). To be held liable the supervisor's fault must simply rise to the requisite level for the particular constitutional provision at issue. For instance, to prove a supervisor has violated equal protection by improperly discharging a subordinate, lower courts have commonly required purposeful discrimination on the supervisor's part. See, e.g., Trautvetter v. Quick, 916 F.2d 1140, 1149 (7th Cir. 1990) (noting that gender discrimination under the Equal Protection Clause must be intentional). See generally Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).
Likewise, a superior who personally breaches a constitutionally imposed duty, such as the affirmative obligation to provide medical assistance to inmates,\textsuperscript{28} is responsible under section 1983. Whether the superior personally acts in contravention of the Constitution or breaches one of its rare duties,\textsuperscript{29} liability flows directly from the violation. Because no unique problems peculiar to the supervisory liability context arise in these cases, they are not discussed here.

I confine this discussion to the more common predicament where a street-level official perpetrates a constitutional wrong without any “direct” participation on behalf of superior government officers. The assumption is that high-ranking officers either do not antecedently know of the wrong or do not actively participate in it. The questions that emerge then are: first, whether these superior officers \textit{should} be held responsible; and second, whether they \textit{can} be held accountable given Supreme Court precedent.

I argue that superior officers can and should be held personally accountable under section 1983 even without direct participation, or indeed any action at all. I conclude that a supervisory official who possesses the ability to control subordinates should be expected to exercise that control reasonably. If the supervisor fails to perform in a reasonable fashion he should be held personally accountable for his subordinates’ wrongs.

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\textsuperscript{28}See, e.g., Greason v. Kemp, 891 F.2d 829, 833–34 (11th Cir. 1990); Crooks v. Nix, 872 F.2d 800, 804 (8th Cir. 1989); Oliver v. Townsend, 534 So. 2d 1038, 1043 (Ala. 1988). In these cases, consistent with the constitutional mandate of Estelle v. Gamble, 429 U.S. 97, 104–05 (1976), courts have found supervisory liability where the supervisor showed “deliberate indifference” to the medical needs of a prisoner.

\textsuperscript{29}Omission cases of a constitutional magnitude are rare, at least in differing theories of liability if not numbers, because the constitution does not normally \textit{require} government action; rather, it generally only \textit{prohibits} it. See, e.g., DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189, 195 (1989) (noting that the Due Process Clause does not impose a duty on the state to protect life, liberty, and property interests of citizens against private invasion); Martinez v. California, 444 U.S. 277, 285 (1980) (upholding the constitutionality of a state statute granting absolute immunity to the parole board from liability for harm resulting from the parole of a prisoner); Commonwealth Bank & Trust v. Russell, 825 F.2d 12, 14–17 (3d Cir. 1987) (suggesting that state officials do not have a duty to protect members of the public at large with whom they have no special relationship and who they do not know are in any danger); see also David P. Currie, \textit{Positive and Negative Constitutional Rights}, 53 U. CHI. L. REV. 864, 886 (1986) (“My survey . . . leaves me convinced . . . that in this country government need not actively support everything it may not forbid.”); Daniel A. Farber, \textit{Government Liability After DeShaney}, \textit{TRIAL}, May 1989, at 18 (“[T]he Constitution does not confer a general, judicially enforceable right to government protection.”).
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Importantly, the duty to control subordinates in this context should be treated as a wholly federal duty. Courts have generally looked blindly to state law for supervisory duties. This Article argues that although state law should offer direction, it should not command the nature and extent of that inquiry. This approach avoids the doctrinal pitfalls that often accompany federal inquiries into state law. Moreover, it should alleviate any fears federal courts might have in using section 1983 to redress incompetence in the upper echelons of government.

To avoid confusion, I refer to cases that do not involve "direct" participation by superior government officers as cases of "derivative" supervisory liability. Derivative liability includes those cases where a supervisor does not actively and purposely engage in constitutional wrongdoing. In other words, it includes those cases where the supervisor either acts only carelessly, or fails to act at all.

30. See infra notes 63-67 and accompanying text.
31. See infra Part II.C.
32. I do not mean to suggest that "derivative" supervisory liability need be vicarious. In fact, as will become clear, derivative supervisory liability is not vicarious at all, because personal fault on behalf of the supervisor is required. See Larry Kramer & Alan D. Sykes, Municipal Liability Under Section 1983: A Legal and Economic Analysis, 1987 SUP. CT. REV. 249, 283 ("Derivative liability on the basis of negligent failure to supervise a wrongdoer or otherwise to prevent a wrong . . . is not 'vicarious' at all, as the derivatively liable party breached its own duty of care."). Perhaps to avoid the implication that "derivative" means "vicarious," Professor Nahmod labels a similar approach to supervisory liability a "causation interpretation." See SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3.16, at 172 (2d ed. 1986). Professor Nahmod explains: "Under this approach, a supervisor need not personally violate the plaintiff's constitutional rights. It is enough, where a subordinate does so, that the supervisor acted, say, negligently or recklessly with regard to preventing the subordinate from violating the plaintiff's constitutional rights." Id.
33. Because supervisory liability in this context derives from harms inflicted by subordinates, cases like DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 195-97, 201 (1989) (announcing that the Constitution includes no general governmental duty of care), do not control the issues addressed in this Article. See, e.g., Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989) ("Nothing in DeShaney suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates."); cert. denied, 110 S. Ct. 840 (1990). See generally Jack M. Beermann, Administrative Failure and Local Democracy: The Politics of DeShaney, 1990 DUKE L.J. 1079, 1086-96 (arguing that government has a duty to protect the powerless from private violence). In a typical derivative supervisory liability case a subordinate has violated the Constitution. The question then is whether the supervisor should be held accountable. Only in Part IV do I depart from this assumption. See infra notes 292-332 and accompanying text.
Part I of this Article traces the legal history behind derivative supervisory liability as well as its status today. Part II addresses obstacles that might block the development of derivative supervisory liability, at least in the federal court system. Part III offers a solution premised on federalizing the question of duty. Finally, Part IV turns to the unique problem of preserving supervisory liability even in the absence of constitutional fault by the errant subordinate.

I. HISTORY AND CURRENT LAW

A. Supervisory Liability Under State Law

In the early- to mid-nineteenth century the rule was established throughout the states that a supervisory government official could be held accountable for a subordinate’s wrongful acts regardless of the supervisor’s specific intent or participation in the subordinate’s activities. Courts commonly recognized that supervisory officials were obligated to oversee those charged to them; defenses based on a lack of participation or knowledge thus were not accepted.

What was not so clear in the early- to mid-nineteenth century was the exact standard of care expected of supervisory officers. Some states imposed vicarious liability. In those states, a supervisor was personally responsible for all wrongful actions of her subordinates. In others, the standard was not so severe; rather, the supervisor was expected only to act

34. See infra notes 38–67 and accompanying text.
35. See infra notes 68–195 and accompanying text.
36. See infra notes 196–291 and accompanying text.
37. See infra notes 292–332 and accompanying text.
38. See, e.g., Dabney v. Taliaferro, 25 Va. (4 Rand) 256, 262 (1826) (holding a sheriff responsible for the negligence of a jailer placed under his charge). See also M.L. Schellenger, Annotation, Civil Liability of Sheriff or Other Officer Charged with Keeping Jail or Prison for Death or Injury of Prisoner, 14 A.L.R.2d 353, 358 (1950) (“The majority of cases hold that the sheriff, or other officer having charge of the prison and the prisoners confined therein, is liable civilly for the acts and omissions of his deputies when the deputies are acting officially and under color of the office.”).
39. See, e.g., Moore’s Adm’t v. Dawney, 13 Va. (3 Hen. & M.) 127, 129 (1808); Stuart v. Madison, 5 Va. (1 Call) 481, 482 (1798).
reasonably. Liability for the wrongs of subordinates only attached where the supervisor negligently failed to perform her assigned duties.

Under either standard, specific intent or conscious awareness on behalf of the supervisor was not a prerequisite for liability. The law, reflecting the morality of the times, expected supervisors to watch carefully over their charges. Accordingly, excuses resting on lack of direct participation or knowledge were not readily accepted.

By the time section 1983 was enacted, vicarious supervisory liability had become the exception and not the rule. Instead, by the latter part of the nineteenth century supervisory liability was normally premised on the superior's negligent failure to live up to the terms of his office. As stated by one commentator of the times, supervisory liability could attach in any one of four different settings:

(1) where, being charged with the duty of employing or retaining his subordinates, he negligently or wilfully employs or retains unfit or improper persons; or, (2) where, being charged with the duty to see that they are appointed or qualified in a proper manner, he negligently or wilfully fails to require of them the due conformity to the

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40. See, e.g., Tracy v. Cloyd, 10 W. Va. 19, 30 (1877) ("[Supervisors] are not responsible . . . unless, indeed, they are guilty of ordinary negligence at least, in not selecting persons of suitable skill, or in not exercising a reasonable superintendence and vigilance over their [subordinates'] acts and doings."); Foster v. M.A. Metts & Co., 55 Miss. 77, 81 (1877) ("[P]ostmasters are not liable for losses occasioned by their sub-agents, clerks, and servants employed under them, unless they are guilty of negligence in not selecting persons of suitable skill . . . .").


42. See FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 789, at 529 (1890) (noting that vicarious liability was rejected for "obvious considerations of public policy"). In City of Richmond v. Long's Administrators, 58 Va. (17 Gratt.) 375 (1867), overruled by First Virginia Bank-Colonial v. Baker, 301 S.E.2d 8, 12 (1983), the court noted that:

[Public] officers are held responsible for their own acts in the abuse or transgression of their authority, or in default of proper and reasonable care in the choice of their agents or in the superintendence of them in the discharge of their allotted duties. But it is now firmly established that the doctrine of respondeat superior does not apply to them.

Id. at 378; see also Wiggins v. Hathaway, 6 Barb. 632, 635 (N.Y. App. Div. 1849) (finding the postmaster not liable on a respondeat superior basis but liable for his own negligence).
prescribed regulations; or (3) where he so carelessly or negligently oversees, conducts or carries on the business of his office as to furnish the opportunity for the default; or (4) and a fortiori, where he has directed, authorized or co-operated in the wrong.\textsuperscript{43}

Today's tort rules for supervisory liability do not differ significantly from those in force at the turn of the last century. Vicarious liability is normally not applied;\textsuperscript{44} rather, most states require only that superior officers reasonably look after their subordinates.\textsuperscript{45} If a trend has emerged over the last one hundred years, however, it is a greater willingness of modern courts to absolve superior officials of responsibility. Hence, several courts have modified the general negligence standard normally applied, lessening the legal responsibilities of supervisory officials.\textsuperscript{46}

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\item Mechem, supra note 42, § 790, at 529 (footnotes omitted) (collecting cases).
\item See, e.g., Boettger v. Moore, 483 F.2d 86, 87 (9th Cir. 1973) ("The traditional rule is that higher city officials are not liable under the doctrine of respondeat superior for the acts of lower officials because the lower officials are not the employees of the higher officials; both are fellow servants of the city . . . ."); Delaney v. Dias, 415 F. Supp. 1351, 1353 (D. Mass. 1976) ("Public officials cannot be held liable for monetary damages under 1983 purely for an alleged failure to exercise proper supervisory control over their subordinates."); see also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 132, at 529 (footnotes omitted) (collecting cases).
\item Delaney v. Dias, 415 F. Supp. 1351, 1353 (D. Mass. 1976) ("Public officials cannot be held liable for monetary damages under 1983 purely for an alleged failure to exercise proper supervisory control over their subordinates."); see also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 132, at 529 (footnotes omitted) (collecting cases).
\item See, e.g., De Correvant v. Lohman, 228 N.E.2d 592, 594 (Ill. App. Ct. 1967) ("[A] public official is exempt from liability for the unlawful acts of his subordinates
\end{enumerate}
B. Supervisory Liability Under Section 1983

Because section 1983 proved fairly useless until the Supreme Court's 1961 decision in *Monroe v. Pape*, its treatment of supervisory liability has a relatively short history. Suffice it to say that although the Supreme Court has never directly addressed the issue, lower courts over the past twenty years have uniformly (almost unanimously) recognized the potential for derivative supervisory liability under section 1983.

Beginning in the early 1970s, courts interpreting section 1983 applied a basic negligence standard, one virtually identical to the common-law counterpart discussed above. Under this approach, a superior could be held personally

47. 365 U.S. 167 (1961). *Monroe* held that action could be "under color of state law" for purposes of § 1983 even though the state official acted beyond the scope of her duties and even if the official contravened state law. *Id.* at 184-87; see also, e.g., Roberts v. Acres, 495 F.2d 57, 59 (7th Cir. 1974). Professor Zagrans, however, argues that "[a]s a matter of statutory construction *Monroe* is flatly wrong." Eric H. Zagrans, "Under Color of" What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499, 502 (1985). If Professor Zagrans is correct there would effectively be no supervisory liability under § 1983 because a culpable failure to supervise would almost always violate state-imposed duties, *see supra* notes 44-46 and accompanying text, and consequently be "unauthorized." Only supervisory liability for "direct" violations would survive, *see supra* notes 25-29 and accompanying text, and even this would be severely compromised.

48. *See*, e.g., Dewell v. Lawson, 489 F.2d 877, 881 (10th Cir. 1974) (noting the negligence standard); Beverly v. Morris, 470 F.2d 1356, 1357 (5th Cir. 1972) (affirming a jury verdict against a police chief who negligently failed to train or supervise); Wright v. McMann, 460 F.2d 126, 135 (2d Cir.) (applying common-law tort standard that one is responsible for the natural consequences of his actions), *cert. denied*, 409 U.S. 885 (1972); Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971) (applying a negligent breach of duty standard in a § 1983 action), *rev'd on other grounds*, District of Columbia v. Carter, 409 U.S. 418 (1973); Roberts v. Williams, 456 F.2d 819, 822 (5th Cir.) (noting that a supervisor owes a duty to exercise ordinary and reasonable care), *cert. denied*, 404 U.S. 866 (1971). *See generally* Steven W. Hansen, Use of the Federal Injunction to Protect Constitutional Rights: *Rizzo v. Goode* and the Control of Governmental Bureaucracies, 12 GONZ. L. REV. 231, 243 & n.59 (1977) ("[I]n numerous cases it was held that a superior's negligent failure to train or supervise subordinates or to prevent unlawful actions by private parties was actionable.") (collecting cases).
accountable in damages for the unconstitutional conduct of his subordinates, but only to the extent that the superior was negligent in performing his duties.\textsuperscript{49}

Today, notwithstanding sporadic protests to the contrary,\textsuperscript{50} courts are still willing to impose derivative supervisory liability under section 1983.\textsuperscript{51} Courts typically, however, have foregone the negligence standard\textsuperscript{52} that traditionally

\begin{itemize}
\item \textsuperscript{49} Vicarious liability premised on § 1983 was never regarded as a serious possibility. Commentators have agreed with this conclusion. See NAHMOD, supra note 32, § 3.15, at 168 ("There are ... sound policy reasons for not applying respondeat superior to superior officers in § 1983 cases."); Kerry P. Eagan, The Scope of Supervisory Liability Under 42 U.S.C. § 1983, 6 J. CONTEMP. L. 141 (1979) (urging a negligence standard); VINCENT R. FONTANA, MUNICIPAL LIABILITY: LAW AND PRACTICE § 8.7, at 361 (1990) ("Although Monell dealt only with the liability of municipalities and not their supervisory employees, the weight of authority now suggests that the doctrine of respondeat superior has no place in Section 1983 jurisprudence at all." (citations omitted)). Nevertheless, a few courts have used vicarious liability where called for by state law. See, e.g., McDaniel v. Carroll, 457 F.2d 968, 969 (6th Cir. 1972), cert. denied, 409 U.S. 1106 (1973); Hesselgesser v. Reilly, 440 F.2d 901, 903 (9th Cir. 1971); cf. Brown v. Byer, 870 F.2d 975, 980 (5th Cir. 1989) (imposing vicarious liability under state law if a supervisor "ratified" wrongdoing).
\item \textsuperscript{50} See, e.g., Brown v. Grabowski, 922 F.2d 1097, 1120 (3d Cir. 1990) ("[A]n official's mere—and even callous—inaction in the face of subordinate officers' unconstitutional actions clearly does not suffice to render the official liable for those actions."); cert. denied, 111 S. Ct. 2827 (1991); Allen v. Lowder, 875 F.2d 82, 84–85 (4th Cir. 1989) ("In the first place, there is a serious question of whether these supervisory officials could be held liable for damages for the acts of their subordinates. . . . At any rate, we are easily persuaded that, under these circumstances, these officers are entitled to qualified immunity . . ."); Gutierrez v. City of Hialeah, 723 F. Supp. 1494, 1499 (S.D. Fla. 1989) ("A plaintiff must establish that a supervisor . . . actually exercised control over the officer in connection with the conduct at issue (i.e., shooting!)."); see also NAHMOD, supra note 32, § 3.15, at 168, § 3.16, at 171–73 (arguing for limiting supervisory liability to situations where the superior personally acted unconstitutionally as well as the subordinate).
\item \textsuperscript{52} See, e.g., Oliver v. Collins, 904 F.2d 278, 281 (5th Cir. 1990) (finding that a claim of negligent supervision failed to state a claim under § 1983); Leach v. Shelby County Sheriff, 891 F.2d 1241, 1246 (6th Cir. 1989) (["A] claim of failure to supervise or properly train under section 1983 cannot be based on simple negligence."); cert. denied, 110 S. Ct. 2173 (1990); Howard v. Adkison, 887 F.2d 134, 138 (8th Cir. 1989) (stating that reckless disregard on the part of a supervisor suffices for supervisory liability and that this "requires more than mere negligence"); Croft v. Harder, 730 F. Supp. 342, 353 (D. Kan. 1989) (noting that in the Second Circuit a successful "negligent supervision" claim requires a showing of gross negligence), aff'd, 927 F.2d 1163 (10th Cir. 1991); Shelly v. Johnson, 684 F. Supp. 941, 946 (W.D. Mich. 1987) ("[A] claim that supervisory prison officials negligently failed to halt harassment will not
guided supervisors’ actions and have instead adopted a more tolerant approach premised upon either the superior’s “super-carelessness” or her conscious awareness of the subordinate’s wrongdoing.

To describe what this Article refers to as super-carelessness, courts have used terminology such as “gross negligence,” “recklessness,” and “deliberate indifference.” Descriptions such as these have not been given independent significance, but instead have been used interchangeably by the courts. The gist of all of these terms is that the supervisor was extremely careless; his actions exhibited “more than mere negligence yet less than malicious or actual intent.”

stand.”), aff’d, 849 F.2d 228 (6th Cir. 1988); cf. Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990) (suggesting that a supervisor need only be put on “notice of the need to correct the alleged violation” to be held accountable), cert. denied, 111 S. Ct. 2056 (1991); Voutour v. Vitale, 761 F.2d 812, 825–26 (1st Cir. 1985) (Bownes, J., concurring) (urging a standard focusing on the foreseeability of the constitutional wrong), cert. denied, 474 U.S. 1100 (1986).


54. See, e.g., Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989) (“[S]upervisory liability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates ‘gross negligence’ or ‘deliberate indifference’ by failing to act.”); Howard v. Adkison, 887 F.2d 134, 137–38 (8th Cir. 1989) (deliberate indifference or reckless disregard); Bordanaro v. McLeod, 871 F.2d 1151, 1163 (1st Cir.) (reckless or callous indifference), cert. denied, 110 S. Ct. 75 (1989); Dobos v. Driscoll, 537 N.E.2d 558, 569–70 (Mass.) (equating gross negligence with deliberate indifference), cert. denied, 110 S. Ct. 149 (1989).

After the Court’s decision in City of Canton v. Harris, 489 U.S. 378 (1989), some lower courts have begun to recognize that gross negligence, recklessness, and deliberate indifference are selective degrees of culpability with independent significance. See, e.g., Redman v. County of San Diego, 896 F.2d 362, 366 n.4 (9th Cir. 1990) (discussing distinctions between various levels of mens rea), aff’d in part, rev’d in part en banc, 942 F.2d 1435 (9th Cir. 1991), cert. denied, 60 U.S.L.W. 3520 (1992). In municipal liability cases, these distinctions are important because a city is only responsible for its “deliberate indifference” in failing to train its employees. Harris, 489 U.S. at 388. “Gross negligence” and “recklessness” are not enough. See Mark R. Brown, Correlating Municipal Liability and Official Immunity Under Section 1983, 1989 U. ILL. L. REV. 625, 653. But in regard to supervisory liability no distinctions between these levels of culpability have yet been drawn.

55. Howard v. Adkison, 887 F.2d 134, 138 (8th Cir. 1989) (citing the definition of reckless disregard given in Miller v. Solem, 728 F.2d 1020, 1025 (8th Cir.), cert. denied, 469 U.S. 841 (1984)).
Though super-carelessness appears to form the rule, a substantial minority of courts have required an even higher level of mens rea based on conscious wrongdoing. These courts speak in terms of the supervisor’s “knowledge,” “acquiescence,” or “implicit authorization.”\(^{56}\) Apparently, though not overly clear from the opinions, this standard results in a superior’s liability only if she was aware of the subordinate’s activity. Though the superior need not direct or encourage the subordinate’s unconstitutional activity, she must antecedently (or at least contemporaneously)\(^{57}\) be aware of it.\(^{58}\)

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56. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990) (“[T]here must be some affirmative conduct by the supervisor . . . . [This] can be shown in two ways, either ‘through allegations of personal direction or of actual knowledge and acquiescence,’ or through proof of direct discrimination by the supervisor.” (citations omitted)); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (“A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.”); Leach v. Shelby County Sheriff, 891 F.2d 1241, 1246 (6th Cir. 1989) (noting that there must be at least “implicit authorization” or “knowing acquiescence”), cert. denied, 110 S. Ct. 2173 (1990); Moy v. Gold, 735 F. Supp. 279, 283 (N.D. Ill. 1990) (“personal knowledge”); Kreutzer v. County of San Diego, 200 Cal. Rptr. 322, 327 (Cal. Ct. App. 1984) (“general knowledge” required); Lloyd v. Hines, 474 So. 2d 376, 379 (Fla. Dist. Ct. App. 1985) (“actual knowledge” sufficient).

57. The majority of courts requiring awareness speak of the superior having the ability to prevent the constitutional harm by the subordinate. See, e.g., Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (stating that a “supervisor is only liable . . . if the supervisor . . . knew of the violations and failed to act to prevent them”). This necessarily implies that knowledge be at least contemporaneous with the unconstitutional activity. At least one circuit has taken a different approach, focusing on knowledge, yet finding subsequent knowledge sufficient for liability when the same type of violation or condition continues unremedied. See Pool v. Missouri Dep’t of Corrections & Human Resources, 883 F.2d 640, 645 (8th Cir. 1989) (“[A] plaintiff must show that a superior had actual knowledge that his subordinates caused deprivations of constitutional rights and that he demonstrated deliberate indifference or ‘tacit authorization’ of the offensive acts by failing to take steps to remedy them.”). The Pool court’s approach, allowing subsequent awareness to lead to liability, appears more like a carelessness standard than one based on actual awareness.

58. See, e.g., Jones v. Lewis, 874 F.2d 1125, 1128 (6th Cir. 1989) (“At a minimum, a . . . plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.” (citing Alioto v. City of Shively, 835 F.2d 1173, 1175 (6th Cir. 1987))); Delaney v. Dias, 415 F. Supp. 1351, 1354 (D. Mass. 1976) (“[T]here must be an allegation of, at least, some participation or acquiescence—express or otherwise—in the constitutional deprivations complained of.”).

Several courts speak of supervisory liability where the supervisor was present when the constitutional wrong took place. Presence and acquiescence should thus prove sufficient for liability. See, e.g., Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972) (finding assault in the presence of a supervisor sufficient for supervisory liability); Anderson v. City of N.Y., 657 F. Supp. 1571, 1580–81 (S.D.N.Y. 1987) (involving supervisory presence and failure to intercede); McQuarter v. City of Atlanta, 572 F. Supp. 1401, 1415 (N.D. Ga. 1983) (same), appeal dismissed, 724 F.2d 881 (11th Cir.
Whether using a super-carelessness formula or one dependent upon the superior's awareness of wrongdoing, courts interpreting section 1983 have agreed that supervisory liability may attach for omissions as well as actions.\textsuperscript{59} To this extent section 1983 has proven consistent with the traditional state law analogue. It really could be no other way, because supervisory inaction forms the classical model for supervisory liability. Though courts often speak of "wrongful conduct" on behalf of the supervisor,\textsuperscript{60} or the supervisor's personal involvement,\textsuperscript{61} invariably they are alluding to supervisory inaction. Cases rarely arise where the plaintiff attempts to establish that a supervisor affirmatively acted to cause a constitutional violation.\textsuperscript{62} Instead, the plaintiff almost universally claims that the supervisor failed to properly train, instruct or otherwise supervise his subordinates.

In any omission case, of course, the principal question is one of duty. Courts thus typically begin their analysis by searching for a duty on the supervisor's part to train or instruct the wayward subordinate.\textsuperscript{63} And in this process,

\textsuperscript{59} See, e.g., Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989) ("Supervisors, in addition to being liable for their own actions, are liable when their corrective inaction amounts to 'deliberate indifference' to or 'tacit authorization' of the violative practices."); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A supervisor is . . . liable . . . if the supervisor . . . knew of the violations and failed to act to prevent them."); Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989) ("[S]upervisory liability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act."); Figueroa v. Aponte-Roque, 864 F.2d 947, 953 (1st Cir. 1989) (noting that supervisors could be found liable if they "could have prevented the challenged act"); Voutour v. Vitale, 761 F.2d 812, 820 (1st Cir. 1985) (stating that allegations of gross negligence in failing to provide proper police training could state a claim under § 1983), cert. denied, 474 U.S. 1100 (1986). But see Brown v. Grabowski, 922 F.2d 1097, 1120 (3d Cir. 1990) (rejecting supervisory inaction as a basis of liability for police officers), cert. denied, 111 S. Ct. 2827 (1991).

\textsuperscript{60} E.g., Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989).

\textsuperscript{61} E.g., Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988).

\textsuperscript{62} When cases predicated upon a supervisor's wrongful action arise, they normally involve either the supervisor's personal violation of the Constitution, or his complicity in a constitutional violation. \textit{See supra} notes 25--29 and accompanying text.

\textsuperscript{63} \textit{See, e.g.}, Redman v. County of San Diego, 896 F.2d 362, 364 (9th Cir. 1990) (stating that a supervisor is liable under § 1983 if "he omits to perform an act which he is legally required to do that causes the deprivation"), \textit{aff'd in part, rev'd in part en banc}, 942 F.2d 1435 (9th Cir. 1991), cert. denied, 60 U.S.L.W. 3520 (1992);
courts, predominantly federal courts, have experienced little difficulty locating supervisory duties. With little dissent, courts have looked to state and local law for the requisite duty.

Even though courts have been willing to use state law duties to support section 1983 liability, they have refused to incorporate these duties verbatim. Courts have tended to disregard state law to the extent that it imposes negligence (or vicarious liability) as the standard for supervisory care. Instead, super-carelessness has supplanted whatever level of fault is prescribed by the state law duty. A hybrid supervisory duty results, where state law supplies the impetus to act but federal law defines the degree of expected care.

Stevenson v. Koskey, 877 F.2d 1435, 1439 (9th Cir. 1989) ("The defendant must omit to perform an act which he is legally required to do which causes the deprivation of the plaintiff's federally protected rights."); Cochran v. Rowe, 438 F. Supp. 566, 573 (N.D. Ill. 1977) ("It is clear that where the defendant is under an affirmative duty to act and fails to act, he may be held liable for the consequences under 42 U.S.C. § 1983.").

64. See, e.g., Bush v. Viterna, 795 F.2d 1203, 1209-10 (5th Cir. 1986) (identifying analytical confusion that may arise in § 1983 litigation when courts look to state law in locating supervisory duty) (discussed infra note 168); Coon v. Ledbetter, 780 F.2d 1158, 1162 (5th Cir. 1986) (rejecting the use of state law duties for § 1983 liability).

65. See, e.g., Thompson v. Duke, 882 F.2d 1180, 1186-87 (7th Cir. 1989) (looking to statutory obligations for vicarious liability of supervisor), cert. denied, 110 S. Ct. 2167 (1990); Brown v. Byer, 870 F.2d 975, 980 (5th Cir. 1989) (same); Crooks v. Nix, 872 F.2d 800, 804 (8th Cir. 1989) (same); Hewett v. Jarrard, 786 F.2d 1080, 1087 (11th Cir. 1986) (noting that a "violation of a duty imposed by state law resulting in constitutional injury will establish a causal connection sufficient to trigger supervisory liability"); Voutour v. Vitale, 761 F.2d 812, 821 (1st Cir. 1985) (noting that a supervisor's violation of state law may be treated as evidence of gross negligence), cert. denied, 474 U.S. 1100 (1986); Howard v. Fortenberry, 723 F.2d 1206, 1209 (5th Cir.) ("[N]o defendant can be held liable unless it is shown that he breached some duty imposed by state law, and that the breach had some causal connection with the constitutional deprivation."); vacated in part, 728 F.2d 712, 713 (1984); McDaniel v. Carroll, 457 F.2d 968, 969 (6th Cir. 1972) (referring to state law to hold a supervisor vicariously liable for punitive damages), cert. denied, 409 U.S. 1106 (1973); Wright v. McMann, 460 F.2d 126, 131 (2d Cir.) (noting duties created by state law), cert. denied, 409 U.S. 885 (1972); Hesselgesser v. Reilly, 440 F.2d 901, 903 (9th Cir. 1971) ("We think the Civil Rights Act does authorize the application, under appropriate circumstances, of state laws pertaining to vicarious liability and liability created by statute.").

66. See supra notes 52-58 (collecting cases).

67. See supra notes 52-55 and accompanying text. Some courts have completely applied state law, even where the state law is one of vicarious liability. But this is the exception and not the rule. See supra note 49.
II. DOCTRINAL PROBLEMS WITH DERIVATIVE LIABILITY

The model for section 1983 supervisory liability that has emerged in the lower courts can be faulted for a number of reasons, some doctrinal and others more philosophical. Two doctrinal problems that deserve discussion are: first, whether section 1983 is available at all to remedy supervisory omissions; and second, assuming section 1983 is accessible, whether federal courts are always competent to furnish relief. Although the first hurdle can be overcome easily, the second proves troublesome.

A. Section 1983 Liability for Supervisory Omissions

It appears today that vicarious supervisory liability falls beyond the ambit of section 1983. Though the Supreme Court has not specifically addressed the issue, it has on two occasions alluded to the fact that this form of liability cannot be sustained under section 1983. Consequently, supervisors cannot be held strictly liable for not preventing the constitutional wrongs of their subordinates.

In Rizzo v. Goode, decided at a time when local governments were immune from section 1983 liability, the Court held that injunctive relief could not be granted against a municipality's supervisory officials who did not participate in

68. See NAHMOD, supra note 32, § 3.15, at 166–68.

Monell . . . demonstrates convincingly that respondeat superior cannot be applied either to superiors or to local government entities . . . . [R]espondeat superior, according to the Court, cannot be used against local government entities because § 1983's language requires a causal relation between the conduct of the person and the plaintiff's constitutional deprivation . . . . More to the point, the Court also indicated rather clearly what an earlier § 1983 decision, Rizzo v. Goode, had only hinted: this same personal involvement and causal relation are necessary where the person is an individual.
the unconstitutional activity of subordinates.\textsuperscript{71} Rather, to secure equitable relief against supervisory officials an "affirmative link" must be established between the officials and the wrong.\textsuperscript{72} Though the Court did not elaborate on what kind of participation or "affirmative link" was necessary, it rejected the supervisor-subordinate relationship alone as insufficient.\textsuperscript{73}

More recently, in \textit{Monell v. Department of Social Services},\textsuperscript{74} the Court rejected outright \textit{respondeat superior} as a basis for municipal liability under section 1983.\textsuperscript{75} In doing so the Court interpreted section 1983's causation requirement to be inconsistent with the concept of vicarious liability.\textsuperscript{76} Though not beyond doubt, this same causation requirement likely operates to defeat vicarious liability for supervisory personnel as well. Professor Nahmod, noting the Court's reliance on the causation language of section 1983, has reached just such a conclusion, stating that \textit{Monell} "demonstrates convincingly that \textit{respondeat superior} cannot be applied either to superiors or to local government entities."\textsuperscript{77}

Although \textit{Monell} and \textit{Rizzo} preclude vicarious responsibility under section 1983, they do not mean that a supervisor

\textsuperscript{71} Id. at 377-80. \textit{Rizzo} arose at a time when local government was not considered a person for purposes of § 1983. Instead, the Court was operating under the assumption that federal actions against local government raised serious federalism concerns. \textit{See id.; Monroe v. Pape, 365 U.S. 167, 188–91 (1961).} Two years after \textit{Rizzo}, the Court held that municipalities were liable under § 1983, and dispelled most of these fears. \textit{See Monell v. Department of Social Servs., 436 U.S. 658, 690–91 (1978).} \textit{See generally Hansen, supra note 48, at 241–42.} \textit{Rizzo}'s primary concern was protection of local government from § 1983 litigation, and not protection of individual officers. 423 U.S. at 378–79. \textit{Rizzo} thus arguably left open the potential for vicarious liability where the damage award ran directly against a municipal official acting in his individual capacity. In any event, following \textit{Monell} it appears clear that the Court will not allow any form of vicarious liability under § 1983. \textit{See Monell, 436 U.S. at 691–92; Fontana, supra note 49, § 8.7, at 361; Nahmod, supra note 32, § 3.15, at 168.}

\textsuperscript{72} \textit{Rizzo}, 423 U.S. at 371.

\textsuperscript{73} Id.

\textsuperscript{74} 436 U.S. 658 (1978).

\textsuperscript{75} Id. at 691.

\textsuperscript{76} Id. at 692. Section 1983 expressly provides that a person is liable only if she "subjects, or causes [another] to be subjected" to a constitutional (or other federal) violation. 42 U.S.C. § 1983 (1988).

\textsuperscript{77} Nahmod, supra note 32, § 3.15, at 167–68. Moreover, in a footnote to the \textit{Monell} opinion the Court stated: "By our decision in \textit{Rizzo} . . . we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support §§ 1983 liability." 436 U.S. at 694 n.58.
inaction can *never* result in that supervisor's being held personally accountable. In *City of Canton v. Harris*, the Court held that a municipality's inaction may lead to section 1983 liability. If passive liability is not precluded for municipalities, it certainly cannot be foreclosed for supervisors. Indeed, individual liability under section 1983 has not caused the Court anywhere near the consternation posed by institutional liability. Thus, *Harris*'s recognition of passive institutional liability indicates that supervisors too should be held accountable under section 1983 for omisive behavior.

*Harris*, however, cannot be read to dictate the terms of omisive liability for supervisors. Although some courts have extrapolated from *Harris* and argued that supervisors' omissions are actionable to the same extent as municipalities', such rote extension of *Harris* is both unprincipled and unwarranted. *Harris* was an abstract institutional liability case conceived as a compromise to address institutional problems. The Court's rejection in *Monell* of *respondeat superior* left it with a serious problem of developing an alternative algorithm for addressing institutional liability. *Harris* attempted to fill this void.

Because *Harris* was born of *Monell*'s rejection of *respondeat superior*, understanding *Harris* requires understanding *Monell*. *Monell* rejected *respondeat superior* because the Court believed that the Forty-second Congress rejected it. Interpreting the legislative history behind section 1983, the Court in *Monell* concluded that the framers of section 1983 were concerned with their constitutional authority to subject local government to vicarious liability, either for the wrongs of private

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79. The Court held that a municipality's inadequate police training could be actionable under § 1983 "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388.
80. See, e.g., *Walker v. Norris*, 917 F.2d 1449, 1454 (6th Cir. 1990) (relying on *Harris* to support the viability of a supervisory liability claim); *Wilks v. Young*, 897 F.2d 896, 898 (7th Cir. 1990) (noting that "[a]s recently as last year, the Supreme Court [in *Harris*] acknowledged that supervisory officials may be liable for constitutional deprivations, even in circumstances where the official was not directly involved in the deprivation itself").
citizens or public servants. To do so might require that local government create a police force or otherwise redirect limited public resources. According to the Court, many members of the Forty-second Congress felt that the constitutional division of power between national and state government did not allow such a federal commandeering of local resources.

With these concerns in mind, the Court in Monell fashioned a compromise, one it felt would adequately allay fears grounded in fiscal federalism. It concluded that local government could be held accountable, but only for its own wrongs, not those practiced by others. In any case, though the logic of Monell is somewhat shaky, at least one facet of the opinion is clear.

81. Prior to passage of the Ku Klux Klan Act, Senator Sherman of Ohio proposed an amendment that would have effectively made towns and counties responsible for the wrongs of citizens who "riotously and tumultuously assembled together." See Monell, 436 U.S. at 664; Susanah M. Mead, 42 U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture, 65 N.C. L. Rev. 517, 524 (1987). The amendment was rejected, however, and this rejection subsequently was interpreted by the Court in Monroe v. Pape, 365 U.S. 167 (1961), to mean that the Congress wholly rejected municipal liability. Id. at 188-91. Monell returned once again to the rejection of Sherman's proposal, but found it not to preclude completely municipal liability. Instead, the Court in Monell found that the Forty-second Congress's rejection of the Sherman Amendment was motivated by a general concern over federal authority to compel local government to "keep the peace" when they were not so obligated by state law. Monell, 436 U.S. at 668. The fear was that the Sherman Amendment might force cities into a "Hobson's choice" of either creating police forces or paying damages for its citizens' wrongs. Id. at 673, 679. Some in the Forty-second Congress doubted whether the federal government possessed constitutional authority to impose such a burden on local government. Id. at 679. Unlike Monroe, however, Monell interpreted this rejection of a general duty to keep the peace not to foreclose the possibility of a municipality's liability for its own wrongs, as opposed to the wrongs of its private citizens. Id. at 669. For support the Court turned to the Dictionary Act, passed shortly before the Ku Klux Klan Act, that defined "person" to include "bodies politic and corporate." Id. at 688. The Monell Court thus concluded that the 'plain meaning' of § 1 is that local government bodies were to be included within the ambit of the persons who could be sued under § 1 of the Civil Rights Act." Id. at 688-89; see also George D. Brown, Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on City of Oklahoma City v. Tuttle and Pembaur v. City of Cincinnati—The "Official Policy" Cases, 27 B.C. L. Rev. 883, 889 (1986).

82. Monell, 436 U.S. at 693 ("Equally important, creation of a federal law of respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional."). See generally id. at 691-93 & n.57.

83. Id. at 673.

84. Id. at 673, 679-80.

85. Id. at 691-92.

86. Several commentators, and Justice Stevens, have argued that Monell's rejection of respondeat superior was unfounded. See City of Okla. City v. Tuttle, 471
Fiscal federalism played a principal role in forging the modern model of municipal liability. Because *Harris* derives from *Monell*, it too is a fruit of this federalism.

These same federalism concerns could not have influenced what the Forty-second Congress thought about supervisory liability. Holding a government official personally liable for damages does not have the same constitutional repercussions as directing that government pay for the wrongs of others. In 1871, as today, there was no suggestion that individual officers enjoyed the protection of sovereign immunity, let alone the Eleventh Amendment. Hence, the Forty-second Congress could not have seriously questioned its authority to impose personal liability on government supervisors. Whether the Forty-second Congress intended to allow for derivative supervisory liability, and what standards should be imposed, are additional questions. But certainly no principled reading of *Monell*—and consequently *Harris*—can support a blind extension of the rules surrounding municipal liability to supervisors. Though the logic of *Harris* suggests that supervisors can be held liable for omissions, *Harris* cannot be used to supply the appropriate standards for when such liability should attach.

*Rizzo*'s impact on supervisory liability is more difficult to assess, partly because of its oblique language and partly

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87. See Michael J. Gerhardt, The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983, 62 S. CAL. L. REV. 539, 542 (1989) ("Monell's policy or custom requirement strikes a fundamental balance between (1) making municipalities accountable in federal court for their constitutional violations and (2) accommodating federalism concerns . . . .").

88. See *Harris*, 489 U.S. at 392.

89. See *Hafer v. Melo*, 112 S. Ct. 358, 364 (1991) ("[T]he Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983."); see also infra notes 189-92 and accompanying text.

90. See *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 382 (7th Cir. 1988) ("Because personal-capacity suits are really suits against the official as an individual, not against the government entity, *Monell* is always inapplicable."); *Moy v. Gold*, 735 F. Supp. 279, 283 n.4 (N.D. Ill. 1990) (refusing to extend *Harris* to the supervisory liability context).

91. The Court in *Rizzo* addressed three separate issues, any one of which would appear sufficient to defeat the cause of action. First, the Court expressed "serious doubts" as to whether the plaintiffs possessed Article III standing to pursue the case because of the lack of any connection between their alleged injuries and the defendants' actions. 423 U.S. at 371-73. Second, the Court found no § 1983 claim because of the absence of any "affirmative link" between the defendants and the
because of the historical context in which it arose. Commentators in the immediate aftermath of Rizzo pessimistically concluded, for example, that Rizzo required "active supervisory encouragement" before section 1983 liability could attach. Courts, however, proved more charitable. They tended to casually cite Rizzo to mean the opposite; rather than precluding the use of passive behavior to support supervisory liability under section 1983, Rizzo was found to support it.

Regardless of citations to the contrary, Rizzo cannot be relied on to support the use of supervisory omissions as a basis...
of liability under section 1983. The majority in Rizzo specifically warned against equating governmental failures and actions. Moreover, the dissent in Rizzo read the majority opinion to preclude section 1983 liability based on anything less than an official's "directions." Reading Rizzo to support liability premised on passive conduct, whether individual or institutional, thus appears nothing less than fanciful.

Like Monell and Harris, Rizzo does not provide answers to questions concerning the precise limits of supervisory liability. The plaintiffs in Rizzo were operating under the strictures of Monroe v. Pape, the Court's seventeen-year false start that precluded governmental responsibility under section 1983. The lawsuit filed in Rizzo, though naming supervisory personnel as defendants, was in reality an equitable action against the City of Philadelphia. As with Monell and Harris, Rizzo was an institutional case. Supervisors were named defendants only because the plaintiffs could not sue the City of Philadelphia directly.

More importantly, the Court's federalism discussion in Rizzo demonstrates that not only was it prosecuted as an institutional case, it was decided as one. As demonstrated

95. 423 U.S. at 375-76; see also Brown, 922 F.2d at 1120 (citing Rizzo as a bar to supervisory liability for inaction).

96. 423 U.S. at 384 (Blackmun, J., dissenting) ("The Court today appears to assert that a state official is not subject to the strictures of 42 U.S.C. § 1983 unless he directs the deprivation of constitutional rights.").


98. See 423 U.S. at 371. The officers named in the original complaints filed in Rizzo were sued in their official capacities. See id. at 365 n.1 ("Both complaints named as defendants those officials then occupying the offices of Mayor, City Managing Director . . . and the Police Commissioner . . . .") (emphasis added). Any relief ordered in the case would have operated against the city through the officials who were currently holding office. See supra note 92.

99. See Schnapper, supra note 92, at 237 ("In light of Monell it appears that the outcome of Rizzo resulted in part from the fact that, under Monroe, only the mayor but not the city of Philadelphia was then an available defendant."); Susan Bandes, Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act, 72 IOWA L. REV. 101, 153 (1986) ("Rizzo did not fully discuss a municipality's liability for its customs because Rizzo was decided before Monell.").

100. See 423 U.S. at 378-80. Professor Fallon has observed that Rizzo was a difficult case because a federal court was asked to supervise a local police department:
above, the policies molding institutional decisions like Monell and Rizzo are fundamentally different from those that shape the rules of individual liability.\(^1\) Hence, whatever the exact meaning of Rizzo,\(^2\) it cannot have any serious application in the context of supervisory liability. It simply fails to address the question.\(^3\)

B. A Fresh Inquiry into Passive Supervisory Liability

The most appropriate starting point for assessing the merit of an argument in favor of passive supervisory liability is the language of section 1983. Section 1983 requires that before a person can be held liable she must “subject[, or cause[ ][another] to be subjected” to a constitutional deprivation.\(^4\) Of course, it can be argued (as in Rizzo) that this language requires affirmative conduct for liability to attach; only actions, not omissions, cause results.

Tort law, however, has traditionally recognized that omissions too cause results, at least under certain circumstances.\(^5\)


101. See supra notes 89–90 and accompanying text.

102. Following Monell’s revitalization of municipal liability, Rizzo appears left as a fairly unremarkable standing case—a precursor to City of Los Angeles v. Lyons, 461 U.S. 95 (1983). In Lyons, the Court held that although a person whose constitutional rights are violated might be able to obtain damages under § 1983, he still might not have standing to obtain injunctive relief. Id. at 105. For a constitutional tort plaintiff to have Article III standing to obtain injunctive relief, he must “establish a real and immediate threat that he would again” experience the same type of constitutional tort. Id. Lyons has been severely criticized as being an undue extension of Rizzo. See LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 110, 117 (1985) (casting Lyons as “anomalous,” “extreme and unprecedented”); Fallon, supra note 100, at 38 (arguing that Rizzo did not compel the conclusion reached in Lyons); The Supreme Court—1982 Term, 97 HARV. L. REV. 70, 219 (1983) (noting that Lyons was a “marked extension of the restrictive principles of standing”).

103. See Leach v. Shelby County Sheriff, 891 F.2d 1241, 1246 (6th Cir. 1989) (“The Supreme Court [in Rizzo] left open the question of whether a supervisor could be liable for inaction where he or she knew or should have known of widespread violations by subordinates.”), cert. denied, 110 S. Ct. 2173 (1990).


105. See generally PROSSER & KEETON, supra note 44, § 56, at 373–85 (describing circumstances and collecting cases).
Distinctions between affirmative action (misfeasance) and passive conduct (nonfeasance) have, of course, proved a hallmark of the common law. Only the former is generally actionable. For the latter to give rise to a cause of action, some special relationship must exist between the victim and the wrongdoer, or the circumstances of the case must otherwise give rise to a duty or obligation to act.\(^{106}\) Once that duty arises, however, tort law recognizes that omissions can and do cause injury.\(^{107}\)

Because of the absence of persuasive legislative history to the contrary,\(^ {108}\) section 1983 should be read consistently

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106. Traditionally, one only has a duty to act if he bears a special relationship to the victim, e.g., husband-wife, or to the tortfeasor, e.g., parent-child, or where one has a contractual duty to act, has gratuitously assumed a duty of care, has a statutory duty to act, or in some way has placed the victim in a perilous situation. \(\text{See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 3.3(a), at 203–04, 206 (2d ed. 1986).}\) An omission can give rise to criminal liability whenever there is a duty to act. \(\text{See id. § 3.3(a), at 203.}\) Likewise, under tort law one can be held responsible for an omission where there is a duty to act. \(\text{See Prosser & Keeton, supra note 44, § 56, at 373–74.}\) The duties are much the same in criminal and tort law. \(\text{See generally Michael Wells & Thomas A. Eaton, Affirmative Duty and Constituational Tort, 16 U. Mich. J.L. Ref. 1 (1982) (considering the scope of government officers’ affirmative duties).}\)

107. \(\text{See Prosser & Keeton, supra note 44, § 41, at 265 (“The failure to fence a railway track may be a cause, and an important one, that a child is struck by a train. It is familiar law that if such omissions are culpable they will result in liability.” (citation omitted)).}\)

Criminal law has developed along the same lines. It is assumed that one who breaches a duty owed to another is criminally responsible for the harm that might have been avoided. \(\text{See LaFave & Scott, supra note 106, § 3.3(d), at 209–10.}\) If a child is drowning in a lake and a bystander fails to jump into the water to save her, saying that the bystander caused the child’s death is indeed troublesome. There are simply too many events other than the omission that appear more proximately related to the death. If the bystander is the child’s father, however, the combination of his passively allowing the child to drown and the duty imposed on him by law lead to the conclusion that the father is the “legal cause” of the child’s death. \(\text{See Jerome Hall, General Principles of Criminal Law 196 (2d ed. 1960). See generally Graham Hughes, Criminal Omissions, 67 Yale L.J. 590 (1958).}\)

108. The legislative history behind § 1983 on this point is at best ambiguous. \(\text{See Jay I. Sabin, Note, Clio and the Court Redux: Toward a Dynamic Mode of Interpreting Reconstruction Era Civil Rights Laws, 23 Colum. J.L. & Soc. Probs. 369, 384 (1990) (“[T]he very problem with section 1983 is the fact that the Forty-second Congress did not pay much attention to it. Thus, for the most part, almost any historical interpretation of it is at best inconclusive.” (citation omitted)).}\)

Nonetheless, the legislative history behind § 1983 more likely supports passive liability. \(\text{See, e.g., Aviam Soifer, Protecting Civil Rights: A Critique of Raoul Berger’s History, 54 N.Y.U. L. Rev. 651, 674, 700–05 (1979) (arguing that congressional intent following the Civil War was to force states to provide protection, not necessarily only to prohibit state action).}\) The history cited by the Court in Monroe v. Pape, 365 U.S. 167 (1961), certainly supports liability for omissions. In addressing the third “aim” behind § 1983, that is, “to provide a federal remedy where the state remedy, though
with these common-law principles. Congress was presumptively aware of the fundamental principles of tort law when it enacted section 1983. Without any conclusive proof to the contrary, reasoning that section 1983 was intended to be treated in a similar fashion makes perfect sense. Thus, as with tort and criminal law, the focus under section 1983 should shift from causation to duty. As for duty, history demonstrates that government officials for the last two hundred years have been obligated in one way or another to supervise subordinates. Given that the law in 1871 commonly held superiors to a duty to supervise subordinates—again, a fact of which the Forty-second Congress was presumptively aware—one is hard-pressed to argue that section 1983 precludes passive supervisory liability. Instead, the conclusion that Congress meant for passive liability to be at least a possibility under section 1983 seems unassailable.

adequate in theory, was not available in practice," id. at 173–74 (1961), the Court quoted at length statements made by supporters and opponents of the bill which was to become § 1983. These quotations included several references to remedying passive official conduct, that is, to force state officials to act and to hold them responsible for their omissions. Id. at 175. For instance, the Court found one of the major concerns of the Forty-second Congress was states' inability or unwillingness to enforce state law when dealing with the Ku Klux Klan. Id. at 174–75. The Court noted that "[t]here was available to the Congress during these debates a report . . . dealing with the activities of the Klan and the inability of the state governments to cope with it." Id. at 174. The Court continued, explaining that the bill's momentum came "not [from] the unavailability of state remedies but [from] the failure of certain States to enforce the laws . . . ." Id. (emphasis added). Moreover, the Court observed: "While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law." Id. at 175–76 (citation omitted). If Monroe accurately reflects the intent behind § 1983, contrary to the view of Professor Zagrans, see Zagrans, supra note 47, at 502, there can be little doubt that the Forty-second Congress was aware of and intended § 1983 to address official omissions.

109. See City of Okla. City v. Tuttle, 471 U.S. 808, 838 (1985) (Stevens, J., dissenting) ("[We have repeatedly held that § 1983 should be construed to incorporate common-law doctrine 'absent specific provisions to the contrary.' We have consistently applied this principle of construction to federal legislation enacted in the 19th Century." (citation omitted)); cf. Owen v. City of Independence, 445 U.S. 622, 637–38 (1980) (holding that common-law immunity doctrines are preserved by § 1983).

110. See Tuttle, 471 U.S. at 837–38 (Stevens, J., dissenting) ("[I]t is always appropriate to assume that our elected representatives, like other citizens, know the law' [when passing legislation].") (citations omitted)).

111. See supra notes 38–46 and accompanying text.
C. State Law as a Source of Duties

Recognizing that the Forty-second Congress was familiar with liability for passive conduct does not end the inquiry. The question of the proper standard of care remains. Parcel to this issue is where to search for the appropriate standard. Should the search be of federal or state law?

Because the focus of this Article is derivative supervisory liability, I will assume at this juncture that no specific federal duty arises under either statute or the Constitution, at least none that is generated independently of section 1983. The question then is whether to choose state law to supply supervisory duties, or to use section 1983 itself to create a more general federal obligation. Lower courts to date have unfortunately avoided using section 1983 as a source of duty, and have instead generally opted for state law.

Jurisdictional problems naturally develop when state law is relied upon to support a federal action in federal court.

In the classical supervisory liability case, the court (normally a federal court) will observe that supervisors can be

112. Where an affirmative duty to act is created by the Federal Constitution (or some other federal law) no peculiar problems arise. The terms of the debate simply focus on the substantive federal law. If the Constitution says one must act, then § 1983 obviously provides a remedy for breach of that duty. For example, the Eighth and Fourteenth Amendments have been interpreted to require that prison officials provide needed medical assistance to inmates. See, e.g., Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). If a prison official is deliberately indifferent to the medical needs of an inmate the prison official can be held directly responsible under § 1983 for his failures. See id. at 105; see also supra notes 28-29 and accompanying text.

113. Breach of a specific federal duty would itself be sufficient to support a § 1983 cause of action. See Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (interpreting § 1983 to cover violations of federal statutory and constitutional law). Note that this is different from § 1983 supplying the duty. Should § 1983 be interpreted as creating a duty to supervise, some other substantive right would also need to be violated for a cause of action to arise. In this sense, using § 1983 to generate a duty to supervise would still result in derivative liability. See infra notes 196-212 and accompanying text.

114. See supra notes 65-67 and accompanying text.

115. See infra notes 122-95 and accompanying text. Recognition of the ostensibly remedial nature of § 1983 is perhaps the cause of this search of state law. See supra notes 65-67 and accompanying text; infra notes 198-200 and accompanying text.

116. Even though state courts can entertain § 1983 claims—indeed, they are required to hear them, see Howlett v. Rose, 110 S. Ct. 2430, 2439-40 (1990) (“A state court may not deny a federal right, when ... properly before it, in the absence of a 'valid excuse.' ”)—section 1983 plaintiffs more often choose federal courts to vindicate
held derivatively liable under section 1983 for the constitutional violations of subordinates. "But," the court will say, "only if there exists a duty." The court then marches off into the vagaries of state statutes and decisions in search of a supervisory obligation. Although courts sometimes are silent as to the exact source of the duty they find, more often than not the duty is found only by canvassing state law.

Few federal courts have yet ventured an opinion as to the propriety of exploring state law for substantive duties. Instead, they readily accept the task, apparently as a condition of section 1983. And, indeed, it may be—but that itself


117. For instance, in McQuinter v. City of Atlanta, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984), the police unlawfully used a chokehold on a suspect, resulting in the suspect's death. His widow brought suit not only against the officers at the scene who applied the chokehold, but also against their superiors. The court found the superiors equally responsible for the constitutional violation because they "had a duty to intervene in the excessive use of force against [the victim] and failed to do so." 572 F. Supp. at 1416. Not a word was mentioned as to the source of that duty.

118. In Hewett v. Jarrard, 786 F.2d 1080 (11th Cir. 1986), for example, the court concluded that "violation of a duty imposed by state law resulting in constitutional injury will establish a causal connection sufficient to trigger supervisory liability." Id. at 1087 (citing Barksdale v. King, 699 F.2d 744, 746 (5th Cir. 1983)); see also Brown v. Byer, 870 F.2d 975, 980 (5th Cir. 1989) (finding a duty in a state statute); Crooks v. Nix, 872 F.2d 800, 804 (8th Cir. 1989) (same).

is a separate, complex question, one addressed below.\textsuperscript{120} For the moment, assume that section 1983 is wholly silent about duty and where it might be located.\textsuperscript{121}

Given this supposition, federal courts may not possess authority to conduct such an inquiry. The specific question is whether a federal court can use state law duties to attribute liability under section 1983 from one government official to another. Stated more generally, the issue is whether a federal court can entertain a state claim against a supervisory official not otherwise subject to federal jurisdiction when that claim is closely related to a federal claim against a supervised state agent.

1. \textit{Pendent-party jurisdiction}—Because the Supreme Court has occasionally endorsed federal perusals of state law to aid resolution of a federal question,\textsuperscript{122} a single answer to this question might not be possible. It may depend on how the federal court is using state law. Consider two cases, one arising in State A and the other in State B. In each, assume a police officer uses excessive force against a suspect and thereby violates the suspect's Fourth Amendment rights.\textsuperscript{123} Both suspects wish to sue in federal court and join the offending officer's immediate supervisor, the chief of police.

Assume State A's law provides that the chief of police is unconditionally responsible for the wrongs of his subordinates. In other words, assume the law of State A affords strict, vicarious liability against the chief of police.\textsuperscript{124} Assume the

\textsuperscript{120} See infra notes 196–212 and accompanying text.

\textsuperscript{121} Section 1988 of Title 42 of the United States Code provides that state law might sometimes be used to supplement § 1983. 42 U.S.C. § 1988 (1988). This use of § 1988 is discussed infra at notes 199, 210–12 and accompanying text.


\textsuperscript{124} See, e.g., Brown v. Byer, 870 F.2d 975, 980 (5th Cir. 1989) (willing to find § 1983 liability if the conditions of Texas's vicarious liability rule are met); Wood v.
law of State B, meanwhile, creates no absolute liability on behalf of the chief. Instead, the law of State B merely provides that the chief of police is responsible for training and supervising his subordinates. Assume further that the courts of State B are willing to hold a superior personally liable should she negligently forgo her obligation.\(^{125}\)

Assuming no complete diversity,\(^{126}\) federal jurisdiction over the chief of police in State A is certainly questionable. Of course, a federal question premised on the Fourth Amendment exists as to the offending officer. But what of the chief of police? What supports a federal court's exercising subject matter jurisdiction over him? He can be held responsible based on State A's rule of vicarious liability, but only if the federal court can hear the claim.

The ready answer to this problem rests with "pendent-party" jurisdiction. It can be argued that because the state claim against the police chief (based on vicarious liability) and the federal claim against the offending officer (based on section 1983 and the Fourth Amendment) arise out of a "common nucleus of operative fact,"\(^{127}\) the federal court should be able to exercise jurisdiction over both. Once the federal court has jurisdiction over the chief, the doctrine of Erie Railroad v. Tompkins\(^ {128}\) requires that the court apply State A's law and hold the chief vicariously liable.\(^ {129}\)

Sunn, 865 F.2d 982, 990 (9th Cir. 1988) ("In a section 1983 action in this circuit, vicarious liability may not be imposed in the absence of a state law imposing such liability."); vacated, 880 F.2d 1011 (1989); McDaniel v. Carroll, 457 F.2d 968, 969 (6th Cir. 1972) (referring to state law to hold a supervisor vicariously liable for unconstitutional conduct of an agent); cert. denied, 409 U.S. 1106 (1973); Hesselgesser v. Reilly, 440 F.2d 901, 903 (9th Cir. 1971) (finding that state law supported the imposition of liability on county sheriffs for civil rights violations perpetrated by their deputies). Contra Coon v. Ledbetter, 780 F.2d 1158, 1162 (5th Cir. 1986) ("Monell prohibits courts from allowing the vagaries of state law attribution rules to define the contours of constitutional claims.").

125. See supra note 45 (collecting cases).

126. With complete diversity there would exist an independent jurisdictional basis. See Aldinger v. Howard, 427 U.S. 1, 17 n.12 (1976).

127. See 28 U.S.C.A. § 1367 (West Supp. 1991) (using the phrase "claims that are so related . . . that they form part of the same case or controversy"); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (coining the phrase "common nucleus of operative fact").

128. 304 U.S. 64 (1938); see also Robert H. Smith, Pennhurst v. Halderman: The Eleventh Amendment, Erie, and Pendent State Law Claims, 34 BUFF. L. REV. 227, 241 (1985) ("Since the Erie decision, a federal court hearing a claim based on state law must follow that state's common law rules.").

129. See Erie, 304 U.S. at 78; see also McDaniel v. Carroll, 457 F.2d 968, 969 (6th Cir. 1972) (relying on pendent-party jurisdiction and Erie to hold a supervisor vicariously liable for a § 1983 violation of a subordinate); cert. denied, 409 U.S. 1106 (1973).
Though the Supreme Court never completely disapproved of pendent-party jurisdiction, it indicated in *Aldinger v. Howard*\(^{130}\) that it would not allow pendent-party jurisdiction to circumvent federal liability rules under section 1983. *Aldinger* involved a section 1983 plaintiff who sought to have pendent-party jurisdiction exercised over a municipality based upon a municipal employee's constitutional violation and state law that held municipalities vicariously liable.\(^{131}\) The Court rejected the invitation, holding that no federal jurisdiction existed over the state law claim.\(^{132}\)

In reaching its conclusion the Court noted that it was not attempting to "formulate any general, all-encompassing jurisdictional rule."\(^{133}\) Still, it expressed grave concerns about whether federal jurisdiction could be exercised over a state law claim where that claim was against a defendant not already properly before the court.\(^{134}\) The Court avoided this broader issue only by finding a congressional intent under section 1983 not to allow local governments to be brought "back within [federal judicial] power merely because the facts also give rise to an ordinary civil action against them under state law."\(^{135}\)

Of course, the specific holding in *Aldinger*—that local government cannot be joined as a pendent party because of Congress's contrary intent—was partially overruled by the
Supreme Court's decision in *Monell.* *Monell* held that local government can be sued under section 1983, at least where a municipal policy or custom causes a federal violation. *Monell*, however, does not mean that a state claim against a municipality can be brought in federal court simply because the claim is pendent to a section 1983 action against a municipal official. Indeed, after *Monell* district courts continued to dismiss state claims against municipalities that were joined with section 1983 actions against officials. For example, federal courts have refused to entertain state law claims against municipalities based either on indemnification or vicarious liability regardless of how closely connected the state claim was to a section 1983 action pending against a municipal official. *Aldinger* thus retained serious force even after *Monell.*

136. See, e.g., Vacca v. Barletta, 753 F. Supp. 400, 402 (D. Mass. 1990) (noting that *Monell* partially moots *Aldinger*, but the “basic holding of *Aldinger* ... is still good law”), affd, 933 F.2d 31 (1st Cir.), cert. denied, 112 S. Ct. 194 (1991); Griffin v. City of Chicago, 746 F. Supp 827, 828 (N.D. Ill. 1990) (“There is some considerable disagreement on the question whether municipalities are amenable to pendent party claims on § 1983 actions post-*Monell*.”).

137. *Monell*, 436 U.S. at 690–92; see also Brown, supra note 54, at 632–33.

138. See Peter Cassat, Note, *Statutory Indemnification in Section 1983 Actions Based on Police Misconduct: Choosing a Forum*, 1988 Wis. L. Rev. 605, 615–17. Several federal courts, however, have entertained indemnity claims against local governments regardless of the existence of a *Monell* policy or custom. See, e.g., Bell v. City of Milwaukee, 746 F.2d 1205, 1268–69 (7th Cir. 1984) (noting that the city could be held liable under a Wisconsin indemnity statute for the § 1983 violations of its agents); Cornelius v. La Croix, 631 F. Supp 610, 621 (E.D. Wis. 1986), affd in part, rev’d in part, 838 F.2d 207 (7th Cir. 1988).

139. See, e.g., Mathis v. Parks, 741 F. Supp. 567, 575 (E.D.N.C. 1990) (dismissing a *respondent superior* claim against a municipality because of *Aldinger*); Grier v. Galinac, 740 F. Supp. 338, 340 (M.D. Pa. 1990) (dismissing a *respondent superior* claim against municipality because of *Finley v. United States* (*Finley* is discussed infra notes 141–42 and accompanying text)); Flowers v. City of Harvey, 739 F. Supp. 1148, 1149 (N.D. Ill. 1990) (answering negatively the “issue ... whether a court may exercise pendent party jurisdiction to hear a state tort claim filed against a city when the underlying federal jurisdiction is based on a Section 1983 claim.”). Only where a *Monell* claim is also made against the city is jurisdiction certain. See, e.g., Ismail v. Cohen, 899 F.2d 183, 187 (2d Cir. 1990) (finding pendent jurisdiction over a city on a state law claim proper where a “colorable or plausible” *Monell* claim also exists against the city); see also Cassat, supra note 138, at 606, 613–14.

140. Applying state vicarious liability rules is troubling for the additional reason that they are inconsistent with the Court's interpretation of § 1983. In *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 732–33 (1989), the Court expressly refused to “borrow” the common-law rule of *respondent superior* to hold a municipality liable under §§ 1981 and 1983 of Title 42. The Court did not rely on *Aldinger* or any other jurisdictional basis for its holding; rather, it found that it could not borrow the state rule under § 1988, see infra notes 210–12 and accompanying text, because of the state rule's inconsistency with § 1983's rejection of vicarious liability. 491 U.S. at
In 1989 the Supreme Court in *Finley v. United States*¹⁴¹ reaffirmed its general aversion to pendent-party jurisdiction by holding that state law claims against pendent parties could not be joined in federal court under the Federal Tort Claims Act.¹⁴² Congress responded to *Finley* in October of 1990 by adding section 1367 to Title 28 of the United States Code.¹⁴³ Section 1367(a) allows for pendent-party jurisdiction over state claims that "are so related to claims in the action within [the district court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."¹⁴⁴

Arguably, section 1367(a) lifts *Aldinger*’s bar to pendent-party jurisdiction, leaving federal courts free to join municipalities in section 1983 actions against municipal employees

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¹⁴² Id. at 555–56. While expressing reservations about the general constitutionality of pendent-party jurisdiction, id. at 549, the Court in *Finley* reasoned that to be properly applied, pendent-party jurisdiction must be given express approval by Congress. Id. at 556. The Court concluded that the FTCA did not include such an express authorization and that the private parties had to be dismissed. Id. at 554–56.


¹⁴⁴ The text of section 1367(a) provides:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

²⁸ U.S.C.A. § 1367(a) (West Supp. 1991). Section 1367(b) precludes pendent-party jurisdiction (often known as ancillary jurisdiction) where federal jurisdiction is based "solely on section 1332 [of Title 28]." Id. § 1367(b). Section 1367(c) grants the district courts discretion to dismiss certain cases.
regardless of Monell's policy or custom requirement.\textsuperscript{145} Similarly, section 1367(a)'s approval of pendent-party jurisdiction arguably removes Aldinger's jurisdictional impediment to using state law to support derivative supervisory liability.\textsuperscript{146} Hence, under section 1367(a) one might successfully join a state claim against a supervisor to a section 1983 action against a subordinate.

Using state law in this fashion to support derivative supervisory liability, however, is hampered in two ways. First, section 1367(c) grants district courts discretion to decline pendent-party jurisdiction if: (1) the state claim is "novel or complex,"\textsuperscript{147} (2) the state claim "substantially predominates over the [federal] claim,"\textsuperscript{148} (3) the federal claim has been dismissed,\textsuperscript{149} or (4) other "compelling reasons" exist.\textsuperscript{150} State law thus offers no certainty.\textsuperscript{151}

Second, the exact scope of pendent-party jurisdiction under section 1367(a) has yet to be determined. Arguably, pendent-party jurisdiction is coextensive with pendent-claim jurisdiction under United Mine Workers v. Gibbs,\textsuperscript{152} leading one to inquire whether the state and federal claims arise under a "common nucleus of operative fact." Assuming Gibbs provides the proper analysis, joining a state attribution claim against a supervisor likely would not prove problematic. Such a claim normally would be expected to arise from the same facts as the section 1983 claim against the subordinate.\textsuperscript{153}

\begin{itemize}
  \item 146. See, e.g., Brown v. Grabowski, 922 F.2d 1097, 1121 n.17 (3d Cir. 1990) (suggesting that § 1367(a) solves the jurisdictional problem), cert. denied, 111 S. Ct. 2827 (1991).
  \item 148. Id. § 1367(c)(2).
  \item 149. Id. § 1367(c)(3).
  \item 150. Id. § 1367(c)(4).
  \item 151. District courts appear to have the same broad authority to dismiss pendent parties as they do to dismiss pendent claims. As a practical matter then, § 1367 may offer little assistance to § 1983 litigants who seek to join additional parties under state law. See Steinglass, supra note 145, at 21 ("Many district court judges are reluctant to exercise pendent jurisdiction in Sec. 1983 litigation and routinely dismiss state law claims.").
  \item 152. 383 U.S. 715, 724-25 (1966). A "pendent claim" is a state law claim that arises against a party who is already properly before the federal court. "Pendent-party" jurisdiction differs in that it attempts to bring litigants before the federal court who could not be there but for a pendent-party theory of jurisdiction.
  \item 153. See, e.g., Mathis v. Parks, 741 F. Supp. 567, 574 (E.D.N.C. 1990) (finding that pendent state claims against a city clearly arise under a common nucleus of
The possibility exists, however, that pendent-party jurisdiction might be more restrictive than pendent-claim jurisdiction, or perhaps even non-existent. Section 1367(a) states that pendent-party jurisdiction is proper only to the extent the state and federal claims “form part of the same case or controversy under Article III.” This leaves the constitutional questions of whether pendent-party jurisdiction can ever be proper, and if so, whether it extends as far as allowed by Gibbs.

In *Finley* the Court stated that the constitutional questions surrounding pendent-party jurisdiction were still open. Moreover, in both *Finley* and *Aldinger* the Court observed “significant legal differences” between pendent claims and pendent parties, implying that Article III might prove more restrictive for the latter. Joining supervisors as pendent parties would then be more difficult.

I do not intend to speculate about the future of pendent-party jurisdiction in this Article. My point is merely that its usefulness as the sole basis for derivative supervisory liability is uncertain. Return once again to the hypothetical case arising in *State A* where a state vicarious liability claim is made against the chief of police. In the past, district courts have been reluctant to entertain these claims because of questionable jurisdiction. Even after the advent of section

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154. 28 U.S.C.A. § 1367(a) (West Supp. 1991); see also Sarmiento v. Texas Bd. of Veterinary Medical Examiners, 939 F.2d 1242, 1247 (5th Cir. 1991) (noting that the “*Finley* court assumed, without deciding, that pendent-party jurisdiction would be within the constitutional grant of federal judicial power”).


156. 490 U.S. at 549 (“We may assume, without deciding, that the constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction, and that petitioner's state law claims pass that test.”). See generally Wendy C. Perdue, *Finley* v. United States: *Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 555 n.97 (1990) (discussing Article III problems raised by pendent-party jurisdiction); Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247, 259–60 (arguing that pendent parties are no different from pendent claims for Article III purposes).

157. *Finley*, 490 U.S. at 550; *Aldinger* v. Howard, 427 U.S. 1, 15 (1976); see also supra note 134 and accompanying text.

158. See, e.g., *Figueroa* v. Molina, 725 F. Supp. 651, 654–55 (D.P.R. 1989). In *Figueroa*, claims were brought under § 1983 against certain police officers and their supervisor. A state claim based on vicarious liability was joined against the supervisor. Id. at 653–54. The district court dismissed the direct § 1983 claim against the supervisor because the charges against him were conclusory and failed
1367(a) a federal court could dismiss the chief of police as a defendant, either as a discretionary matter or because pendent-party jurisdiction is lacking.

What about the second case, where the law of State B does not strictly attribute liability to the police chief, but instead only creates a supervisory duty? Courts have not recognized any jurisdictional problem with using state-created duties to support supervisory liability under section 1983. Thus, although using a state vicarious liability rule might fall outside federal jurisdiction, the use of a state law duty apparently does not.

Of course, one can always distinguish the two cases based on the substance of the respective state laws. State A’s law independently attributes liability from one official to another. State B, in contrast, offers only a portion of what is needed for liability to attach. State B’s duty must still be tied in with section 1983 before the supervisor can be held accountable. One might thus argue that because State B’s law by itself does not result in attribution of damages against the supervisor, it is “in series” with and parcel to a federal question. For this reason, the use of State B’s duty might appear more like interpreting state law under guise of the “property” language of the Due Process Clause, and as such might also appear to fall within the ambit of a federal issue.

But this is an awkward explanation for why one claim can proceed in federal court while the other cannot. In the first place, vicarious liability is not that different from a substantive duty. Indeed, vicarious liability can be expressed as nothing more than an absolute duty to prevent the wrong from occurring. Next, arguing that state law duties are parcel to a federal question says nothing about why attribution rules, such as vicarious liability, are not. In either case state law is to allege more than negligence. Id. at 653. Turning to the state claim against the supervisor, the court held it had no pendent-party jurisdiction. Id. at 656. Hence, the supervisor could not be held accountable for the federal wrongs of his subordinates. See also supra notes 139–40 and accompanying text.

159. See supra notes 147–50 and accompanying text.

160. See supra notes 154–57 and accompanying text.

161. See supra notes 63–65 and accompanying text. But see Bush v. Viterna, 795 F.2d 1203, 1209 (5th Cir. 1986) (citing Pennhurst to support a narrow interpretation of supervisory duty under state law).

162. See Dwyer, supra note 122, at 161.

163. See supra note 122.

164. See PROSSER & KEETON, supra note 44, § 69, at 499 (stating that vicarious liability “is in one sense a form of strict liability”).
being retrieved to support a state actor's liability. Vicarious liability would appear just as "in series" with a supervisory liability question as a state law duty.

In any event, the point of this discussion is that complete reliance on state law to support supervisory liability under section 1983 raises a difficult jurisdictional issue for federal courts. Granted, the problem is not insurmountable, especially in light of section 1367(a). Still, resolution of the jurisdictional issue requires some rather creative and complex legal reasoning. Moreover, the discretionary nature of pendent-party jurisdiction would leave derivative supervisory liability an always uncertain endeavor. The better course is to avoid the problem altogether by federalizing the question of duty.\textsuperscript{165}

2. \textit{Eleventh Amendment concerns}—Assuming pendent-party jurisdiction can be established, problems might still emerge under the Eleventh Amendment. The Supreme Court's decision in \textit{Pennhurst State School & Hospital v. Halderman}\textsuperscript{166} (\textit{Pennhurst II}) could bar the use of state law altogether in supervisory liability suits under section 1983.\textsuperscript{167} The Fifth Circuit, for example, relying on \textit{Pennhurst}, has stated in the supervisory liability context that "the enforcement of state law is the job of the states, and the federal civil rights statute may not be used to bootstrap alleged violations of state

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\textsuperscript{165.} See infra notes 196–212 and accompanying text.  
\textsuperscript{167.} See Vicki C. Jackson, \textit{The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity}, 98 YALE L.J. 1, 61 n.242 (1988) ("Although \textit{Pennhurst} evinces no intent to overturn the settled sovereign immunity doctrine that permits damage suits against an officer individually, the logic of \textit{Pennhurst's} abandonment of the \textit{Young} rationale in fact may threaten its viability." (citation omitted)). Professor Althouse argues that the danger of a misinterpretation of state law "counsels hesitation." Ann Althouse, \textit{How to Build a Separate Sphere: Federal Courts and State Power}, 100 HARV. L. REV. 1485, 1523 (1987). She continues: "If a federal court can assume jurisdiction despite the state's lack of consent, it may interpret the state law more broadly than the state court would, depriving the state of control over its own law." \textit{Id.} She concludes: "When the state has created a right running against itself, but has failed to take the additional step of consenting to suit in federal court, the federal court should find that jurisdiction properly belongs to the state courts." \textit{Id.} If Professor Althouse is correct, then \textit{Pennhurst} logically applies in the context of supervisory liability. But see George D. Brown, \textit{Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court}, 71 VA. L. REV. 343, 360 (1985) (arguing that federal court interpretation of state law is not that intrusive in light of the \textit{Erie} doctrine); Dwyer, supra note 122, at 145–48 (arguing that abstention is sufficient to satisfy concerns surrounding misinterpretation of state law unless the case is one of institutional liability).
law into federal claims." Hence, pendent-party jurisdictional problems aside, the Eleventh Amendment might be interpreted to prohibit using state law to support supervisory liability.

Fortunately, a careful examination of *Pennhurst* reveals that it should have no direct application in the context of supervisory liability. Instead, *Pennhurst* appears concerned with suits premised on state law that seek injunctive relief against the government, and not with personal liability actions against its officials. For purposes of supervisory liability, *Pennhurst*'s bark is worse than its bite.

*Pennhurst* involved a challenge in federal district court to the conditions of care at a state-operated hospital in Pennsylvania. Both federal and state law claims for damages and injunctive relief were joined in the suit. The district court found violations of both federal and state law, and though it did not award damages, ordered massive equitable relief.

The *Pennhurst* case suffered a lengthy appeal that took it to the Supreme Court twice: once on the merits, and once to address federal jurisdiction. As for the merits (the first appeal), the Supreme Court found that the federal law

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168. Bush v. Viterna, 795 F.2d 1203, 1209 (5th Cir. 1986). Viterna did not use *Pennhurst* to wholly defeat supervisory liability claims. Instead, it used *Pennhurst* to support a more narrow focus on the definition of duty. Specifically, it held that the question of duty is a federal one, and that state law is useful only to the extent it helps to "identify the relevant state actors." Id. at 1206. To this extent Viterna appears to present a sensible, though by no means compelled, reading of *Pennhurst*. For a further discussion of the source of the duty to supervise, see infra notes 196-245 and accompanying text.

169. See infra notes 183-92 and accompanying text.

170. 465 U.S. at 92.


173. The individual defendants were found to have acted in good faith and thus were immune from damages. 465 U.S. at 93 n.1. The hospital, being an "arm of the state," was protected from an award of damages by the Eleventh Amendment. 465 id. at 123-24.

174. Id. at 93.

relied upon by the court of appeals to sustain the relief offered no substantive protection to the plaintiffs. The Court remanded the action to the court of appeals to determine whether some other ground, such as state law, might support the district court's order. On remand the court of appeals concluded that state law supported the district court's judgment and its award of equitable relief. The Supreme Court again took the case, this time to decide whether federal jurisdiction over a state law claim against state officials was proper.

The Court, following an extensive review of Eleventh Amendment jurisprudence, ruled that a federal court could not award equitable relief against a state or its officers on the basis of state law. Instead, prospective relief against a state was found to survive Eleventh Amendment scrutiny only if the relief were grounded in federal law. The Court explained:

A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Following Pennhurst, a federal court's reliance on state law to order equitable relief against state government is certainly problematic. Indeed, courts have struggled with Pennhurst in this context even where state law is parcel to the "property" question of due process. The crucial question for purposes

176. Specifically, the Court ruled that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001–6083, created no substantive rights. 451 U.S. at 18–22. The Court was not called on to address any of the other federal claims, as they were not relied upon by the court below. Id. at 30–32; Pennhurst II, 465 U.S. at 94–95.
180. Id. at 123.
181. Id. at 106.
of supervisory liability is whether *Pennhurst* was intended to likewise apply to damage actions against state officials.

The majority disavowed any intent to extend the *Pennhurst* rationale to an action against a state official seeking monetary damages. In distinguishing several prior Supreme Court opinions where damages had been awarded against state officers, the Court noted that "[n]one of these cases can be said to be overruled by our holding today." Only where injunctive relief is sought against the state official, the Court explained, does the action "run more directly against the State," thus invoking the bar of the Eleventh Amendment.

Notwithstanding the dissent's protests to the contrary, the majority's distinction in *Pennhurst* between equitable and monetary relief appears sound, both from an internal and external perspective. The distinction is internally consistent because, as Professor Dwyer has explained, "the Court

(5th Cir. 1986); cf. Spruytte v. Walters, 753 F.2d 498, 512–14 (6th Cir. 1985) (reversing the district court's dismissal of a complaint that required the federal court to consider state law issues because the complaint also alleged violations of federal law), cert. denied, 474 U.S. 1054 (1986).

183. 465 U.S. at 110 n.19. The Court thus distinguished Johnson v. Lankford, 245 U.S. 541 (1918), as a case where "the relief sought was not injunctive relief but money damages against the individual officer." *Id.* The Court also noted that many of the cases cited by the dissent, including Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); Bates v. Clark, 95 U.S. 204 (1877); and Belknap v. Schild, 161 U.S. 10 (1896), "were actions for damages in tort against the individual officer." 465 U.S. at 111 n.21. The Court continued: "In *Belknap* the Court drew a careful distinction between such actions and suits in which the relief would run more directly against the State. The Court disallowed injunctive relief against the officers on this basis. Contrary to the view of the dissent, nothing in our opinion touches these cases." *Id.* (citations omitted).

184. *Id.*

185. The dissent in *Pennhurst* was not convinced that the Court was in reality so limiting its decision:

Surely the Court cannot mean to rely on a distinction between damages and injunctive relief, for it states: "A federal court's grant of relief against state officers on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law...." Awarding damages for a violation of state law by state officers acting within their authority is inconsistent with the majority's position that only a need to vindicate federal law justifies the lifting of the Eleventh Amendment bar. If an order to pay damages for wrongful conduct against a state officer is not against the State for purposes of the Eleventh Amendment, an additional order in the form of an injunction telling the officer not to do it again is no more against the State.

*Id.* at 135 n.10 (Stevens, J., dissenting) (citation omitted).
indicated that its principal focus [was] the threat to sovereignty created when a federal court formulates injunctive relief, not simply when it interprets state law."\textsuperscript{186} The concern of the Court was not so much the source of the claim, but was instead the nature of the relief.\textsuperscript{187} A distinction between monetary relief awarded against state officials and injunctive relief against state officials, which is effectively against the state, makes perfect sense.\textsuperscript{188}

More importantly, the Court's distinction between equitable relief and damages is necessary from an external vantage in order to square \textit{Pennhurst} with traditional rules of sovereign immunity. As pointed out by the dissent, the doctrine of sovereign immunity has never protected government officials from individual-capacity suits.\textsuperscript{189} Even assuming that the

\begin{footnotes}
\textsuperscript{186} Dwyer, \textit{supra} note 122, at 146.
\textsuperscript{187} See 465 U.S. at 117; see also Dwyer, \textit{supra} note 122, at 145. Professor Dwyer recognizes that the language in \textit{Pennhurst} is not unambiguous:

\textit{Id. (citation omitted).} He argues persuasively, however, that if the source of the claim—state law—was the determinative factor in the Court's eleventh amendment analysis. Nevertheless, the focus of the entire opinion, as well as some of the language, suggests that the Court's new eleventh amendment doctrine will apply only to institutional reform cases such as \textit{Pennhurst}.

\textit{Id.} at 146–48.

\textsuperscript{188} The majority of commentators who have addressed this issue conclude that damage actions against state officials premised on state law survive \textit{Pennhurst}. \textit{See Dwyer, supra} note 122, at 145–46 (arguing that \textit{Pennhurst} is limited to institutional reform cases); David L. Shapiro, \textit{Wrong Turns: The Eleventh Amendment and the Pennhurst Case}, 98 Harv. L. Rev. 61, 82 (1984) ("[I]n the case in which an individual officer is sought to be held personally liable for harm done, \textit{Pennhurst} seems to have no impact: a federal court damage suit against a state trooper for fourth amendment violations can still be accompanied by a state law damage claim sounding in tort."); Smith, \textit{supra} note 128, at 268 ("Since a suit brought against a state official 'individually' seeks no relief from the state, the eleventh amendment presents no barrier to such an action in a federal court."); Louise Weinberg, \textit{The New Judicial Federalism: Where We Are Now}, 19 Ga. L. Rev. 1075, 1092 (1985) ("The individual-capacity civil rights action for damages, even one against state officials, even under state law, appears safe, for the present.").

\textsuperscript{189} See 465 U.S. at 132–33 & n.8 (Stevens, J., dissenting). Justice Stevens quoted at length from an opinion by Justice Holmes:

"In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. . . . The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the
Eleventh Amendment was intended to codify sovereign immunity, it cannot protect government officials from actions against them personally. The Eleventh Amendment is implicated only where the relief operates against the state. \(^{190}\) \textit{Pennhurst}, at least "for the present,"\(^{191}\) should not interfere with a federal court's use of state law to attribute personal liability to government supervisors.

\[^{190}\] This is a proposition subject to serious debate. See, e.g., Port Auth. Trans-Hudson Corp. v. Feeney, 110 S. Ct. 1868, 1875 (1990) (Brennan, J., concurring) (refusing to join part of the Court's opinion "because it presupposes the validity of this Court's current characterization of the Eleventh Amendment as cloaking the States with sovereign immunity"); Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2286 (1989) (Stevens, J., concurring) (arguing that sovereign immunity's incorporation into the Eleventh Amendment was improper); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247–48 (1985) (Brennan, J., dissenting). See generally George D. Brown, \textit{Has the Supreme Court Confessed Error on the Eleventh Amendment? Revisionist Scholarship and State Immunity}, 68 N.C. L. Rev. 867 (1990) (addressing whether the Eleventh Amendment was intended to codify sovereign immunity).

\[^{191}\] The Eleventh Amendment, according to the Supreme Court, does not protect "counties and similar municipal corporations." Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977). For this reason the applicability of \textit{Pennhurst} to state law claims against local government has been seriously questioned. See, e.g., Erwin Chemerinsky, \textit{State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst} v. Halderman, 12 HASTINGS CONST. L.Q. 643, 662 & n.96 (1985) (noting that \textit{Pennhurst} may not apply to local governments); Abigail English, \textit{The Pennhurst II Decision and Its Implications for Foster Care Litigation}, 18 CLEARINGHOUSE REV. 33, 36–37 (1984) (suggesting suing county officials and local governments because they cannot invoke the Eleventh Amendment bar if their funding relationship with the state is sufficiently attenuated); Smith, supra note 128, at 266 ("Some pendent jurisdiction claims may still be heard after \textit{Pennhurst II}. For example, claims that do not seek relief from the state—when relief is sought against county or municipal officials . . . ."). The Court in \textit{Pennhurst}, though presented with the issue because of the presence of local government officials in the suit, skirted it by simply stating that "any relief granted against the county officials on the basis of the state statute would be partial and incomplete at best. Such an ineffective enforcement of state law would not appear to serve the purposes of efficiency, convenience, and fairness that must inform the exercise of pendent jurisdiction." 465 U.S. at 124. Of course, if the commentary cited above is correct, there would exist no \textit{Pennhurst} problem with holding municipal supervisors liable.

\[^{192}\] Weinberg, supra note 188, at 1092.
Still, the only certain method for avoiding jurisdictional problems is to federalize the question of duty. Without a federal definition of duty, one is always faced with charting the treacherous waters of federal jurisdiction. Moreover, even if one can navigate these jurisdictional waters safely, abstention principles might delay federal review. Assuming the general viability of derivative supervisory liability (a proposition generally endorsed by the lower courts), federalizing the question of duty presents a more solid foundation for its framework.

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193. For example, a federal court might choose to abstain to allow the state courts to develop the state law question focusing on the supervisory duty. See, e.g., Bush v. Viterna, 795 F.2d 1203, 1204, 1209–10 (5th Cir. 1986) (affirming a motion to dismiss the state law claim where state law had not clearly specified who should be responsible, or what their duty was). See generally Keith Werhan, Pullman Abstention After Pennhurst: A Comment on Judicial Federalism, 27 WM. & MARY L. REV. 449, 487 (1986). Where a state court action is already in progress, of course, abstention under Younger v. Harris, 401 U.S. 37, 43–44 (1971), is also a possibility. The Supreme Court has yet to decide whether Younger abstention principles apply with equal force to § 1983 damage actions, as opposed to suits for declaratory or equitable relief. See Tower v. Glover, 467 U.S. 914, 923 (1984); Judice v. Vail, 430 U.S. 327, 339 n.16 (1977). Some lower federal courts have extended Younger abstention to damage actions, so long as the damage action might be “substantially disruptive” to an ongoing criminal proceeding. See, e.g., Mann v. Jett, 781 F.2d 1448, 1449 (9th Cir. 1986). Others have simply ignored any distinction between actions for damages and actions for declaratory or equitable relief. See, e.g., Nilsson v. Ruppert, Bronson & Chicarelli Co., 888 F.2d 452 (6th Cir. 1989). At least one court has refused to extend Younger to an action under § 1983 for damages. See Lebbos v. Judges of Superior Court, Santa Clara County, 883 F.2d 810, 817 (9th Cir. 1989); see also 28 U.S.C.A. § 1367(c)(1) (West Supp. 1991) (allowing federal courts to dismiss certain “novel or complex” state law claims).

194. See supra notes 59–62 and accompanying text.

195. Note that the Court in Hafer v. Melo, 112 S. Ct. 358 (1991), held that state officials acting in their individual capacities are not entitled to Eleventh Amendment immunity from damages. Id. at 364. This would seem to militate against extending Pennhurst’s Eleventh Amendment rationale to officials. But assuming Pennhurst were to be extended to actions against government officials, Congress certainly has the power to override the limitation. See, e.g., Hoffman v. Connecticut Dept’ of Income Maintenance, 492 U.S. 96, 101 (1989); Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 224, 242–43 (1985); see also Calvin R. Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. CHI. L. REV. 61, 70–71 (1989) (noting that Congress can abrogate Eleventh Amendment immunity under § 5 of the Fourteenth Amendment so long as its intent is unmistakably clear in the language of the statute). Whether Congress has chosen to impose derivative liability on supervisors thus becomes the critical question—one I address in Part III. Cf. Quern v. Jordan, 440 U.S. 332, 338–45 (1979) (finding that § 1983 does not overcome a state’s Eleventh Amendment immunity).
III. TOWARD A FEDERAL DUTY

A. Source of the Duty

Any attempt to develop a duty to supervise under section 1983 must first overcome repeated rhetoric that section 1983 was intended only as a remedial device, devoid of substantive meaning.\textsuperscript{196} If that position were correct, how could section 1983 be interpreted to include a supervisory duty? Duty appears to be a normative creature, and section 1983 must be divorced from such substantive concerns.

The answer is simple. The Supreme Court can find a federal duty to supervise under section 1983 in the same fashion it has found other substantive rules under section 1983—by resort to a federal common law of civil rights jurisprudence.\textsuperscript{197} Of course, a lively debate continues over whether Congress intended to grant federal courts this

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\begin{enumerate}
\item[196.] In Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979), the Court observed:

Unlike the 1866 and 1870 Acts, § 1 of the Civil Rights Act of 1871 did not provide for any substantive rights—equal or otherwise. As introduced and enacted, it served only to ensure that an individual had a cause of action for violations of the Constitution. . . . No matter how broad the § 1 cause of action may be, the breadth of its coverage does not alter its procedural character. Even if claimants are correct in asserting that § 1983 provides a cause of action for all federal statutory claims, it remains true that one cannot go into court and claim "a violation of § 1983"—for § 1983 by itself does not protect anyone against anything.


\item[197.] \textit{See} Martha A. Field, \textit{Sources of Law: The Scope of Federal Common Law}, 99 HARV. L. REV. 881, 890 (1986) ("[F]ederal common law' [refers] to any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional.").
\end{enumerate}
\end{footnotesize}
authority. Those caught up in remedial rhetoric would find it difficult to embrace such an approach. But others have persuasively argued that the Forty-second Congress envisioned a common-law approach to section 1983, whereby the federal courts actively construct substantive as well as remedial rules.

Professor Kreimer, for example, using section 1988 of Title 42, has argued that Congress intended to give federal courts authority to fill in section 1983 with an evolving federal jurisprudence. Professor Kreimer asserts that because the Reconstruction Congress (responsible for both section 1983 and the “borrowing” portion of section 1988) “lived in the era of Swift,” a time when “[f]ederal courts were wont to expound the common law in diversity cases, . . . section 1988 is explicit statutory authority to do the same in the newly-created civil rights jurisdiction.” Professor Kreimer contends that federal courts need not feel constrained by the common law of the mid-nineteenth century because “[u]nder Swift, courts


199. 42 U.S.C. § 1988 (1988). Section 1988 of Title 42, originally adopted in 1866, directs federal courts to apply “the common law, as modified and changed by the constitution and statutes” of the forum state where federal law is “deficient in the provisions necessary to furnish suitable remedies.” Id. For an excellent discussion of the uses to which § 1988 has been put, see Jack M. Beermann, A Critical Approach to Section 1983 with Special Attention to Sources of Law, 42 STAN. L. REV. 51 (1989). To date § 1988 has been used to borrow state law only in the contexts of state survival statutes, see Robertson v. Wegmann, 436 U.S. 584, 587-95 (1978), and statutes of limitations, see Wilson v. Garcia, 471 U.S. 261, 280 (1985).

200. Kreimer, supra note 198, at 619-30. Professor Eisenberg for quite different reasons has reached what appears to be a similar conclusion—that § 1983 should be filled in with federal and not state rules. Professor Eisenberg concludes that § 1988 has application only “to actions that are removed from state to federal court pursuant to civil rights removal provisions.” Eisenberg, supra note 198, at 500. Professor Eisenberg thus eschews the general use of § 1988 to borrow state law, id. at 516-17, and rejects the argument that § 1988 was intended to authorize the development of federal common law. Id. at 515. Instead, Professor Eisenberg simply concludes that “[f]ederal courts should fill out the federal civil rights program by the same techniques used to fill out other programs.” Id. at 543.

201. Kreimer, supra note 198, at 619.
sitting in diversity acknowledged the necessity of the evolution of the common law.\textsuperscript{202} Congress knew this and intended to impart this authority to the courts.

 Regardless of whether Professor Kreimer's thesis that Congress intended to allow federal courts to fill in section 1983 is correct,\textsuperscript{203} the Supreme Court repeatedly has assumed the authority to do so.\textsuperscript{204} The most notable instances of section 1983 common law are the Court's creation of official immunities\textsuperscript{205} and its development of institutional liability.\textsuperscript{206} Rules surrounding causation\textsuperscript{207} and monetary damages\textsuperscript{208} are additional examples. The weight of precedent\textsuperscript{209} consequently refutes any suggestion that section 1983 is devoid of meaning.

 One might argue that instead of creating a federal duty, courts should use section 1988 to borrow existing state law
At least three objections to such an approach are apparent. First, using section 1988 to borrow state law still gives states leeway to avoid supervisory liability by altering their duties. Second, such an approach would tend to generate a lack of uniformity in federal law. Finally, certain duties, such as the absolute duty encompassed by vicarious liability, likely would be deemed inconsistent with section 1983, resulting in their being discarded. State duties would therefore eventually be measured by section 1983 jurisprudence anyway, with the “borrowing” technique devolving into nothing more than a new brand of federal common law. Assuming that section 1983 can be interpreted to encompass a federal duty to supervise, the next question is whether it should. Although the legislative history behind section 1983 might appear inconclusive on this precise point, the Forty-second Congress’s debates suggest that Congress intended to remedy at least some forms of official inaction. Of course, this falls short of an express congressional intention to adopt

210. Section 1988 in effect turns the state rule into a federal rule, at least for purposes of the case at hand. See Robertson, 436 U.S. at 588 (“Regardless of the source of the law applied in a particular case, however, it is clear that the ultimate rule adopted under § 1988 ‘is a federal rule responsive to the need whenever a federal right is impaired.’”) (citations omitted)). For this reason, the jurisdictional problems discussed above, see supra notes 122-95 and accompanying text, are avoided.

211. See Beermann, supra note 199, at 58, 62; Eisenberg, supra note 198, at 517; Kreimer, supra note 198, at 619–20; Zante, supra note 198, at 512; cf. Coleman, supra note 198, at 668 (arguing that § 1983’s purposes set a national threshold even when courts look to state law under § 1988).

212. See, e.g., Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989). In Jett the Court refused to use § 1988 to borrow common-law respondeat superior to hold a local government liable under §§ 1981 and 1983. Id. at 732–33. The Court found vicarious liability to be inconsistent with § 1983. Id. at 733; see also supra note 140.

213. See Kreimer, supra note 198, at 605 (“[T]wo decades of excursions into the Congressional Globe of 1871 have convinced most observers that the legislative history of section 1893 is, in the main, unhelpful . . . . [F]ew lawyers are unable to find support for their position in those turbulent debates.”).

214. See supra note 108; see also Developments in the Law—Section 1983 and Federalism, 90 HARV. L. REV. 1133, 1154 (1977) (observing that § 1983 “was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan’s outrages”); Note, supra note 93, at 557 (“The legislative history of section 1983 strongly suggests that Congress intended to remedy at least some forms of passive official behavior leading to constitutional infringements.”); cf. Thomas A. Eaton & Michael Wells, Governmental Inaction as a Constitutional Tort: Deshaney and Its Aftermath, 66 WASH. L. REV. 107, 119 (1991) (“[T]here is affirmative evidence that the fourteenth amendment was intended to recognize a state’s obligation to protect its citizens from harm.”); Beermann, supra note 33, at 1083 (same).
a general supervisory duty. But it at least demonstrates that the Forty-second Congress could not have intended an outright rejection of omissions and duties as predicates for section 1983 liability.

Though legislative history might not clearly establish a congressional intent to impose a general supervisory duty, legal history does. Tort law has always recognized that omissions "cause" results, a fact presumably known by the Forty-second Congress. It would seem only natural that Congress assumed that the causation language of section 1983 would be read consistently with the common-law rules already in place. And when one considers that mid- to late-nineteenth century law generally recognized a duty on behalf of government officials to oversee their subordinates, believing that the Forty-second Congress intended a similar duty to exist under section 1983 is not difficult.

Moreover, recognition of a federal duty under section 1983 will promote deterrence by denouncing incompetent government. Officials will be forewarned that society expects competence and will accept no less. Responsibility will be enhanced because officials will not have the luxury of claiming "I wasn't involved"—the clear rejoinder to any such defense will be "you should have been." Officials who occupy command positions will be encouraged to exercise control, and the result will be fewer illegalities. Government accountability, and hence deterrence, will be served.

Section 1983's compensatory purpose will also be advanced by the enhanced potential for recovery and the availability of attorney's fees under section 1988. And because supervisory fault is a prerequisite for recovery no claim of injustice

215. See supra notes 105–07 and accompanying text.
216. See supra note 110 and accompanying text.
217. See supra notes 38–43 and accompanying text.
218. Cf. SCHUCK, supra note 19, at 16 ("Public tort law implicates five primary social goals or constraints: to deter wrongdoing, to encourage vigorous decision-making by officials, to compensate victims of official misconduct, to exemplify society's moral principles, and to achieve institutional competence and legitimacy.")
219. If state law were to form the sole basis for recovery from the supervisor, state law could also limit the plaintiff's damages. Section 1983 does not limit compensatory or punitive damages in this regard. See Carey v. Piphus, 435 U.S. 247, 254–64 (1978) (discussing the fact that compensatory damages, including mental and emotional distress are recoverable under § 1983); cf. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (finding a municipality not subject to punitive damages under § 1983).
220. 42 U.S.C. § 1988 (1988) (providing that the "prevailing party" is entitled to a "reasonable attorney's fee as part of the costs").
221. See supra notes 42–43 and accompanying text.
can be made by the superior officer.\textsuperscript{222} Rather, holding the supervisor accountable clearly serves corrective justice.\textsuperscript{223} In short, no policy indigenous to section 1983 supports distinguishing supervisory nonfeasance from misfeasance.\textsuperscript{224}

\textsuperscript{222} Indeed, Professors Wells and Eaton argue that "it is unjust to permit the defendant to ignore the plaintiff's predicament when he himself has played some role in bringing it about." Wells & Eaton, supra note 106, at 38. Where a government agent, such as a police officer, is directly responsible for the harm, the government has played a role in the harm and is justly put to a duty to help correct it. See id.

This principle is analogous to the common law exception to the no-duty rule when the defendant is connected with the plaintiff or his injury in some way. The individual may have an obligation to help if this conduct is causally, though not culpably, related to the harm, or if he has undertaken to help the plaintiff, or if there is some special relationship between him and the plaintiff, like common carrier and passenger or landlord and tenant.

\textit{Id.} (citations omitted).

\textsuperscript{223} See John C. Jeffries, Jr., \textit{Compensation for Constitutional Torts: Reflections on the Significance of Fault}, 88 \textit{MICH. L. REV.} 82 (1989). Professor Jeffries explains corrective justice as being the sole theory to support compensation for constitutional torts:

The government has achieved a wrongful gain... by inflicting a wrongful loss. The award of damages from government to victim at once annuls the wrongful gain and rectifies the wrongful loss. The payment from wrongdoer to victim retraces the moral relationship between them. To the extent possible, it undoes the wrong. ... This restorative transfer from wrongdoer to victim is intelligible as corrective justice, without regard to distributive effect.

\textit{Id.} at 94.

\textsuperscript{224} Professors Wells and Eaton argue that although the nonfeasance-misfeasance distinction serves valid goals in relation to private actors, it does not serve these same goals when applied to public officials:

The rationale for the no-duty rule differs sharply depending on whether the defendant is public or private. The no-duty rule as applied to individuals rests primarily on libertarian values. A state-imposed duty to act would seriously impinge upon individual freedom and autonomy. ... Furthermore, a tort duty to act is thought to undermine the moral worth of an individual's decision to help another person in distress. ...

When the defendant is a government or its officer, individual autonomy is not an issue. Consequently, the no-duty rule must look elsewhere for support.

Wells & Eaton, supra note 106, at 3--4; see also Whitney v. City of Worcester, 366 N.E.2d 1210, 1218 (Mass. 1977) (holding that when dealing with public officials, distinctions between misfeasance and nonfeasance "have no real connection with sound reasoning or policy"); Reckman v. Keiter, 164 N.E.2d 448, 457 (Ohio Ct. App. 1959) ("In determining the liability of a public official for acts of his deputies, no distinction is drawn between acts done \textit{virtute officii} and acts done \textit{colore officii}, and it makes no difference whether the act done is classified as nonfeasance, misfeasance or malfeasance.").
Of course, one might always attempt to reach beyond the immediate contours of section 1983 and make the generic argument that official liability for nonfeasance will deter public officials from exercising their "discretion in allocating limited public resources," or in some other way influence those seated in government. Additionally, one can argue that exposure to personal liability for nonfeasance deters qualified persons from seeking public office.

Even assuming that the prospect of personal liability affects the judgment of supervisory officers, a distinction between official nonfeasance and misfeasance in the context of derivative supervisory liability is not justified. Supervisory officials are continually entangled in the affairs of their subordinates. Supervisors are always acting and omitting with no clear line between the two. Addressing concerns of undue influence or skewed discretion by attempting to dissect supervisory acts from omissions seems impractical at best. At worst, it amounts to an arbitrary endeavor.

In any event, the fears of curtailing official discretion and deterring persons from seeking office are adequately addressed by existing immunity doctrines, particularly the qualified

225. Wells & Eaton, supra note 106, at 5.
226. See, e.g., State v. Reichert, 80 N.E.2d 289, 293 (Ind. 1948) ("Competent persons would not be willing to accept positions which imposed upon them liability for torts and wrongs committed by subordinates . . . .").

The threat of personal liability for state and local officials under . . . § 1983 does not appear to be so great as to interfere with the performance of government by inhibiting officials in the performance of their duties. This conclusion is substantiated by the limited attempts to monitor the precise effects of personal liability on the behavior of public officials.

Id. at 334; cf. Sheldon H. Nahmod, Constitutional Wrongs Without Remedies: Executive Official Immunity, 62 WASH. U. L.Q. 221, 248 (1984) (observing that there exists "no data showing that the costs [of a lesser immunity] had a significant adverse effect on executive decision-making").
228. See Whitney, 366 N.E.2d at 1217–18 (rejecting the distinction between misfeasance and nonfeasance and observing that officials receive adequate protection from immunity); Kinports, supra note 20, at 601 (noting that qualified immunity "protect[s] public officials from being sued for every error in judgment, thereby diverting their attention from their public duties, preventing them from independently exercising their discretion because of the fear of damages liability, and discouraging qualified persons from seeking public office at all"); see also Richard H. Fallon, Jr. &
immunity now available for all government officials. The Supreme Court has tailored qualified immunity to insulate government officials from the influence of harassing litigation. Hence, an official who fails to perform his assigned duties will escape liability so long as the constitutional right violated was not clearly established. Rejection of

Daniel J. Meltzer, New Laws, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1731, 1822 (1991) (noting that even in cases of individual liability, officials often are “indemnified by their governmental employers”).

229. Courts have uniformly recognized that supervisors exposed to potential derivative liability may invoke qualified immunity. See, e.g., Brown v. Grabowski, 922 F.2d 1097, 1119–20 (3d Cir. 1990) (finding immunity because no direct, personal involvement existed), cert. denied, 111 S. Ct. 2827 (1991); Andrews v. City of Philadelphia, 885 F.2d 1469, 1479–80 (3d Cir. 1990) (stating that a supervisor is immune to § 1983 damages unless a reasonable person in her position would know that her conduct violated the plaintiff’s constitutional rights, but not finding immunity on the facts of the case); Greason v. Kemp, 891 F.2d 829, 836, 840 (11th Cir. 1990) (same); Al-Jundi v. Estate of Rockefeller, 885 F.2d 1060, 1066–67 (2d Cir. 1989); Allen v. Lowder, 875 F.2d 82, 85 (4th Cir. 1989). One question that arises is whether a supervisor’s immunity must be coextensive with the perpetrator-subordinate’s. Though few courts have addressed the issue, it appears that the immunities in any particular case need not be equal. In Cleveland-Perdue v. Brutsche, 881 F.2d 427 (7th Cir. 1989), cert. denied, 111 S. Ct. 368 (1990), for example, the court found a “supervisor of supervisors” immune, but not the supervisor directly under him. Id. at 429. Thus, Brutsche indicates that the party further removed from the actual violation might enjoy a greater chance at succeeding under the immunity defense. In Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985), cert. denied, 474 U.S. 1100 (1986), however, the opposite was true. The court there affirmed a finding of immunity for a police officer (Wheeler) who was present when his partner (Vitale) used excessive force against a suspect because Wheeler could not have reasonably known that the shooting would take place. Id. at 819. The court in turn rejected the police chief’s (Forni) defense of qualified immunity: “Unlike Wheeler’s situation . . . we believe that a wrongful shooting would be the type of result that would be likely to arise—and hence be ‘known’ under Harlow—from a failure to train police officers in the proper use of weapons.” Id. at 822 n.7.

230. See Davis v. Scherer, 468 U.S. 183, 196 (1984) (“The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated.”); see also Jerry L. Mashaw, Civil Liability of Government Officers: Property Rights and Official Accountability, LAW & CONTEMP. PROBS., Winter 1978 at 8, 26 (“The major explicit reason for insulating officials from damage actions is the fear that damages will induce timidity in them.”).

231. See Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982). See generally Kinports, supra note 20, at 600–07 (reviewing Harlow and the Supreme Court’s shaping of qualified immunity). Some supervisors performing quasi-legislative tasks might even be entitled to absolute immunity, see, e.g., Healy v. Town of Pembroke Park, 831 F.2d 989, 993 (11th Cir. 1987) (affirming the district court’s dismissal on absolute immunity grounds because the mayor and commissioners acted in a legislative capacity when they voted on how to provide police services to the town), though given that most local officials act in wholly administrative and executive capacities absolute immunity should be uncommon, see, e.g., Cordero v. De Jesus-Mendez, 867 F.2d 1, 19–20 (1st Cir. 1989) (holding that where no constitutional
nonfeasance as a basis for supervisory liability would disrupt the delicate balance presently achieved through the immunity doctrines. Indeed, it would be overkill in favor of blameless government.

B. Nature of the Duty

Assuming that a federal supervisory duty is recognized under section 1983, the next issue becomes the exact terms of that obligation. As discussed above, the law traditionally has recognized several supervisory duties, some more specific than others. At a minimum, government officials normally have been expected to “oversee” subordinates in a reasonable fashion so as to not “furnish the opportunity for the default.” In other words, supervisory government officials are expected to reasonably manage subordinates in order to minimize the risk of illegal behavior.

A federal supervisory duty likewise should obligate an official occupying a control position to manage her subordinates “adequately.” If a superior has the ability (power) to control others’ actions she is obligated to act. The key is ability; the supervisor must actually be in a position to control the wrongdoer.

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violation was established, the mayor could not be held liable, but where the mayor did violate the plaintiff's constitutional rights while acting as an administrator, he could not claim qualified immunity); see generally JOSEPH G. COOK & JOHN L. SOBIESKI, CIVIL RIGHTS ACTIONS ¶ 2.08[C] (1987).

232. See supra notes 42–43 and accompanying text.

233. MECHEN, supra note 42, § 790, at 529.

234. I use the adverb “adequately” at this point because I do not yet wish to address the appropriate standard of care to be imposed. Standards of care, of course, range from strict liability to the requirement that one avoid only purposeful conduct. I hope to establish in Part III.E that reasonableness is the appropriate standard of care for supervisory liability. See infra notes 290–91 and accompanying text.

235. The general tort rule is that one who is obligated to act need only do that which “he reasonably can.” PROSSER & KEETON, supra note 44, § 56, at 377. For example, a parent who fails to save his drowning child is responsible only if the parent can swim. See LAFAVE & SCOTT, supra note 106, § 3.3(c), at 208–09.

236. Consistent with this approach, in order to possess the ability to control subordinates a supervisor must know she is in a position of power. Though she need not necessarily know of her subordinates' actions, see supra notes 42–43 and accompanying text and infra note 291 and accompanying text, she must at least be aware that she is in charge. This is not to be confused with knowing one is under a legal duty to act. Generally, one need only be aware of the circumstances that give rise to the duty to be held accountable. One need not know of the actual duty. See
State law "obligations," such as strict vicarious liability or a general duty to oversee subordinates, though relevant, should not control the federal definition of duty. Instead, the federal focus should be more specific, asking whether the hierarchical structure of government and the surrounding circumstances in a particular case gave the supervisor the ability to direct or otherwise control the subordinate at issue. A supervisor saddled with vicarious liability by state law may in fact be so far removed from the offending subordinate that she could exercise no control whatsoever. At the

LAFAVE & SCOTT, supra note 106, § 3.3(b), at 207–08. For instance, a parent who fails to save his drowning child is accountable so long as he knew it was his child. It is irrelevant that the parent did not know of the law's imposition of the duty to save the child. See id. § 3.3(b), at 208. Again, the concern is avoiding strict, vicarious liability. An individual who unknowingly is made chief of police should not be held accountable for the actions of the police force notwithstanding her failure to supervise.

237. See, e.g., Bush v. Viterna, 795 F.2d 1203, 1209 (5th Cir. 1986) (concluding that state law should only be used "to identify the persons responsible for an identified civil rights violation," and not to woodenly attribute liability to them).

238. The Court's recent decision in Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989), offers an appropriate model for how the duty inquiry should proceed. In Jett the Court expressed a willingness to peruse state law to determine which local government officials possess "final authority" to bind the local government under § 1983. The Court stated:

As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury. Reviewing the relevant legal materials, including state and local positive law, as well as "custom or usage' having the force of law," . . . . the trial judge must identify those officials or governmental bodies who speak with final policymaking authority . . . .

Id. at 737 (citation omitted).

Although under Jett state law forms the central focus of the search for final authority, the analysis still is federal in character. Even if state law were to provide expressly that official X possessed no authority, a court could still conclude he was a policymaker. Common custom and practice are also relevant to the analysis and must be considered in conjunction with state law. The federal question under § 1983 that emerges from Jett is whether "authority" existed under state law and practice. State law, local law, custom, and usage are the evidence used to answer this federal question.

239. See, e.g., Allen v. Lowder, 875 F.2d 82, 84 (4th Cir. 1989) (involving a superior who was unable, given state law, to prevent the harm to the plaintiff); Gomm v. DeLand, 729 F. Supp. 767, 781 (D. Utah 1990), aff'd, 931 F.2d 62 (10th Cir. 1991) (finding a prison warden unable to order treatment for an inmate, and thus not liable under a theory of supervisory liability); Lyons v. Powell, 729 F. Supp. 1404, 1405 (D.N.H. 1989) (noting that a supervisor must have the "power and duty to alleviate the conditions which led to the violation" to be liable (quoting Miranda v. Munoz, 770 F.2d 255, 260 (1st Cir. 1985))}.
other extreme, an immediate supervisor who is expressly insulated from liability by local law might still have the power and ability to direct the subordinate's action.240 Ability should be addressed in light of state law, but also independently of it.241

Of course, the mere existence of a supervisory duty cannot immediately result in the superior's being held responsible. The question of breach remains.242 The fact finder must

240. Local government may not insulate itself from a federal inquiry in municipal liability cases. In City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), the Court stated:

[E]gregious attempts by local governments to insulate themselves from liability . . . are precluded by a separate doctrine. . . . [W]e have long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a 'custom or usage' with the force of law."

_id. at 127 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970)); see also Ware v. Unified Sch. Dist. No. 492, 902 F.2d 815, 818 (10th Cir. 1990) (noting that although state law is the focus of inquiry, "lawfully empowered decisionmakers cannot insulate themselves from liability under section 1983 by knowingly allowing a subordinate to exercise final policymaking authority"); Mandel v. Doe, 888 F.2d 783, 793 (11th Cir. 1989) ("In making this determination, the court should examine not only the relevant positive law, including ordinances, rules and regulations, but also the relevant customs and practices having the force of law.")

241. The analysis should be a functional one. A supervisor might possess the ability to control subordinates in relation to task x, but not task y; a duty would thus exist only in the context of the former. For instance, a police chief might have the power to control how arrests are made, but be unable to make personnel decisions. See Crowley v. Prince George's County, 890 F.2d 683, 686 (4th Cir. 1989) (finding that with respect to final policy making authority, the police chief had no authority to make personnel decisions though he may have had authority in other areas). Section 1983 liability might therefore attach to the chief for Fourth Amendment violations, but not for any unconstitutional employment decisions his subordinates make. A similar approach has been used by the Court to address the question of whether a government official is a final authority who binds local government by her actions. See Pembaur v. City of Cincinnati, 475 U.S. 469, 483 n.12 (1986).

242. The lower courts appear to have analyzed the breach requirement in terms of causation. See, e.g., Redman v. County of San Diego, 896 F.2d 362, 364 (9th Cir. 1990) (finding that a person violates § 1983 if he "omits to perform an act which he is legally required to do that causes the deprivation"), _aff'd in part, rev'd in part en banc_, 942 F.2d 1435 (1991), _cert. denied_, 60 U.S.L.W. 3520 (1992); Hewett v. Jarrard, 786 F.2d 1080, 1086–87 (11th Cir. 1986) (noting that a "violation of a duty imposed by state law resulting in constitutional injury will establish a causal connection sufficient to trigger supervisory liability"); Howard v. Fortenberry, 723 F.2d 1206, 1209 (5th Cir.) ("[N]o defendant can be held liable unless it is shown that he breached some duty imposed by state law, and that the breach had some causal connection with the constitutional deprivation."). _vacated in part on other grounds_, 728 F.2d 712, 713 (1984). As noted earlier, _see supra_ notes 105–07 and accompanying text, when speaking of omissions the question of causation tends to become
conclude that the superior did not abide by his affirmative obligation. It may be that a superior has done all he possibly can to prevent unconstitutional conduct, or perhaps has otherwise "adequately" looked after his subordinates. If he has, then the supervisor is not blameworthy and he should not be held accountable.

The question of breach is thus nothing more than a question of culpability. Breach asks what should have been done under the circumstances. If one does not do what should have been done, then she has breached her duty of care. And if she has breached her duty of care, she is culpable. The problem thus comes full circle to the question of culpability and what superiors must do to avoid breaching their duties.

No set criteria exist for fulfilling any given duty. Instead, one placed under an affirmative obligation to act is normally expected to perform "reasonably." Wide latitude is afforded the individual to select the appropriate course of action. All that is required is that the course chosen prove reasonable.

Consider, for example, a good samaritan who offers assistance to an injured traveler and thereby assumes a duty to care for the traveler. Identifying exactly what the good samaritan must do for the traveler is impossible. Instead, the good samaritan is only expected to act reasonably; he can choose his actions, so long as a normal person would not look upon his choice as being a negligent one. Hence, he might summon aid by dialing "911" or he might bandage the traveler's wounds and send him on his way. Either could suffice.

Nothing more can be expected of a government official. She should be given the latitude to choose those actions and omissions that satisfy her affirmative obligation. Only if her choice does not measure up to society's expectations should she be held responsible.

murky. Perhaps the better approach is to avoid causation language altogether and simply focus on whether the defendant failed to perform the obligation imposed upon her by law.

243. The question of breach is a factual one to be decided by the appropriate fact finder. See Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989) (stating that whether the final authority's act or acquiescence caused the constitutional deprivation is a factual question for the jury).

244. See Prosser & Keeton, supra note 44, § 56, at 377.

245. Id. § 56, at 378.
C. Culpability and Precedent

Of course, all of this begs the question of the exact standard of care to be imposed on government officials. Traditionally, the law has only expected of government officials what it has expected from everyone else—reasonableness.246 Hence, a superior who reasonably watched after his subordinates was secure from personal liability regardless of the subordinates' actions. Only a negligent supervisor was accountable.

The predominant view that has emerged under section 1983, however, is much more tolerant of government nonfeasance. Lower courts have held that a supervisor is liable for constitutional wrongs practiced by a subordinate only where the supervisor either "super-carelessly" allowed the wrongs to take place,247 or was aware of the subordinate's illegal conduct.248 Under either standard negligent supervisors are not held accountable.

To date, lower courts have failed to provide an adequate explanation for why less has been required of government officials under section 1983. Those courts that have attempted to justify a more tolerant standard of care for supervisors have tended to cite Supreme Court precedent beginning with Parratt v. Taylor249 and ending with Daniels v. Williams.250

246. See supra note 40 and accompanying text. Of course, government officials sometimes enjoy the protections of governmental immunity, thus absolving them of liability in certain situations where private individuals would be held accountable. See PROSSER & KEETON, supra note 44, § 132, at 1056.

247. See supra notes 53–55 and accompanying text.

248. See supra notes 56–58 and accompanying text.


250. 474 U.S. 327 (1986). Courts citing these cases include: Leach v. Shelby County Sheriff, 891 F.2d 1241, 1246 (6th Cir. 1989), cert. denied, 110 S. Ct. 2173 (1990) (citing Daniels for the proposition that "a claim of failure to supervise or properly train under section 1983 cannot be based on simple negligence"); Stevenson v. Koskey, 877 F.2d 1435, 1439–40 (9th Cir. 1989) (discussing both Parratt and Daniels and concluding that supervisory negligence is not actionable); Delbridge v. Schaeffer, 569 A.2d 872, 889 (N.J. Super. Ct. Law Div. 1989) (citing Daniels for the proposition that negligent supervision is not actionable).
A few have even referred to City of Canton v. Harris.251 But neither Parratt, Daniels nor Harris support requiring less of government personnel than common, everyday citizens.

Parratt held that a claim of official negligence could, under appropriate circumstances, support a claim for relief under section 1983.252 Daniels raised the particular level of culpability required for a due process violation, but reaffirmed Parratt's interpretation of section 1983.253 The net effect of these two cases was thus an explicit rejection of any inherent limiting principle within section 1983.

The assumption that Parratt and Daniels were intended to restrict the meaning of section 1983 inverts the natural implication of those cases. Parratt and Daniels's rejection of a mens rea standard for section 1983 expands the potential for liability rather than restricts it.

Moreover, supervisory responsibility presents an altogether different question than that considered in either Daniels or Parratt. Both of those cases were concerned with whether the Constitution was violated at all by a street-level government official.254 Nothing in either Parratt or Daniels suggests that the requirement of constitutional fault extends beyond the perpetrator. When speaking of derivative supervisory responsibility, the assumption is that a constitutional violation has taken place—which mollifies any concerns of Parratt and Daniels.255 Whether to hold a superior personally accountable for the wrongs of subordinates presents a statutory question left largely unaffected by constitutional cases such as Parratt and Daniels.

251. 489 U.S. 378 (1989). Courts referring to Harris include: Walker v. Norris, 917 F.2d 1449, 1455 (6th Cir. 1990) (relying on Harris to support a deliberate indifference standard in a supervisory liability action); Wilks v. Young, 897 F.2d 896, 898 (7th Cir. 1990) (relying on Harris in a supervisory liability context); Greason v. Kemp, 891 F.2d 829, 837 (11th Cir. 1990) ("[W]e find the analogous situation of municipal liability under City of Canton to be helpful in determining whether a supervisor was deliberately indifferent...."); Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989) ("[W]e are confident that, absent official immunity, the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve." (relying on Harris)).

252. 451 U.S. at 534–35.

253. Daniels, 474 U.S. at 330.


255. See Daniels, 474 U.S. at 330 ("[I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right.").
Use of City of Canton v. Harris fares no better. Harris dealt with holding local government responsible for its failure to adequately train and supervise its police force. The Court unanimously held that a city could only be held liable under section 1983 for its "deliberate indifference" to the constitutional rights of the victim. Because the Harris deliberate indifference standard evolved from an institutional compromise, however, it has no immediate application to cases involving personal liability.

D. Rationalizing a Singular Standard of Care

Nothing in Parratt, Daniels or Harris thus compels the selection of any singular standard of fault under section 1983.

256. See, e.g., FONTANA, supra note 49, § 3.27, at 112 ("It is submitted that the recent case of Canton ... signals the Supreme Court's affirmance of this [deliberate indifference] standard for supervisory cases as well, since the elements of liability for either claim are essentially similar." (citation omitted)). Professor Nahmod observes:

City of Canton could indicate that henceforth, and as a matter of § 1983 statutory interpretation, supervisory liability will require at least deliberate indifference to the rights of persons with whom subordinates come into contact. It is argued ... that such a requirement would be inconsistent with the Court's declaration in Parratt v. Taylor ... that § 1983 does not have an independent state of mind requirement.


257. City of Canton v. Harris, 489 U.S. 378, 380, 388 (1989). The deliberate indifference standard adopted by the Court in Harris operates independently of the Constitution. See id. at 388 n.8. Thus, even though equal protection is at issue, purposeful discrimination need not be established on behalf of the municipality. Rather, deliberate indifference is sufficient. See, e.g., Coffman v. Wilson Police Dep't, 739 F. Supp. 257, 262-63 (E.D. Pa. 1990) (relying on Harris in concluding that an equal protection claim against officials may result in municipal liability if the city was deliberately indifferent).

258. As discussed previously, see supra notes 80-90 and accompanying text, Harris is an outgrowth of the Court's rejection of respondeat superior in Monell, and therefore is wholly dependent for support upon the rationale of Monell. Monell's reading of legislative history found the Forty-second Congress heavily influenced by federalism concerns and the potential lack of federal authority to compel local governments to keep the peace. See supra notes 81-84 and accompanying text. That the Forty-second Congress entertained these same concerns about supervisory liability is doubtful indeed, especially when one considers that sovereign immunity (including that found in the Eleventh Amendment) has never protected government officials from personal liability. The Forty-second Congress certainly knew it was free to choose whatever rule it wished, whether one predicated on vicarious liability, some criminal analog demanding specific intent, or anything in between.
The more challenging question is whether Parratt and Daniels allow for any single standard of care for supervisors under section 1983. Though Parratt and Daniels held that negligence could support a section 1983 claim, they did not hold that it necessarily would. Instead, the Court held that section 1983 depends on the substantive constitutional right at issue. The result is a functional fault requirement for section 1983. While gross negligence might be required for due process, purpose is required for equal protection. And certain constitutional provisions, such as the Fourth Amendment's proscription against excessive force, might even be satisfied by simple negligence.

In light of the flexible approach taken by Parratt and Daniels, Professor Nahmod has argued that the level of fault

259. See Brown, supra note 254, at 867 (analyzing Daniels).
261. The Supreme Court has yet to clearly identify what level of mens rea is needed for a Fourth Amendment violation. In Graham v. Connor, 490 U.S. 386 (1989), the Court held that an arresting officer's "underlying intent or motivation" is irrelevant to the determination of whether the force used to effectuate the arrest was excessive. Id. at 397. Instead, the question is an objective one, such that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." Id. Graham left unanswered whether intentional conduct is needed in the first instance to implicate the Fourth Amendment. Whether an officer's accidentally causing injury to a suspect raises a Fourth Amendment question, for example, was not resolved by Graham. In Brower v. County of Inyo, 489 U.S. 593 (1989), the Court cast serious doubt on whether "accidents" fall under Fourth Amendment scrutiny. There, a high speed chase resulted in a suspect's crashing into a barricade set up by police. Brower v. County of Inyo, 817 F.2d 540, 542 (9th Cir. 1987). The court of appeals found this not to constitute a seizure for Fourth Amendment purposes. Id. at 546-47. The Supreme Court reversed, concluding that because the police intended to stop the suspect, "terminat[ing] [his] freedom of movement through means intentionally applied," they had in fact "seized" him. 489 U.S. at 597. In drawing this conclusion the Court distinguished high speed chases that result in the suspect's "unexpectedly" crashing his car. Id. at 595. No Fourth Amendment seizure occurs in such a case. Likewise, the Court distinguished as involving no seizure that case where a police car "slips its brake and pins a passerby against a wall." Id. at 596. Still, the Court stopped short of saying that the harm must be intentionally brought about. Id. at 598-99. Hence, even though harm is only negligently or recklessly brought on, it may be actionable under the Fourth Amendment—at least where the means that bring about the harm are "intentionally applied." See Kathryn R. Urbonya, The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments, 35 St. Louis U. L.J. 205, 278-80 (1991) (discussing the meaning of Brower); cf. California v. Hodari D., 111 S. Ct. 1547 (1991) (holding that no seizure occurs for the purposes of the exclusionary rule until a suspect is physically restrained).
required for supervisory liability should also fluctuate with that required for the constitutional violation at issue.\textsuperscript{262} Under Professor Nahmod's approach, for example, a supervisor is liable for a Fourteenth Amendment equal protection violation only if the supervisor possessed discriminatory animus in failing to live up to his duties.\textsuperscript{263} Due process would require gross negligence, and so on.

At first blush this functional approach to supervisory liability under section 1983 has appeal. It has that degree of symmetry normally appreciated by the law in that all government officials, be they street-level or supervisory, are held to the same flexible standard.\textsuperscript{264} In contrast, applying any unitary standard to supervisors short of one based on specific intent\textsuperscript{265} could prove asymmetrical in that a superior, depending on the constitutional right at issue, could find himself bound by a higher standard of care than his errant subordinate. For example, where due process is the substantive right at issue, street-level officials need only avoid recklessness; simple negligence will not support liability.\textsuperscript{266} A uniform reasonableness standard for supervisors, however, would require that they avoid negligence. Greater care would thus be required of supervisors

\textsuperscript{262} See Nahmod, supra note 32, § 3.16, at 171.


\textsuperscript{264} This does not mean that the supervisor and the subordinate-perpetrator must possess the same level of culpability in a particular case. A supervisor's and subordinate's mental state may differ, and yet they may both still be held accountable. For instance, a subordinate may purposely (or even maliciously) injure someone in violation of due process, while the supervisor was only reckless in performing her duties. Assuming due process only requires super-carelessness, both the supervisor and the subordinate are accountable. Equivalency of culpability requirements is all that is needed. No similar consistency of actual blameworthiness need be shown.

\textsuperscript{265} Requiring specific intent (i.e., purpose) would mean that the supervisor is always at least as culpable as the perpetrator. Such a requirement, however, would essentially equate supervisory liability with complicity theory, leaving it almost impossible to ever hold supervisors responsible under § 1983. No one has yet suggested such a draconian measure, and I do not entertain it as a serious suggestion here.

\textsuperscript{266} Daniels v. Williams, 474 U.S. 327, 330–31 (1986) (holding that simple negligence will not support a due process violation). Several lower courts have interpreted this to mean that gross negligence or recklessness will support a due process violation. See Brown, supra note 254, at 867 n.372 (collecting cases).
than of the actual wrongdoers. The same could also prove true for equal protection and the Eighth Amendment.

Additionally, one might always argue that a flexible approach based on constitutional fault is mandated by the Court's treatment of section 1983 as a remedial statute. Because section 1983 has no substantive value, the argument goes, it cannot generate a separate culpability standard for supervisors. Rather, the standard of care required of supervisors can only come from the substantive right at issue.

The response to the latter of these contentions is the same as that made to the argument about duty—notwithstanding rhetoric to the contrary, section 1983 has often been given substantive meaning by the Court. Responding to the argument that imposing a higher standard of care on supervisors is unfair (or unjust) when measured against what is expected of street-level officials is more problematic. Part of the challenge is inherent in the question of fairness. What is fair or just to one person may not be to another. One therefore can never be certain that he has responded adequately to the argument.

Still, even conceding the amorphous nature of fairness, an equitable system may require more from supervisory officials than street-level subordinates. Granted, disparate obligations are often frowned upon by the law. Both tort law and

267. For a subordinate to be held accountable under the Equal Protection Clause of the Fourteenth Amendment she must engage in purposeful discrimination. See supra note 263. Anything less is insufficient to support liability. The care required of the subordinate is minimal, with only complete impunity being a lesser standard. A supervisor held to a negligence standard, however, is required to act objectively reasonably. More is expected of her. In fact, the supervisor could be held accountable for the perpetrator's wrong notwithstanding the supervisor's lack of purpose.


269. See supra notes 196-98 and accompanying text.

270. See supra notes 204-09 and accompanying text. Any argument framed in terms of § 1983's "purely remedial mission" thus cannot be taken seriously. More often than not such an argument is simply a contrived attempt to circumvent liability under § 1983.

271. Under tort law a supervisor and her subordinate are generally held to the same standard of care—one based on reasonableness. See MECHEN, supra note 42, § 789, at 529; PROSSER & KEETON, supra note 44, § 132, at 1067. A few jurisdictions, however, have imposed strict vicarious liability on supervisors for certain wrongful acts of their subordinates. See, e.g., Salem Bank & Trust Co. v. Whitcomb, 362
criminal law\textsuperscript{272} tend to require the same of people regardless of their status. However, sometimes a person's status or rank justifies differing treatment.

Consider again tort and criminal law's various exceptions to the general requirement that one is only held accountable for her actions and not her omissions.\textsuperscript{273} Persons of particular status, such as parents, lifeguards, spouses, et cetera, are often required to act in situations where others may stand idly by.\textsuperscript{274} In effect, these persons are held to a higher standard than the general citizenry.

True, these illustrations only speak to the law's occasional relaxation of the act requirement and do not address allowing for a relaxed level of \textit{mens rea}. Still, they are indicative of society's willingness to impose greater burdens on an individual who has assumed a particular status or who otherwise has adopted a specific role. Further illustrations can be found with doctors, lawyers, and others who occupy a professional status.\textsuperscript{275} Though the law speaks of "negligence" when assessing these individuals' potential liability, it is clear that more is expected of them than nonprofessionals. Similarly, more can be expected of government supervisors.

One might always respond to these examples by arguing that the same standard (reasonableness) is always being applied; it merely varies in application with the particular facts of each case. While doctors and lawyers are expected to act reasonably, so are nonprofessionals. The theoretical standard is always the same. The proposition that supervisors should act reasonably while subordinates are enjoined only from more culpable conduct, however, is a different matter.


\textsuperscript{273} Under criminal law derivative liability is generally achieved only through complicity liability and conspiracy theory, both of which require specific intent. Because of this specific intent requirement one who is held derivatively liable by the criminal law is always at least as culpable as the perpetrator. See LaFave & Scott, \textit{supra} note 106, \S 6.7(b), at 579–80.

\textsuperscript{274} See \textit{supra} notes 105–07 and accompanying text.

\textsuperscript{275} See \textit{Prosser & Keeton, supra} note 44, \S 56, at 376–84.
The differing expectations flow not from application of an otherwise uniform rule, but result from a standard that is higher in theory. Though this argument is based largely on semantics, it deserves a response. The rejoinder is that the law in fact recognizes graduated duties, stated as such, depending on the status of the actor. Consider the doctrine of respondeat superior. An employer is held absolutely responsible for the negligence of her employee, so long as the employee was acting within the scope of his employment. The employee, meanwhile, is responsible only for his own negligence. The employer's strict standard of care thus requires more of her than is required of the employee.

This need not suggest that supervisors too should be held vicariously responsible for the wrongs of their subordinates. As discussed above, precedent and policy dictate against this. Nor are the virtues of vicarious liability being trumpeted here. Rather, private sector respondeat superior is offered only to dispel any thought that disparate expectations based on status are completely foreign to the law.

Several justifications exist for holding a private employer to a stricter standard than his employee. Modern thought accepts vicarious liability because it better allocates risks among victims, employees, and the employer. The employer is in a position to better absorb risks and distribute the corresponding cost as a part of doing business. Moreover, the employer can command his employees and take the necessary precautions to avoid injuries. Strict liability encourages greater care from the person most able to provide it.

When the employer's ability to control her employees' actions is coupled with her profit motive, the argument goes, it is fair to expect more from her than the errant employee. The employer has the ability to select and terminate personnel, as well as the power to direct their day to day operations. She personally benefits from the activities she directs and has the ability to order necessary changes. Given this control-benefit formula, requiring an employer to pay for her employees' wrongs is a reasonable cost of doing business.

276. See id. § 69, at 499–500.
277. See id. § 69, at 499.
278. See supra notes 68–77 and accompanying text.
279. See PROSSER & KEETON, supra note 44, § 69, at 500 (listing reasons).
280. See id.
281. See id. § 69, at 501.
282. See id. § 69, at 500–01.
Courts have observed that upper-level government officials are not analogous to employers in the private sector and cannot be held responsible as such.\textsuperscript{283} Instead, supervisors are more like foremen, wielding some control but not sharing the employer's profit motive. The difference between private employers and public supervisors, however, can be overstated. Even though government supervisors may not have the identical profit motive that drives private employers, and may not exercise the same arbitrary employment power, they still possess measures of both. For instance, a person occupying an important position in government might expect continued employment and a greater salary. And even those who do not anticipate personal financial gain might expect to profit politically.\textsuperscript{284}

Further, supervisory control over subordinates, though not plenary, can be substantial. Government officials are often delegated a large measure of discretion when dealing with subordinates.\textsuperscript{285} Even assuming a supervisor does not make "final" personnel decisions, her authority might be so substantial as to make her the virtual equivalent of an employer.\textsuperscript{286}

Supervisory officials in government are thus not that different from employers in the private sector. Granted, they might be distinctive enough so that strict, vicarious liability should not apply. But that is not what is being urged. Instead, the suggestion here is only that a singular culpability standard for supervisory personnel can be considered just notwithstanding a more permissive, flexible standard for street-level officials. Given the control exercised by supervisory officials and their ability to profit politically from their decisions, holding them to a more rigorous standard of care than front-line officers is at least as fair as tort law's imposition of vicarious liability on private-sector employers.


\textsuperscript{284} A police chief who wants to gain favor with the electorate (or their representatives on the city council), for example, might decide to get tough on crime and order more severe police surveillance. The result is more protection for the general citizenry (and a happy electorate), but at a cost of several Fourth Amendment violations. The police chief certainly has profited from his decision because he has gained the favor of a vast majority of the citizens. Should he not be held accountable (assuming culpability) for the unlawful activity that results as a "cost" of doing business? Mere political accountability is insufficient, because those aggrieved make up only a small percentage of the populace. A more immediate mechanism for responsibility, such as an action for damages, would likely get the chief's attention.


\textsuperscript{286} See id.
The policies behind section 1983 also warrant such an approach. Professor Schuck has observed that "[h]igh-level supervisory or policymaking officials tend to be more visible, financially capable of satisfying a judgment, and well positioned to change official policy. Moreover, their 'greater power,'... 'affords a greater potential for a regime of lawless conduct.'" Given the deterrent and compensatory purposes behind section 1983, requiring more from these officials seems sensible. Because they make and administer policy, deterrence is more effectively served by addressing supervisory officials directly. Compensation of victims also becomes more of a reality when government supervisors are exposed to liability. In short, the policies behind section 1983 would be duly served by holding supervisors to a singular, stricter standard of care than their street-level underlings.

As a final note, it bears repeating that this discussion focuses on derivative supervisory liability. No attempt is made here to hold a supervisor accountable in the first instance for unconstitutional conduct. The assumption is that a constitutional wrong has occurred at the hands of a street-level officer. Therefore, no doctrinal problems are presented by holding a supervisor to a higher standard of care than that required by the Constitution. All constitutional requirements are satisfied; the question is only how far liability should extend.

E. Identifying the Appropriate Standard

The law traditionally has expected everyone, including government officials, to act reasonably. At the time when section 1 of the Ku Klux Klan Act was enacted, supervisory officials were held accountable for their negligence in failing to oversee their subordinates. Unless society's tolerance of bad government has expanded so much as to justify departure from this historical norm, negligence should still provide the appropriate standard.


288. See id. at 16–17 ("Deterrence can be enhanced by encouraging supervision and legal challenge, or blunted by shifting the risks of litigation and liability to others.").

289. See supra notes 254–55 and accompanying text.

290. See supra notes 42–43 and accompanying text.
Requiring less of government officials than of the common citizenry is a back-handed compliment at best. The message conveyed to our government officials is that they are not as moral and responsible as the rest of the populace and thus not worthy of trust. Hopefully this is not the case at all; rather, government officials presumably are as responsible as any reasonable person.

For this reason, Judge Bownes of the United States Court of Appeals for the First Circuit is certainly correct in stating, "If the knowledge expected of government officials is that which a reasonable person could be expected to have, the foresight expected of government officials should be the same—that of a reasonable person." Reasonableness should be the standard by which supervisory officials are judged under section 1983. An official in a control position who negligently fails to oversee his subordinates should be held responsible for constitutional violations that result. Those in high places should not be heard to claim, "I didn't know," or "I wasn't involved." Instead, society should expect government officials to know and take action. It should be able to rely on a government free from hierarchic negligence. Government officials should earn their pay by reasonably performing their duties. Such is the price of good government.

IV. SUPERVISORY LIABILITY WITH SUBORDINATE'S INNOCENCE

Parts I through III assumed that a street-level subordinate violated the Constitution. The question then was whether derelict supervisors too should be held responsible. But what if no constitutional violation occurs at the hands of the street-level subordinate? More specifically, what if the street-level subordinate does not possess the requisite mens rea? Can a negligent supervisor still be held responsible?

Consider a case where a street-level subordinate wrongfully destroys property or somehow causes personal injury. Assume the subordinate was only negligent in

292. By "wrongfully" I simply mean the damage should not have taken place.
293. See generally Brown, supra note 254, at 847–50 (discussing procedural due process in the context of constitutional torts).
causing the harm, or perhaps was not culpable at all.\textsuperscript{294} Assume further that the subordinate's supervisor was negligent in failing to look after this particular street-level subordinate. Is the supervisor personally responsible even though the subordinate is not?

Applying the model for supervisory liability developed above, one might conclude that the supervisor should be held accountable. He was negligent (thus satisfying the requirement of section 1983)\textsuperscript{295} and harm was wrongfully inflicted on the victim. The mere fortuity\textsuperscript{296} that the subordinate lacked the requisite constitutional level of fault, the argument goes, should not absolve the negligent supervisor of responsibility.

In the absence of constitutional fault on someone's behalf, however, liability under section 1983 is precluded.\textsuperscript{297} Without either the street-level subordinate or the supervisor satisfying the due process fault standard, there is no substantive claim. Thus, there can be no claim under section 1983.

Assuming again that the perpetrator is innocent of wrongdoing, can a supervisor who satisfies the constitutional fault standard be held accountable? No constitutional obstacle would appear to preclude imposing liability in such a case because constitutional fault exists on behalf of the supervisor. But is there a nonconstitutional problem? Is it troubling that

\textsuperscript{294} Negligence, of course, cannot support a due process violation. See Daniels v. Williams, 474 U.S. 327, 330–31 (1986); see also Collins v. City of Harker Heights, 60 U.S.L.W. 4182, 4186 (U.S. Feb. 26, 1992) ("[T]he Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace . . . ."), affirming 916 F.2d 284 (5th Cir. 1990).

\textsuperscript{295} See supra notes 290–91 and accompanying text.

\textsuperscript{296} One might attempt to argue that no fortuity necessarily exists; rather, the supervisor might have selected or trained the subordinate so as to avoid the subordinate's personal fault. A supervisor could do this in one of two ways: first, she might select or train "smart" subordinates so that no wrong (and hence no fault) exists; second, she might select or train "ignorant" subordinates in the hope that should a wrong occur they will not, in light of their subjective ignorance, be found at fault. If the first of these is true (that is, if the supervisor selects or trains smart subordinates) then even assuming one of these subordinates were to cause harm, there would exist no supervisory negligence. Such a choice would therefore not lead to a situation where the subordinate was innocent but the supervisor was culpable. Only under the second choice is there a possibility that the supervisor might be deemed negligent while the subordinate escapes liability. But if the absence of fault on behalf of the subordinate results not from a fortuity but from conscious selection or training on behalf of the supervisor, the supervisor surely should be held accountable. Otherwise, supervisors would be encouraged to select ignorant employees and train them poorly. Hopefully, at best, the combination of an innocent subordinate and culpable supervisor is the result of a fortuity.

\textsuperscript{297} See supra notes 254–55 and accompanying text.
a person one step removed from the harm can be held responsible when the perpetrator is innocent of wrongdoing? Reference to either general tort principles or criminal law would indicate that the answer is “no.” Under the tort law doctrines of negligent supervision and negligent entrustment, for example, an employee need not be personally at fault for a negligent employer to be held responsible. Similarly, criminal law recognizes the so-called innocent agent theory of liability, holding guilty one who uses another to commit a crime notwithstanding the latter’s subjective innocence. In either case, the innocent perpetrator is treated as a mere instrumentality of the wrong. His innocence does not defeat the liability of the person using him, just as the innocence of a gun does not exculpate a murderer.

But the answer to whether section 1983 allows supervisory liability in the absence of an employee’s personal constitutional fault is not so clear. Instead, the waters are muddied by the Supreme Court’s decision in City of Los Angeles v. Heller, a case that casts doubt on whether a supervisory

298. See, e.g., Robinson v. Moore, 512 S.W.2d 573, 575–78 (Tenn. Ct. App. 1974) (finding the employer liable but not the employee); Wishone v. Yellow Cab Co., 97 S.W.2d 452, 453–54 (Tenn. Ct. App. 1936) (finding the cab company negligent though the driver—an epileptic—was not). As one commentator explains:

[J]The employee's conduct need not itself be actionable before liability can be imputed to the employer under negligent employment theories, unlike vicarious liability theories. Employee incompetence will support a negligent hiring claim against an employer when the plaintiff alleges that the employee possessed a characteristic which created an unreasonable risk of harm, whether or not the plaintiff alleges that the characteristic would render the employee personally liable for the plaintiff's injury.

299. See, e.g., State v. McCarthy, 425 A.2d 924, 932–35 (Conn. 1979) (holding responsible a defendant who directed a drug-dependent follower to commit a murder, even though the follower was not guilty of murder); MODEL PENAL CODE § 2.06(2)(a) (1962) (“A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct.”). See generally MODEL PENAL CODE § 2.06 comment 3 (1985).

300. 475 U.S. 796 (1986) (per curiam); cf. Praprotnik v. City of St. Louis, 798 F.2d 1168, 1172–73 n.3 (8th Cir. 1986), rev’d on other grounds, 485 U.S. 112 (1988). In Praprotnik it was argued that because certain officials were exonerated of wrongdoing the city could not be held accountable. The Eighth Circuit disagreed, finding that the jury could have determined that other unnamed officials were responsible for the plaintiff's harm. Id.
official’s constitutional fault might be sufficient to sustain liability where the subordinate proves innocent of wrongdoing.

A. City of Los Angeles v. Heller

In Heller a police officer was charged under section 1983 with unnecessarily using a chokehold to make an arrest, and thereby causing the suspect to fall through a plate-glass window. The municipality was also joined under section 1983 because it officially sanctioned use of the chokehold and trained its officers how to employ the maneuver.

In a bifurcated trial the jury first returned a verdict in favor of the police officer. Because the jury was not instructed on the possibility of a qualified immunity defense the verdict apparently indicated that the police officer’s use of force was not unconstitutional. The trial court then dismissed the action against the municipality, concluding that if the agent did not violate the Constitution then neither did the city.

The Supreme Court agreed with the trial court’s conclusion. Responding to the claim that the city’s policy might itself have been unconstitutional, the Court stated: “If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.” Thus, Heller ostensibly means that so long as the perpetrator is innocent of wrongdoing, her municipal employer cannot be held liable under section 1983, notwithstanding the existence of a Monell policy or custom.

302. See id. at 801–03 (Stevens, J., dissenting).
303. See id. at 798.
304. See id. at 798–99. The court of appeals, however, did not interpret the verdict in this way. It found that the jury might have concluded the officer was entitled to a good faith defense because the force he used was reasonable according to police department regulations. Heller, 759 F.2d at 1374.
305. See 475 U.S. at 798.
306. Id. at 799.
307. See, e.g., Frost v. Hawkins County Bd. of Educ., 851 F.2d 822, 827 (6th Cir.) (finding that a verdict that the perpetrators are not liable is “conclusive” as to municipal liability), cert. denied, 488 U.S. 981 (1988); Dodd v. City of Norwich, 827 F.2d 1, 8 (2d Cir. 1987) (finding that where the official is not responsible the city cannot be held liable), cert. denied, 484 U.S. 1007 (1988); In re Scott County, 672
B. Heller’s Impact on Supervisory Liability

Heller can be used to argue that a supervisor’s authorization of unconstitutional activity, and hence his complicity in it, is “beside the point” if the subordinate did not personally violate the Constitution. A fortiori, any lesser degree of culpability on behalf of the supervisor is irrelevant so long as the subordinate is innocent of constitutional wrongdoing. Without constitutional fault on behalf of the subordinate, there can be no cause of action against the supervisor.

Lower courts have not read Heller to preclude supervisory liability in the absence of a subordinate’s constitutional fault. Instead, both before and after Heller, courts have recognized the potential for derivative liability regardless of the perpetrator’s innocence, so long as the “accomplice” is constitutionally blameworthy. Unfortunately, post-Heller cases have

F. Supp. 1152, 1187 (D. Minn. 1987) (“[P]laintiffs have not suffered any constitutional harm at the hands of the deputies or the social workers, hence, their failure to train or supervise theory against Scott County must fail.”), aff’d, 868 F.2d 1017 (8th Cir. 1989). But see, e.g., Gibson v. City of Chicago, 910 F.2d 1510, 1519–21 (7th Cir. 1990) (noting that the municipality may be liable for its policies notwithstanding the fact that the government tortfeasor was found not liable because he was not acting under color of law).

Where the perpetrator escapes liability because of immunity, however, the governmental employer may still be held liable. See, e.g., Newcomb v. City of Troy, 719 F. Supp. 1408, 1416–17 (E.D. Mich. 1989). Where immunity protects the tortfeasor a constitutional violation might still have taken place; therefore, the government employer (which is not protected by immunity) is still potentially accountable.


309. See, e.g., Professional Ass’n of College Educators, TSTA/NEA v. El Paso Community College Dist., 730 F.2d 258, 266 & n.14 (5th Cir.) (holding that the president of a college was liable under § 1983 for retaliating against a union member in violation of the First Amendment notwithstanding the innocence of the intermediate board of trustees that acted on the president’s recommendation), cert. denied, 469 U.S. 881 (1984).

310. See, e.g., Gibson, 910 F.2d at 1519–22 (holding that a police officer was not liable under § 1983 because he was not acting under color of state law, but that the city was possibly liable for the officer’s actions); Wulf v. City of Wichita, 883 F.2d 842, 862–64 (10th Cir. 1989) (holding the police chief personally liable because of his improper motive but not the city manager whose conduct was not impermissibly motivated); Jacobs v. Meister, 775 P.2d. 254, 258–59 (N.M. Ct. App.) (holding that improper motive on the part of an administrator results in liability notwithstanding the innocence of the regents), cert. denied, 775 P.2d 1299 (N.M. 1989). But see Gutierrez, 723 F. Supp. at 1498 (excusing supervisors where the perpetrators were innocent).
failed to explain why this is so. Though these decisions seem correct, *Heller* still warrants distinction.

Of course, the best way to distinguish *Heller* is to point to its institutional character. Again, the rules governing the liability of local government trace their origin to policies foreign to individual-capacity actions.\(^{311}\) One should therefore be wary of mechanically applying a case like *Heller* to supervisors.

Even assuming *Heller*’s relevance in the supervisory liability context, it is still doubtful that it precludes an innocent-agent theory of liability. On a number of occasions the Court has recognized that institutional responsibility for constitutional wrongs need not be premised on any given individual’s liability.\(^{312}\) Instead, the Court has often analyzed institutional responsibility independently of official liability.\(^{313}\)

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311. *See supra* notes 80–90 and accompanying text.

312. The Court on a number of occasions has found illegal institutional action without identifying any one individual as being personally liable. In particular, school desegregation cases have always allowed for institutional responsibility without looking for any individual wrongdoer. *See*, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *cf.* Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 Mich. L. Rev. 225, 257 (1986) (noting that the school desegregation cases can be explained under the traditional theory that requires one individual to be responsible, but that the cases also suggest a possible movement away from the individual model). The Court has never suggested that to hold a state agency responsible for *de facto* discrimination an individual official must be identified as possessing discriminatory animus. Instead, the question in *de facto* discrimination cases is whether there exists some form of collective intent to discriminate on the part of the relevant institution.

This position is consistent with that normally taken in regard to corporate criminal responsibility. “Corporations have been convicted of crimes requiring knowledge on the basis of the ‘collective knowledge’ of the employees as a group, even though no single employee possessed sufficient information to know that the crime was being committed.” *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1248 (1979).

313. The possibility exists that no one individual could ever be held personally responsible for an otherwise conceded constitutional violation. This is because multiple requirements sometimes exist for a given constitutional violation. Consider equal protection, for example, which requires (1) purposeful discrimination, *see* *Washington v. Davis*, 426 U.S. 229, 239–40 (1976), and (2) discriminatory effect, *see*, e.g., *Palmer v. Thompson*, 403 U.S. 217, 225 (1971). One component of an institution might satisfy the intent element, while another component causes the discriminatory effect. Together they cause a violation, although separately they do not. *See* Whitman, *supra* note 312, at 261 (“[A]t least when there are explicit, decisive, and virtually contemporaneous actions by several top decisionmakers, the Court will recognize that several branches of the government, working together, can create a constitutional tort even though the action of any single branch is not by itself unconstitutional.”).

Additionally, consider due process. In order to prove a violation of due process through government defamation one must establish (1) disparaging remarks, and
That the Court intended *Heller* to limit institutional liability to those cases where an identifiable subordinate is constitutionally at fault is therefore an improbable proposition.

Because of this precedent and the law's general recognition that one person's innocence need not devolve to benefit a guilty party, *Heller* is best read narrowly. Specifically, *Heller* can be interpreted as a case that addresses only what relief is available under section 1983, and not as establishing any general rules of liability. When viewed in this manner *Heller* does not preclude an innocent-agent theory of liability under section 1983, whether the case involves institutional or individual liability.

C. Explaining Heller

Constitutional tort cases encompass two separate questions. The first asks whether a constitutional violation has taken place. The second asks whether the victim is entitled to

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Owen v. City of Independence, 445 U.S. 622 (1980), provides an excellent case study. See Whitman, *supra* note 312, at 261. There a municipal employee (Owen) was allegedly discharged in violation of the due process principles established in Paul v. Davis, 424 U.S. 693, 710 (1976). See *Owen*, 445 U.S. at 633–34 n.13. The supervisor responsible for the discharge (the City Manager) did not defame Owen, rather members of the City Council did. The City Council, meanwhile, did not discharge Owen. *Id.* at 627–29. Thus, neither the City Manager who discharged Owen, nor the members of the City Council who defamed him, satisfied the due process requirements described above. Though the Court in *Owen* never made clear whether either the City Manager or the members of the City Council individually violated the Constitution, it did make clear that due process was violated. *Id.* at 633–34 n.13. It might be said that the violation occurred as a result of the combined acts of the City Council and the City Manager. Taken together the acts implicated the municipality, even though apparently no single official could be held accountable. Of course, if the City Manager and members of the City Council had conspired to violate due process then all would be equally guilty. See *supra* note 26 and accompanying text. Nothing in *Owen*, however, suggests preconcerted activity took place.

314. See *supra* notes 298–99 and accompanying text.

315. The Court in *Heller* implied as much when it stated: "But this was an action for damages, and neither *Monell* . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." 475 U.S. at 799.
relief. Even if one assumes a constitutional wrong has occurred relief might not be available, either because of a lack of harm or perhaps because of a justification or immunity.

Consider, for example, a mixed motive case arising under the Fourteenth Amendment Equal Protection Clause. Assume a woman is discharged from public employment and that the decision to fire her was based in part on her gender. The employer's discriminatory animus establishes the constitutional violation, a necessary predicate for recovery under section 1983. But this alone does not lead to recovery. Instead, should the employer prove that a neutral motivation was the true moving force behind the discharge—that she would have been fired regardless of the employer's discriminatory animus—the plaintiff will not recover damages.

Section 1983 operates on at least two levels: first, on a level of statutory liability which is "absolute and unqualified" with "no mention . . . of any privileges, immunities, or defenses that may be asserted"; and, second, on the level of an action at law for tort liability "for which the court will provide a remedy in the form of an action for damages."

Judicial remedies have always been distinguished from the law of substance and procedure.


316. See Nahmod, supra note 32, § 3.18, at 195–96 (Supp. 1990). One commentator has noted:

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In a mixed motive case the second part of the Mount Healthy test goes to remedy and not to the existence of a constitutional violation. That is, even where a defendant has carried the Mount Healthy burden of showing by a preponderance of the evidence that an impermissible motivation was not the but-for cause of a plaintiff's discharge, the plaintiff who has proved that the impermissible motivation was a substantial factor in the discharge has thereby proved a constitutional violation of, say, the First Amendment or equal protection.

318. See Mt. Healthy, 429 U.S. at 286–87. But, if the impermissible motive was a substantial factor in the discharge, the plaintiff "may be able to recover compensatory damages—for emotional distress, for example—stemming from that violation, even if he or she is not entitled to recover any damages resulting from the discharge itself. There also may be attorney's fees consequences." Nahmod, supra note 32, § 3.18, at 196 (Supp. 1990); see also Carey v. Piphus, 435 U.S. 247, 260–62 (1978).
nondiscriminatory reason breaks the causal connection necessary to recovery.

Returning to *Heller*, recovery from the municipality was improper because nothing the municipality did caused Heller compensable damage. The arresting officer in *Heller* was "exonerated" by the jury. The force he used to make the arrest was therefore reasonable, a determination that severed any causal link between the illegal municipal policy and Heller's injuries. Just as a neutral motive can break the causal connection between discriminatory animus and termination of employment, justifiable force can sever the link between an unlawful arrest policy and a suspect's injuries. Heller therefore could not challenge the municipal policy in an action for damages.

*Heller* applies only in those cases where some independent intervening event, such as an objective justification, severs the connection between an illegality (such as an unlawful municipal policy or a supervisor's constitutional fault) and the victim's injury. Where a violation is avoided only because of the subordinate's subjective innocence, however, whether brought on by a mistake or some other excuse, *Heller* is irrelevant.

To illustrate this distinction, consider again the mixed motive hypothetical discussed above. Assume that a supervisor instructs one of her subordinates to discharge an employee, and further assume that both the supervisor and the subordinate have discriminatory animus. If it can be established that

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320. In *Graham v. Connor*, 490 U.S. 386 (1989), the Court held that the question of justification or exoneration in an excessive force case is one that turns on objective factors and not the arresting officer's subjective intent. *Id.* at 397. Hence, *Graham* makes it clear that a jury verdict exonerating a police officer in an excessive force case necessarily must mean that the officer's actions were objectively reasonable. The verdict exonerating the officer cannot be based on an absence of malicious subjective intent. For this reason, subjective excuses will not normally defeat liability in an excessive force case, and the result in *Heller* should always obtain.
321. *But see Heller*, 475 U.S. at 803–04 (Stevens, J., dissenting) (noting that the jury may have concluded that the officer's actions were subjectively reasonable while the city's policy was objectively unreasonable).
322. *See id.* at 799.
323. Under City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983), Heller would not have had standing to seek injunctive relief either.
324. An external event normally will arise because of the victim's own actions or perhaps through circumstances beyond anyone's control: events that either justify or excuse the street-level subordinate's response.
the victim would have been discharged anyway (that is, regardless of the impermissible animus), there can be no recovery.\textsuperscript{325} If the discharge is justified by, say, poor job performance or misconduct, the link between the supervisor's impermissible motive and the discharge is broken.\textsuperscript{326} Neither the subordinate's nor the supervisor's discriminatory animus leads to liability.

Now assume that it cannot be established that the discharge would have taken place anyway.\textsuperscript{327} And further assume that the subordinate is oblivious to the supervisor's improper motive. Under these facts the supervisor is accountable.\textsuperscript{328} That the subordinate who carries out the discharge is excused because of her subjective innocence does not relieve the supervisor of liability. What is important is not the subordinate's innocence, but causation—specifically, whether external, objective factors break the connection between the harm and the supervisor's wrongdoing. A subordinate's lack of subjective culpability does not break the causal chain.

Finally, return again to the hypothetical case where a street-level subordinate negligently destroys property or causes personal injury.\textsuperscript{329} Of course, this subordinate cannot be held responsible for a due process violation because such a

\textsuperscript{325} See Professional Ass'n of College Educators, TSTA/NEA v. El Paso County Community College Dist., 730 F.2d 258, 266 & nn.13–14 (5th Cir.) ("The causation issue ... is purely factual: did retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence?")\textsuperscript{,} cert. denied, 469 U.S. 881 (1984).

\textsuperscript{326} See, e.g., Jacobs v. Meister, 775 P.2d 254, 258 (N.M. Ct. App.) (noting that a subsequent, independent decision to discharge can break the causal connection between an improper motive and termination of employment), cert. denied, 775 P.2d 1299 (N.M. 1989).

\textsuperscript{327} See, e.g., Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989). In Wulf a public employee working with the police department was discharged in violation of the First Amendment. The police chief, who recommended the discharge to the mayor, possessed the impermissible motive to fire the plaintiff because of a letter the plaintiff wrote to the attorney general. Id. at 848, 862–64. The mayor, however, possessed no wrongful intent. Id. at 863. Still, although the mayor actually fired the plaintiff, the court found that the police chief could be held accountable for the harm under § 1983 because his recommendation "caused" the discharge. Id. at 862–64. The innocence of the mayor was irrelevant.

\textsuperscript{328} See, e.g., Wulf, 883 F.2d at 862–63; Professional Ass'n of College Educators, 730 F.2d at 266 (stating that the issue is whether an improper motive caused the intermediary to discharge plaintiff); Jacobs, 775 P.2d at 258 (noting that the fact that the party terminating the plaintiff's job is innocent does not break the causal connection between the defendant's improper motive and the discharge).

\textsuperscript{329} See supra notes 292–98 and accompanying text.
violation requires more than mere negligence.\textsuperscript{330} We have already seen that a negligent supervisor in this situation cannot be held liable under section 1983.\textsuperscript{331} But can a supervisor who is grossly negligent in either training or supervising that subordinate be held accountable? The answer is "yes," notwithstanding \textit{Heller}, so long as no objective justification exists for the subordinate's actions. The perpetrator's personal constitutional innocence cannot immunize a supervisor who possesses constitutional fault.

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Drawing perfect harmony between the negligence model urged for derivative supervisory liability in Part III, where the subordinate has committed a constitutional violation, and the conclusion reached here unfortunately is impossible. \textit{Daniels} is in the way. Negligence will support supervisory liability only in those cases where the street-level subordinate personally violates the Constitution. Where the subordinate's fault does not satisfy the constitutional predicate, however, supervisory negligence would support liability only in the rare case where negligence forms the constitutional rule.

There is no satisfactory explanation for allowing a negligent supervisor to escape liability based solely upon his subordinate's lack of constitutional fault. In either case the harm to the victim is the same. Corrective justice would seem to require holding the supervisor accountable in either case.\textsuperscript{332}

One might argue that this deficiency sabotages altogether the use of negligence to support derivative supervisory liability. Working backwards, one can argue that if independent constitutional fault is required of the supervisor where the subordinate is innocent, it should also be required where the subordinate is liable.

\textsuperscript{331} See supra notes 254–55 and accompanying text.
\textsuperscript{332} Granted, this "gap" in supervisory accountability under § 1983 looks a bit like the gap between \textit{respondeat superior} and negligent entrustment. Under \textit{respondeat superior} the principal is responsible for the agent's torts committed in the scope of employment, regardless of the principal's fault. Negligent entrustment, however, holds the principal accountable only for her own fault, irrespective of the agent's negligence. See Branch, supra note 298, at 15–17. One might observe a "gap" in that the principal's standard of care (absolute liability versus negligence) turns on the fortuity of her agent's fault. See supra note 296.
Rather than supporting a retraction of supervisory liability based on negligence, however, I believe this reasoning bolsters extending the negligence standard to cases involving innocent subordinates. Government officials occupying supervisory positions should reasonably oversee those charged to their care, and should compensate the victims of their failures. The fortuity that a subordinate escapes liability because he lacks some required subjective mens rea should not absolve an otherwise negligent supervisor. Section 1983's deterrence rationale and compensatory purpose are as strong in this case as in one where the subordinate possesses subjective fault.

CONCLUSION

An old Chinese proverb states that "when the finger points at the moon, the idiot looks at the finger."333 Given the specific facts of the Iran-Contra affair, it appears quite clear that the finger is pointing to the moon and beyond.334 What is not clear, however, is whether our modern morality allows us to look beyond the tip of the finger. If we are caught in a web of "ignorance is bliss," we will not look any farther. We will accept assertions like, "I didn't know," or "It wasn't me," and dutifully turn to sever the offensive finger.

Maybe we are satisfied with this approach in the criminal context, but we need not extend it to the civil sphere. Years of precedent support a less tolerant view of government incompetence. Indeed, in times past society has expected the same of those in government as it requires of its other citizens. Only in the past twenty years have the courts turned from this egalitarian principle and granted government officials room to play.335

Given that no precedent, whether congressional or judicial, compels a relaxation of traditional expectations, something else must explain the recent growth of impunity for those in the governmental hierarchy. One can imagine two different explanations: our courts either have overlooked society's

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333. See Hitchens, supra note 3, at 71.
334. See supra notes 2–16 and accompanying text.
335. See supra notes 47–67 and accompanying text.
traditional distaste for incompetence in government, or they are forging a new, anything-goes morality.\textsuperscript{336} We should hope that the former explanation is the more accurate one. That can be corrected.

\textsuperscript{336} In a recent critical analysis of tort law, Professor Abel offered the following observation:

Tort law fails almost entirely to pass moral judgment on the infliction of risk and injury. Negligent behavior is a public as well as a private wrong because it endangers many people besides the victim. It therefore merits the public disapproval that only the state can express in order to reaffirm the norm of safety.

Richard L. Abel, \textit{A Critique of Torts}, 37 UCLA L. REV. 785, 819 (1990). This is especially true in relation to constitutional torts. By holding our government officials to a negligence standard, courts can make a moral statement denouncing the public wrong of incompetence in government. Anything less is an equally moral statement that the public at large is not worth protecting.