Common Law Elements of the Section 1983 Action

Jack M. Beermann

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol72/iss3/5

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
COMMON LAW ELEMENTS OF THE SECTION 1983 ACTION*

JACK M. BEERMANN**

INTRODUCTION .................................................. 697

I. THE INFLUENCE OF COMMON LAW IN CIVIL RIGHTS
   LITIGATION .......................................................... 700
   A. The Justifications for Relying on Common Law .......... 700
   B. The Types of Issues for Which Common Law Provides Guidance .................................................... 703
      1. Interpretation of Section 1983 ......................... 703
         a. The Heck Issue: Should State Prisoners be Able to Seek Damages for Allegedly Unconstitutional Convictions? .......... 711
         b. Heck in the Lower Courts: No Elements Analysis ................................................................. 714
         c. Heck's Outcome: Toward a More Statutory Focus ................................................................. 720
         d. Heck's Common Law Elements Analysis as Inconsistent with Basic Section 1983 Principles ................................................................. 725
      3. Common Law and the Distinction between Torts and Section 1983 Actions ............................................ 729

II. COMMON LAW AND CONSTITUTIONAL RIGHTS
   PROTECTED UNDER SECTION 1983 ............................. 736
   A. Constitutional Rights and Section 1983 .................... 736

* © 1997 Jack M. Beermann, all rights reserved.
** Professor of Law, Boston University School of Law. Thanks to Hugh Baxter, Ronald Cass, Barry Friedman, Lynn Kumre, Fred Lawrence, Pamela Levine, Sheldon Nahmod, Bill Ryckman, Mike Wells, Larry Yackle, and Mike Wells, for their help with the ideas and/or drafts. Thanks also to the participants in the faculty workshop at Boston University School of Law where the ideas for this Article were presented. Excellent research assistance was provided by Liza Becker and Diego Rotzstain. Financial support was provided by Boston University School of Law research funds. All errors of fact and judgment are mine alone.
B. Constitutional Law and Common Law .............. 738
   1. The Influence of Common Law on
      Constitutional Analysis ....................... 739
   2. Substantive Due Process and Particular
      Constitutional Provisions ................... 743

CONCLUSION ................................................. 745
COMMON LAW ELEMENTS OF THE SECTION 1983 ACTION

INTRODUCTION

This Article explores the role of the common law in Supreme Court interpretation and application of § 1983, which grants a cause of action for violations of constitutional rights committed "under color of any [state] statute, ordinance, regulation, custom or usage." I argue that the common law has served primarily to narrow the reach of § 1983, and that this is inappropriate in light of the broad statutory language and the absence of good evidence that the enacting Congress intended a narrower application than the statutory language indicates.

The controversy over the influence of common law on § 1983 is reflective of a deeper conflict regarding whether the § 1983 remedy should be available even when state law would provide an adequate remedy. This issue appears in different forms. In Monroe v. Pape it was presented as whether action in violation of state law was nonetheless action under color of state law. In later cases, it was presented as the question whether due process was violated by an official’s tortious conduct when a state remedy is available. The more interpretive breadth the Court grants to § 1983, the less relevant state law becomes to whether a § 1983 action is available.

Despite the plausibility of some of the arguments against a broad § 1983 remedy when state remedies exist, I am not convinced that the Court’s use of the common law to limit § 1983 is defensible. While there have undoubtedly been some very expansive applications of § 1983 and other Reconstruction-era civil rights statutes, the statutes have not been allowed to reach their full textual potential, largely because the Court has constructed numerous limiting doctrines, many of which have the common law as their primary doctrinal material.

2. 365 U.S. 167 (1961), overruled in part by Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (overruling Monroe’s holding that cities were not persons subject to § 1983 liability). Not all members of the Court accept the Monroe rule. As recently as 1994, two members of the Supreme Court argued against recognizing a due process claim in a § 1983 suit “where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law.” Albright v. Oliver, 114 S. Ct. 807, 819 (1994) (Kennedy, J. joined by Thomas, J., concurring in the judgment).
4. For general background on § 1983 and other Reconstruction-era civil rights provisions, including many of the issues discussed in this introduction, see Jack M. Beermann, A Critical Approach to Section 1983 with Special Attention to Sources of Law, 42 STAN. L. REV. 51 (1989).
Overall, the Court’s methodology in interpreting and applying the Reconstruction-era civil rights statutes has been highly oriented toward legislative intent and policy, with the common law playing an important role. In discerning legislative intent, the Court has looked to the debates in Congress, and has also presumed that Congress intended to incorporate well-established common law rules that were in operation at the time the statutes were passed into the causes of action created by the statutes. Thus, the common law has been an important source of norms for filling gaps in the statute and for shaping the contours of the § 1983 cause of action. Under this approach, background common law rules have provided immunity defenses in § 1983 actions, and other common law rules have filled gaps in the § 1983’s remedial and other provisions, often with restrictive results.

The principal policy concerns underlying the application of § 1983 in recent years have been the fear that government officials will be timid or distracted in performing their duties as a result of excessive civil rights liability and the ensuing litigation. Based on these concerns, the Court has made it more difficult for plaintiffs to force litigation beyond the pre-trial stage and more difficult for plaintiffs ultimately to prevail on the merits. These interpretive devices and the policy concerns have significantly narrowed the reach of § 1983, especially when considered in light of the very broad textual features of the statute.

By contrast, in other areas, most notably administrative law, the Supreme Court has embarked on a new textualist mode of statutory interpretation that appears designed to prevent Congress and government agencies from moving in regulatory directions the Court finds unwise or inconsistent with the Court majority’s ideological views. In his survey of the 1994 Term’s statutory cases, Professor Peter Strauss notes that this textualist methodology has not been applied to the Reconstruction-era civil rights statutes. In those cases, the Court has employed a more holistic approach, in which common law, statute, and policy work together to create a body of doctrine. Although Pro-
fessor Strauss appears to long for the extension of this more holistic approach to other areas, the holistic approach has had the same effect in the civil rights area as textualism has in other areas: frustrating congressional intent and narrowing the domain of the statutes.

It should not be surprising that a conservative Court would not engage in textualist application of § 1983. A textualist interpretation of § 1983 would not advance a conservative agenda given that § 1983 is broadly drawn with few apparent internal limitations. Textualism, therefore, would greatly expand its reach and afford federal remedies for a wide spectrum of public conduct. Section 1983 provides a cause of action against "[e]very person" who, acting under color of state law, violates rights guaranteed by the federal Constitution and laws. Using its various nontextual interpretive devices, the Court, has, inter alia, narrowed the class of persons liable for violations, narrowed the scope of actionable violations, and restricted the remedies available for violations. While it is unlikely that fresh historical analysis or legal argument will persuade the Supreme Court to reexamine its doctrines and apply Reconstruction-era statutes in a broader, more receptive manner, it would be appropriate for the Court to abandon its common law baseline and develop a federal policy-based mode of interpretation for Reconstruction-era civil rights provisions including § 1983.

In a recent development that is examined closely here, the Court held that a plaintiff suing under § 1983 has no cause of action unless he can plead and prove the elements of the common law cause of action most closely analogous to his civil rights claim. This use of the common law runs counter to the prevailing view that the § 1983 action is largely independent of the existence of common law remedies for the conduct involved. Now it appears that the § 1983 remedy may not be available unless there is also a common law remedy in a particular situation.


This Article proceeds as follows. In the next part, I address generally the influence of common law in civil rights litigation. First, I look at the justifications for common law influence and, second, I examine the different types of issues for which common law is important in § 1983 cases. This part also includes an extensive look at Heck v. Humphrey, which I characterize as potentially a major new development in § 1983 doctrine that could significantly curtail the availability of the § 1983 action. This discussion includes an exploration of the merits of Heck's ruling, a discussion of the possible effects of the Heck analysis on other § 1983 litigation, and a proposed alternative analysis that would reach the same result as Heck without the potential side-effects. Finally, I look at another way in which the common law effects the § 1983 action: the influence of common law concepts on constitutional interpretation.

I. THE INFLUENCE OF COMMON LAW IN CIVIL RIGHTS LITIGATION

A. The Justifications for Relying on Common Law

The Supreme Court's use of common law as an interpretive baseline in civil rights litigation, especially under § 1983, has been detailed in academic commentary several times, and the main points need recounting here only briefly. The Reconstruction-era civil rights statutes are not detailed codes but rather supply only the basic elements of the actions they create. Courts are called upon to fill in the details on many issues, including proper parties, causation, standards of care, remedies, and more. Because some civil rights statutes create actions against local governments and government officials, unique issues arise, including official and entity immunities, notice of claim provisions, exhaustion of administrative remedies, and the relationship between the statutes and the Constitution.

The Court has held that courts should look to common law principles, found in the general provisions of Reconstruction-era and current common law, along with textual and policy analysis, to fill in the details of civil rights actions. The Court relies on two related theories to justify looking to Reconstruction-era common law. The first is that unless the converse was specified, the enacting Congress intended to incorporate well-established common law principles into the cause of action it was creating. The second is that Congress had, as its global intent for § 1983, the creation of a "species of tort liability," so that

10. See, e.g., Beermann, Critical Approach, supra note 4, and sources cited therein.
established tort law doctrines should be incorporated. The Court justifies looking to current common law under the theory that the enacting Congress did not intend to freeze the evolution of the civil rights actions and require federal courts to perpetuate outdated, abandoned, common law doctrines.\textsuperscript{11}

Statutory authority exists for employing common law doctrines to fill gaps in Reconstruction-era civil rights legislation. In the Civil Rights Act of 1871, Congress directed the federal district courts, when exercising their jurisdiction under the Civil Rights statutes, that when federal law is inadequate to "furnish suitable remedies," they should apply "the common law, as modified and changed by the constitution and statutes" of the state in which the district court sits.\textsuperscript{12} This provision might justify importing common law concepts into civil rights litigation. However, the Court does not rely upon this statute when incorporating common law concepts and, without explanation, does not apply it except in exceedingly narrow contexts.\textsuperscript{13}

The Court has not decided every important § 1983 issue with reference to the common law, and it has not discussed how it chooses when to use the common law and when not to do so. The Court often decides cases based upon the statutory language, history, and policies, without reference to common law. For example, the Court has not incorporated the common law of vicarious liability into § 1983 actions against local governments, first holding that municipalities were not proper defendants in § 1983 actions\textsuperscript{14} and later holding that municipalities could be held liable, but only for violations caused by municipal policy or custom.\textsuperscript{15} These decisions were based on the Court's reading of the text and history of § 1983 and not on the underlying


\textsuperscript{12} 42 U.S.C. § 1988(a) (1994). For a discussion of this and other related statutory provisions, see Beermann, Critical Approach, supra note 4, at 57-65.


common law rule of vicarious liability which may have pointed in the other direction.16

The policies underlying § 1983 and litigation against governments and government officials generally have also been important in other controversies. Policy was the primary factor relied upon for the Court's decision that § 1983 preempts state notice of claim statutes, which require notice to government entities before they may be sued.17 The Court's decision to enforce contracts in which arrestees trade their right to bring a civil rights action challenging their arrests in exchange for a prosecutor's agreement not to prosecute, was also based largely on policy grounds.18 The Court referred to the common law only for the general proposition that "promise[s are] unenforceable if the interest in [their] enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."19 The Court did not discuss specifically whether such agreements would be unenforceable under common law standards or whether they were enforceable as a matter of common law during the Reconstruction era. The Court instead relied heavily on policies favoring enlargement, including its impression that not "all [§ 1983 suits] are meritorious. Many are marginal and some are frivolous . . . [and] the burden of defending such lawsuits is substantial."20

Further, the Court's treatment of state statutes of limitations shows an unwillingness to cede control over important decisions regarding § 1983 even when state law clearly governs an issue. The Court has held that state statutes of limitations apply under traditional principles to § 1983 actions. However, the Court has not allowed state law to govern the characterization of the action for purposes of selecting the appropriate state statute.21 Some subsidiary doctrines, such as tolling, are decided with reference to state law while others, such as accrual of the cause of action, are decided as matters of federal law.22

16. There may have been a competing common law tradition of immunity, but the important point is that the Court did not look to common law but rather focused on the history, text, and policies underlying § 1983. See Oklahoma City v. Tuttle, 471 U.S. 808, 837-38 (1985) (Stevens, J. dissenting) (discussing applicability of common law of respondeat superior). See also Black v. Coughlin, 76 F.3d 72, 74 (2d Cir. 1996) (holding that respondeat superior is not proper basis for individual liability in § 1983 case; defendant official must be personally involved in violation to be held liable).
19. Id.
20. Id. at 395.
The Court has also generally scrutinized state statutes of limitations to ensure that their application would not undercut the policies underlying § 1983. The Court has not allowed unreasonably short or discriminatory statutes of limitations to undermine the viability of the § 1983 action.

Thus, when the Court relies upon common law to decide issues that arise under § 1983, it justifies doing so with a theory of legislative intent. But when the Court does not rely upon common law, it has not explained why the common law does not apply to the issue at hand. This makes it difficult to take seriously the Court's justification for using common law when it does.

The common law also affects § 1983 litigation through its effect on constitutional law. The Court has long looked to the common law for guidance in interpreting and applying constitutional norms, and it appears that this may have increased in recent years. The Court's apparent justification for looking to the common law in constitutional decision-making is similar to its reasoning for doing so in § 1983 litigation: the Framers of the Constitution looked to the common law as the primary source of legal norms and intended that constitutional provisions be read to incorporate common law norms where sensible.

B. The Types of Issues for Which Common Law Provides Guidance

1. Interpretation of Section 1983

The Supreme Court has looked to common law concepts for guidance in § 1983 cases since the action first became viable in the late 1950s and early 1960s. In Monroe v. Pape, the Supreme Court finally promised that the cause of action created by Congress ninety years earlier would be available. The Court, in Monroe, relied on general common law principles of responsibility to reject a willfulness requirement for § 1983 actions. The Court stated that it would be inappropriate to impose a state of mind requirement derived from the criminal law and stated that "Section [1983] should be read against the

background of tort liability that makes a man responsible for the natural consequences of his actions."  

The overall effect of the incorporation of common law into Reconstruction-era civil rights actions is mixed, with some references expanding liability and some contracting it. While in *Monroe*, the reference to tort law was employed to broaden the scope of § 1983 liability, later common law references have often narrowed its scope. For example, soon after *Monroe*, the Court ruled that § 1983's creation of liability for all "persons" did not override well-established common law immunities enjoyed by government officials, the main group of "persons" likely to be sued under § 1983.  

Thus, the importation of common law immunities into § 1983 has substantially narrowed its reach, which may be the overall effect of common law on § 1983.  

The conflicting effects of using common law in § 1983 cases reflects a deeper conflict over the proper application of civil rights statutes. This conflict, while apparent in many areas, is illustrated quite well by the relationship between § 1983 and the common law. On the side of broader liability is the notion that enforcement of constitutional rights is more important to our society than enforcement of common law rights because constitutional rights are basic to the maintenance of our form of limited, democratic government. That is why Congress passed the civil rights acts of the Reconstruction-era and why civil rights cases were granted a federal forum. Congress found enforcement of these rights so important that it granted plaintiffs the option of a federal forum even when the defendant could prove that an equally effective remedy was available in state court. Common law doctrines, under this characterization, should not seriously limit the

29. It is interesting, in this regard, to observe the evolution of the importance the Court has ascribed to § 1983's similarity to tort remedies. It has become commonplace to refer to § 1983 as a "species of tort." See, e.g., *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). Originally, the "species of tort liability" language was used in an argument to distinguish § 1983 from other species of tort liability and against immunities which might exist in other species. See *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) ("The statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads. But that view has not prevailed.") *Imbler* appears to be the earliest use of the "species of tort liability" characterization, and the phrase was quickly cited as a reason for treating § 1983 like other species. See *Carey v. Piphus*, 435 U.S. 247, 253 (1978). By the time of the *Heck* decision, it had become axiomatic that the "species of tort liability" characterization means that § 1983 should look, as much as possible, like other species of tort liability. See *Heck*, 512 U.S. at 483.
availability of the civil rights action but might help fill gaps when necessary. The fact that § 1983 creates a species of tort liability does not necessarily mean that it should share traits with other species.

The contrary view argues that the recognition of constitutional rights against governments and government officials is a serious matter, and presents more danger of intrusion on local preferences than the common law. Therefore, it is argued that caution should be the watchword, and traditional common law limitations should be maintained to safeguard against unneeded intrusions. This view counsels that the constitutionally-based action should be available only under extreme circumstances, and only when no other effective remedy is available. The existence of common law remedies means to proponents of this view that civil rights litigation is often unnecessary and should be avoided when common law remedies would be sufficient. This view sees § 1983 as having been passed to combat serious violations but not isolated tort-like misconduct.

Each of these models has influenced different majorities of the Supreme Court at different times, although given the broad statutory language, nontextualist judicial doctrine has been more limiting than expansive. Common law influence has been felt on several different types of issues. First, common law concepts have been used to fill obvious gaps in § 1983, supplying content to barren statutory terms. In this category, I place causation, parties, and remedies. While each of these issues is mentioned in the statute, the statute provides very little detail on them and courts have looked to common law principles to flesh them out. Second, common law concepts have been employed to limit § 1983 in ways that are outside the statute and perhaps even inconsistent with it. The primary example of this is immunity, which is not hinted at in the text of any civil rights statute, but which has been held by the Court to apply because it was so well-established in the common law of the Reconstruction era. Third, in a new development, under the theory that § 1983 creates a common law type of action, the Court has required a plaintiff making a § 1983 claim to prove the elements of an analogous common law claim. Fourth, common law ex-


31. My typology here is essentially similar to that first stated in Whitman, supra note 26, at 15.

32. Causation ("subjects or causes to be subjected") and parties ("person") are mentioned explicitly in § 1983. 42 U.S.C. § 1983 (1994). Remedies, including damages and injunctions, are implicitly mentioned in § 1983's specification of "action at law, suit in equity or other proper proceeding." Id.
erts a great deal of influence on constitutional decision-making and, insofar as a civil rights action is brought to enforce the Constitution, the common law elements of constitutional law become important to civil rights cases.

In the first category, common law concepts filling gaps in § 1983, the Court has by and large rejected the expansive view of § 1983 and employed common law to confine civil rights litigation within the bounds of traditional common law litigation. The best examples of this are damages rules, both compensatory and punitive. The Court has not accepted arguments favoring substantial damages to recognize the abstract value of the rights involved; further, it has rejected augmentation of damages simply because constitutional rights have been violated. Prevailing plaintiffs in civil rights cases are compensated only for those injuries that would be compensable in a common law action and the measure of damages is basically the same measure that would apply in a common law action.33 Regarding punitive damages, the majority of the Court settled on a relatively liberal standard for awarding punitive damages, but the argument was largely over which measure had the best common law pedigree, and not over whether the nature of the civil rights claim demanded that the more liberal standard be adopted.

The Court's heavy use of common law standards in § 1983 cases is open to attack as inconsistent with the role of a court deciding a matter of statutory law. Arguably, the Court should focus on statutory policy and not on the common law background. This argument denies the Court's reliance on the common law background as within the intent of Congress and instead views the Court as engaged in a statutory interpretation/policymaking enterprise. Generally, this is legitimate criticism. However, a close reading of the relevant opinions reveals that the Court has taken statutory policy into account and has not blindly adopted the common law rule. Simply put, the Court has not adopted an expansive version of the policies advanced by the statutes.

It is understandable and, perhaps, inevitable that a statute creating a tort-like cause of action would be construed in line with common law concepts on issues like damages and causation. These issues must be addressed and the common law is a familiar and respected source for guidance. However, the less the Court considers statutory policy the less legitimate its focus on common law appears, unless one is very

sure that Congress intended the common law to be the primary reference. When the Court decides an issue primarily upon the weight of nineteenth century authority, it misses the point that principles underlying § 1983 should be the primary source of guidance on matters not fully addressed in the statutory language.

The second category of doctrines that the Court has employed involve issues that are not mentioned in § 1983. The best examples of these are statutes of limitations and official immunities. These doctrines share two important features. First, the statute arguably could function without them. Second, they serve to limit the availability of the § 1983 action. They are dissimilar, however, in that limitations provisions, while part of state tort law, are statutory creations rather than common law doctrines. Nonetheless, because they are borrowed from state law, it is useful to think of them along with common law doctrines such as immunities.

The Court has created a standard for incorporating these doctrines that are not express or implied in the text of § 1983. The Court has stated that only doctrines that are "universally familiar" or "indispensable prerequisites to litigation" are incorporated, under the theory that Congress must have intended them to apply. Immunities are placed in the former category and statutes of limitation in the latter.

The Court has held that § 1983 cannot function properly without a limitations period, thus making a limitations period indispensable. Although an action brought long after the events would be possible to pursue, practical difficulties for the parties certainly increase with the passage of time. Further, in adopting state personal injury limitations periods for § 1983 actions, the Court relies upon § 1988's direction to employ local law where federal law is deficient. There is an established tradition of federal courts appropriating state limitations periods for federal statutory actions that contain no limitations period. With the enactment of a general federal statute of limitations, however, that tradition has become less important.

36. See id. at 268-71. State law governs the length of the limitations period. See id. at 269. Federal law developed under § 1983 governs the characterization of the § 1983 action for the purpose of selecting the appropriate state limitations period. See id. at 268-69.
37. See Beermann, Critical Approach, supra note 4, at 63-64 n.83.
There are other important issues for which the Court has long looked to the common law for guidance. Professor Whitman mentions causation, compensable injury, and state of mind as elements of § 1983 actions that courts have defined using common law.\(^3\) Causation and injury are mentioned in the statute. The Court's use of common law for them is understandable since it would be difficult for the action to function without judicial interpretation of them, and the common law is the most obvious source of guidance.

With regard to state of mind as a common law element of § 1983 actions, Professor Whitman is correct that the Supreme Court's initial reference to the common law in connection with § 1983 was to reject a criminal law-type state of mind requirement for § 1983 actions and adopt a tort-like rule of liability. In *Monroe v. Pape*, the Court wrote: "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."\(^4\) That passage, which rejects a willfulness requirement for § 1983 cases, is the genesis of the characterization of § 1983 as a species of tort liability. However, it is inaccurate to state that the Court has constructed a state of mind element for § 1983 out of common law concepts. In fact, the Court has very clearly rejected a state of mind requirement for § 1983 actions and, instead, has held that § 1983 itself contains no state of mind requirement.\(^4\)

The wholesale importation of common law immunities into federal civil rights law stands on different footing. The Court has not held that the absence of immunities in § 1983 renders it deficient so that it is necessary under § 1988 to look to state law to fill the "gap" in § 1983's provisions. Section 1983 functions without immunities. The absence of immunities does not affect the practical utility of § 1983, make the claim more difficult to pursue, or present a gap that must be filled one way or the other. The Court relies upon its presumption that Congress would have directly spoken to the issue had it intended to abrogate well-established common law immunities in § 1983.

It is difficult to evaluate, from this distance in time, the merits of the Court's analysis. The statute gives no indication that Congress intended immunities to apply, and its use of "every person" in its specification of defendants appears to contemplate liability for all violators,

\(^3\) See Whitman, *supra* note 26, at 17-18.


not only that small group of potential violators not protected by a common law immunity. The legislative debates shed little light on the issue, although the potential liability of judges, a category of official that receives absolute immunity from damages under current doctrine, appears to have been within Congress's contemplation.\textsuperscript{42} The decision turns on where one places the burden of persuasion. If one places the burden on the proponents of immunities to prove they were preserved, one could argue that, if immunities were universal, it might be expected that Members of Congress would have mentioned them either in the legislation or at least during floor debates. The opponents of the legislation might have taken comfort in the fact that the statutes would be less effective given the widespread existence of immunity. There is no evidence that they did.

Even more interesting is the Court's abandonment of the common law as it has shaped the contours of the immunities.\textsuperscript{43} The features of the immunities have changed dramatically since they were first recognized under the Court's common law doctrine.\textsuperscript{44} While the Court has employed common law standards to determine whether an official is entitled to an absolute or a qualified immunity, the doctrinal features of the immunities, especially qualified immunity, have been altered dramatically without regard to the common law. For example, without regard to the common law, the Court removed the subjective element of the qualified immunity\textsuperscript{45} and decided that absolute judicial immunity from damages did not shield judges from attorneys' fees awards when equitable relief was awarded against a judge.\textsuperscript{46}

Qualified immunity is available to almost every official not entitled to absolute immunity. The subjective element of qualified immunity meant that a plaintiff could overcome the immunity by showing that the defendant acted with malice toward the victim of the constitutional violation. Removing the subjective element means that the only way to overcome the qualified immunity is for the plaintiff to show that the defendant violated a "clearly established ... constitu-
tional right[ ] of which a reasonable person would have known." \(^{47}\)

There is no common law basis for this change, although there may also have been no common law basis for the subjective element in the first place. It was made purely as a matter of statutory policy, which may be a preferable form of decision-making but is inconsistent with the historical, common law basis for the immunities.

The third type of interface between § 1983 and the common law involves potential overlap between the elements of common law torts and § 1983 actions. \(^{48}\) Throughout the post-\textit{Monroe} period, many issues have presented themselves in the form of the question whether a particular tort, when committed by a government official, is a constitutional violation or gives rise to a § 1983 claim. There are many torts, such as false imprisonment and malicious prosecution, that are likely to be committed by government officials because government officials commonly engage in the conduct involved. All torts, however, present similar issues since government officials often engage in conduct that can give rise to claims such as defamation, assault, battery, and even simple claims for negligent property damage or personal injury. Thus, the question arises whether victims of such torts have constitutional claims or whether they are relegated to state tort actions.

Plaintiffs in these official tort cases usually base their claim on due process, arguing that whatever injuries they suffered deprived them of liberty or property without due process of law, since no hearing was held before the injury was inflicted. For the more common, less government-oriented torts, the Court has rejected the claim that such torts automatically violate the Constitution. For example, the Court held that ordinary defamation committed by a government official is not a deprivation of liberty unless some interest in addition to the plaintiff's simple interest in an unblemished reputation is damaged. \(^{49}\) With regard to negligent injuries to property or person, the Court first held that negligence torts were constitutional violations only if the state did not provide an adequate remedy. \(^{50}\) The Court subsequently further restricted the availability of constitutional claims

\(^{47}\) \textit{See Harlow}, 457 U.S. at 818.

\(^{48}\) The most recent incarnation of this issue, the \textit{Heck} doctrine, is discussed in depth in the next sub-section. \textit{See infra} text accompanying notes 54-57.

\(^{49}\) \textit{See Paul v. Davis}, 424 U.S. 693, 701-02 (1976). The Court held that the plaintiff does not make out a claim for a constitutional violation unless he alleges an injury in addition to the damage to his reputation, such as loss of employment opportunities or loss of the ability to enter places of business, due to the stigma created by the defamation. \textit{See id.}

over negligence torts when it held that merely negligent conduct did not amount to a deprivation under the Fourteenth Amendment and, thus, could not give rise to a due process claim.\(^{51}\)

The more government-oriented torts present a different sort of problem because they appear to address conduct that, when performed by a government official, would violate constitutional rights. For example, although the issue has not been decided, it seems natural to suppose that malicious prosecution by a government official who participates in a prosecution without probable cause,\(^{52}\) violates the Constitution. False imprisonment, perhaps by keeping an innocent person (or a person whose sentence has expired) in prison, also seems to be a natural candidate for constitutional condemnation. I have written elsewhere that the Court has not been successful in its attempt to distinguish torts that give rise to constitutional claims from those that do not.\(^{53}\) However, the Court appears to recognize that there is a category of government-oriented common law torts that are closely analogous to constitutional violations.


   a. The Heck Issue: Should State Prisoners be Able to Seek Damages for Allegedly Unconstitutional Convictions?

   The best example of a tort that looks like a constitutional violation when committed by a government official is the recent case, *Heck v. Humphrey*.\(^{54}\) That case was brought by a state prisoner, Roy Heck, who had been convicted of involuntary manslaughter.\(^{55}\) He sued two prosecutors and a state police investigator, alleging that they had committed a variety of constitutional violations that ultimately contributed to his conviction.\(^{56}\) These allegations resemble the common law torts of malicious prosecution and abuse of process. Heck sought only money damages and did not ask for an order releasing him from state prison.\(^{57}\) Had Heck sought release, his claim would have been barred because it would have been construed as a petition for habeas corpus

\(^{51}\) See Daniels v. Williams, 474 U.S. 327, 328 (1986).
\(^{52}\) The actual prosecutor would be immune from damages, but others, such as the police officers making the arrest, might not be immune.
\(^{54}\) 512 U.S. 477 (1994).
\(^{55}\) See id. at 478.
\(^{56}\) See id. at 479.
\(^{57}\) See id.
and Heck had not exhausted all his claims as required before a state prisoner can seek federal habeas relief.\footnote{58} The Court in \textit{Preiser v. Rodriguez}, in dicta, clearly stated that the habeas exhaustion requirement had no effect on damages actions.\footnote{59}

The \textit{Heck} Court, in an opinion written by Justice Scalia, ultimately rejected the \textit{Preiser} dicta and held that a damages action for an unconstitutional conviction may not be brought unless and until the state prisoner establishes that the criminal proceeding was terminated in favor of the accused or that the conviction was held unlawful or expunged in some forum or by some official.\footnote{60} This is not an exhaustion requirement because, even if all claims are fully exhausted, if the conviction has been upheld and the conviction remains valid, the prisoner may not bring a damages action that challenges the conviction. The Court cited powerful policies against allowing tort actions that amount to collateral attacks on convictions,\footnote{61} but the route to its conclusion warrants close examination.

The Court, as noted, acknowledged that \textit{Preiser} was not controlling since the plaintiff was not seeking release from prison. The Court, after arguing that no prior case had granted damages for an unconstitutional conviction and that its no exhaustion rule for § 1983 cases was not implicated, turned to the relationship between § 1983 and tort law principles. The Court recited the familiar adage that § 1983 "creates a species of tort liability"\footnote{62} and in the following paragraphs, broke significant new ground regarding the relationship between § 1983 and tort law:

"We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability." [citation omitted]. "[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well." [citation omitted]. Thus, to determine whether there is any bar to the present suit, we look first to the common law of torts.\footnote{63}

The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here be-

\begin{footnotes}
\item 59. See \textit{Preiser}, 411 U.S. at 494.
\item 60. See \textit{Heck}, 512 U.S. at 486.
\item 61. See \textit{id.} at 484-86.
\item 62. See \textit{id.} at 483 (quoting Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986)).
\item 63. \textit{Id.} at 483 (quoting, respectively, Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986); Carey v. Piphus, 435 U.S. 247, 257-58 (1978)).
\end{footnotes}
THE SECTION 1983 ACTION

cause, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process. "If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 888 (5th ed. 1984).

But a successful malicious prosecution plaintiff may recover, in addition to general damages, "compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society." Id. at 887-888 (footnotes omitted). See also Roberts v. Thomas, 135 Ky. 63, 121 S.W. 961 (1909).

One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. Prosser and Keeton, supra, at 874; Carpenter v. Nutter, 127 Cal. 61, 59 P. 301 (1899). This requirement "avoids parallel litigation over the issues of probable cause and guilt ... and it precludes the possibility of claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." 8 S. Speiser, C. Krause, & A. Grans, American Law of Torts § 28:5, p. 24 (1991). . . . We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.64

The italicized sentence appears to be a startling new holding that § 1983 plaintiffs must allege and prove the elements of the common law action most closely analogous to the § 1983 action.65 While the Court has long looked to common law for guidance on the elements of § 1983 claims, it has done so only where the element is suggested by the statute itself or where the issue must be resolved for the statute to function.66 The Heck Court states the "closest common law analog" requirement without acknowledging that it is new or arguing for it in any fashion.67 There is no argument made that the elements requirement meets either of the Court's standards of being indispensable or so well-established that Congress must have intended that it apply.

64. Id. at 484-86 (alteration in original) (emphasis added).
65. I say "appears" because the Court does not explicitly state that the elements analysis is a universal requirement for all § 1983 actions, but neither does it justify it as a special requirement in the Heck context. It is simply stated as a natural consequence of § 1983's status as a "species of tort law." That reasoning applies to all § 1983 cases, not only a subset of prisoner cases challenging the legality of convictions.
66. See Whitman, supra note 26, at 17.
67. See supra text accompanying note 54.
It is important, in analyzing *Heck*, to separate the result in the case from its analysis. The result may be correct: there may be strong arguments against allowing state prisoners to sue for damages over the legality of their convictions before they have exhausted other remedies. However, the analysis used in *Heck* has the potential to create significant new complications in § 1983 litigation and impose substantial new obstacles on § 1983 plaintiffs. Thus, the Court's reasoning in *Heck* merits close examination.

Perhaps, however, there is not great cause for concern. I may be overreading *Heck*. Although *Heck* is written as if there is a universal requirement in § 1983 cases that the plaintiff plead and prove the elements of the most closely analogous common law action, it may not be applied outside the context of claims challenging criminal convictions, where § 1983 damages litigation may be perceived as highly disruptive. The Supreme Court itself has not indicated that it will insist on compliance with *Heck*'s elements analysis in all § 1983 cases. The Court has decided several § 1983 cases since *Heck* and it has not mentioned the elements analysis again. This should not be surprising: doctrinal consistency is not a hallmark of Supreme Court decision-making. In the § 1983 area, for example, the Court has not even attempted to explain its longstanding use of seemingly inconsistent methodologies. Perhaps *Heck*'s elements analysis will languish silently until a member of the Court, such as *Heck*'s author Justice Scalia, decides to use it to dispose of another troublesome § 1983 case.

b. *Heck* in the Lower Courts: No Elements Analysis

There is also no evidence that the lower courts are requiring all § 1983 plaintiffs to plead and prove the elements of an analogous common law cause of action. In fact, the lower courts have largely ignored *Heck*'s common law elements analysis. The lower courts have embraced *Heck* as an instrument for disposing of the large number of § 1983 cases that arise in the context out of which *Heck* itself arose—damages actions that challenge some aspect of the legality of impris-
The Section 1983 action onment of the plaintiff.\textsuperscript{70} \textit{Heck} is, in a sense, the new \textit{Parratt v. Taylor}\textsuperscript{71} in that it provides an easy way to resolve numerous § 1983 claims against plaintiffs. That it does so in cases involving prisoners is a bonus.\textsuperscript{72} While the lower courts have expansively applied \textit{Heck} within the prisoner litigation context, they have not applied \textit{Heck} to other sorts of claims, such as claims involving defamation or wrongful discharge.\textsuperscript{73}

There has been one major extension of \textit{Heck} beyond challenges to convictions.\textsuperscript{74} In addition to damages actions challenging convictions, lower courts have applied \textit{Heck} to bar damages actions directed at unconstitutional procedures in prison disciplinary hearings.\textsuperscript{75} and

\textsuperscript{70} See, e.g., Fondren v. Klickitat County, 905 P.2d 928 (Wash. App. 1985). Interestingly, the Fondren court presented the issue as resolving the relationship between the habeas statute and § 1983 and did not refer to \textit{Heck} as requiring § 1983 plaintiffs to plead and prove the elements of a common law cause of action. \textit{Id.} at 933. \textit{Heck} has also been applied to \textit{Bivens} actions brought by federal prisoners. See Williams v. Hill, 74 F.3d 1339, 1340 (D.C. Cir. 1996). Since \textit{Bivens} actions are a relatively recent creation of the federal courts, there is no authority for imposing the elements of analogous common law actions on \textit{Bivens} plaintiffs.


\textsuperscript{74} In addition to the extension of \textit{Heck} discussed in text, there is also one unpublished decision applying \textit{Heck} to bar a § 1983 action for compensatory, declaratory, and injunctive relief in the context of civil confinement under a state sexual predator statute. \textit{See Young v. Dreiblatt}, No. 94-35808, 1996 WL 528375, at *1 (9th Cir. Sept. 13, 1996). The court held that, under \textit{Heck}, the action would not lie unless the plaintiff could show that his “civil confinement had been invalidated.” \textit{Id.} There is no discussion in the brief memorandum opinion of the basis for extending \textit{Heck} beyond the context of damages actions implicating the legality of convictions and there is no suggestion that the common law action challenging civil confinement has a “favorable termination” requirement.

\textsuperscript{75} See Miller v. Indiana Dep’t of Corrections, 75 F.3d 330 (7th Cir. 1996) (Posner, C.J.); Best v. Kelly, 39 F.3d 328, 330 (D.C. Cir. 1994). Two courts of appeals have ruled that \textit{Heck} does not apply to damages actions based on due process challenges to disciplinary proceedings for two reasons. \textit{See Armento-Bey v. Harper}, 68 F.3d 215, 216 (8th Cir. 1995) (per curiam); Gotcher v. Wood, 66 F.3d 1097, 1099 (9th Cir. 1995), \textit{petition for cert. filed,} 64 U.S.L.W. 3605 (U.S. Feb. 26, 1996) (No. 95-1385). First, because the Supreme Court in \textit{Heck} explicitly stated, at least where only the procedures in the hearing are challenged, that it does not, and second, because success in the damages action would not necessarily reverse the substantive outcome since a new hearing with proper procedures could conceivably be held and reach the same result. \textit{See Armento-Bey}, 68 F.3d at 216; \textit{Gotcher}, 66 F.3d at 1099. In other words, the award of damages for unconstitutional procedures would not obligate the state to release the prisoner. No case sup-
parole hearings.76 This extension of Heck has been made in the face of Supreme Court precedent directly to the contrary,77 but inspired by dicta in Heck itself.78 These decisions require that the result of a disci-

ports or questions the applicability of Heck with a discussion of a common law analogy to the § 1983 claim involved. Chief Judge Posner distinguished Miller from these cases on the ground that Miller was challenging the substance of the decision against him, not the procedures used to arrive at it. See Miller, 75 F.3d at 331. While this distinction is consistent with dicta in Heck, it is inconsistent with the holding of Wolff v. McDonnell, 418 U.S. 539 (1974). See infra note 77.

76. See Schafer v. Moore, 46 F.3d 43, 45 (8th Cir. 1995) (per curiam).

77. The Supreme Court specifically approved damages actions (and declaratory judgments) challenging procedures in prison disciplinary hearings in Wolff, 418 U.S. 554-55. In Heck, the Court stated that Wolff allows "damages for the deprivation of civil rights" but not "damages for the deprivation of good-time credits." Heck, 512 U.S. at 482 (quoting Wolff, 418 U.S. at 553). This distinction, as Judge Easterbrook recognized in an opinion holding that Heck bars a damages action even if all that is being challenged are the procedures used to deprive the prisoner of good-time credits, makes no sense because it would allow damages to be awarded only for procedural errors not affecting the outcome of the hearing. See Evans v. McBride, 94 F.3d 1062, 1063 (7th Cir. 1996), cert. denied, 117 S. Ct. 991 (1997). Judge Easterbrook finds it odd to award any damages, even nominal damages, in such a case. See id. But that is exactly the kind of case in which nominal damages are appropriate, to recognize procedural due process errors where the outcome of a properly conducted hearing would have been the same. See Carey v. Piphus, 435 U.S. 247, 266-67 (1978). Thus, to make sense of Wolff, courts should allow damages (and declaratory judgments) for unconstitutional deprivations of good-time credits and observe Wolff's limitation of Preiser's restriction to injunctions actually restoring the credits. With all due respect to Justice Scalia's and Judge Easterbrook's views to the contrary, an honest reading of Wolff compels the conclusion that the only remedy that was foreclosed under Preiser and Wolff was an order restoring the good-time credits. All other remedies, including damages for their deprivation, were approved by the Court in Wolff. Here is the relevant language from Wolff:

[7]The complaint also sought damages; and Preiser expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by Preiser; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations. We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled.

Wolff, 418 U.S. at 554-55 (emphasis added) (citation and footnote omitted). Heck's dicta barring damages for the deprivation of good-time credits is contrary to Wolff's explicit holding and the product of a wish that § 1983 prisoner litigation would just go away.

78. See Heck, 512 U.S. at 482-83. Heck's statement, see supra note 77, that Wolff did not recognize damages based on the actual loss of good-time credits is dicta because Heck itself did not involve a challenge to a prison disciplinary hearing but rather was a challenge to a conviction. That Wolff allowed damages based on unconstitutional deprivation of good-time credits, see supra note 77, did not foreclose a rule that disallowed damages based on an unconstitutional conviction. Under Heck, the question should be whether common law required a person seeking damages based on deprivation of good-time credits to first have those credits restored in some other proceeding. The Supreme Court itself has recently approved this extension of Heck in a decision issued as this Article went to press. See Edwards v. Balisok, No. 95-1352 1997 WL 255341, (U.S. May 19, 1997).
plinary or parole hearing be reversed in favor of the prisoner before the prisoner may seek damages for constitutional violations in the parole or disciplinary process. This goes beyond the holding in *Heck* since damages based on an unlawful parole or disciplinary hearing do not implicate the legality of a conviction and do not necessarily implicate the legality of continued confinement. Parole and some disciplinary hearings, when the loss of good-time credits is involved, do implicate the legality of continued confinement of the prisoner. The courts that have applied *Heck* to all damages claims challenging parole and disciplinary hearings have ignored *Heck*'s basis in the elements of the malicious prosecution tort, from which the favorable termination requirement is derived. Instead, they have applied *Heck* as if it were an extension of the *Preiser v. Rodriguez* ban on § 1983 injunctive claims challenging the fact or duration of confinement to damages claims challenging the fact or duration of confinement. Without the elements analysis, there is no basis for applying *Heck* in this context.

This line of cases is contrary to Supreme Court precedent and may violate the Supreme Court's general rule against requiring § 1983 plaintiffs to exhaust their administrative remedies.

---

79. The best example of this is *Miller v. Indiana Dep't of Corrections*, 75 F.3d 330 (7th Cir. 1996). In *Miller*, Chief Judge Posner reasoned that *Heck* applies to damages actions attacking disciplinary proceedings as follows:

The reasoning of *Heck v. Humphrey* is that a prisoner should not be able to use a suit for damages to get around the procedures that have been established for challenging the lawfulness of continued confinement. It is irrelevant whether the challenged confinement is pursuant to a judgment imposing a sentence or an administrative refusal to shorten the sentence by awarding good-time credits. *Id.* at 331. This reads more like an extension of *Preiser* than an application of *Heck*'s common law elements analysis. In Chief Judge Posner's analysis, the genesis of the *Heck* rule, in the elements of the malicious prosecution action, is apparently irrelevant.

80. I am uncertain whether malicious prosecution would be the closest common law analogy to a damages claim over an unconstitutionally held disciplinary or parole hearing. In another context, the Supreme Court has held that prison disciplinary hearings are not analogous to judicial hearings. See *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (holding that prison guards hearing disciplinary cases are not entitled to absolute judicial immunity from damages in § 1983 cases).

81. The statement in text is no longer true since, as this Article went to press, the Supreme Court held, in *Edwards v. Balisok*, No. 95-1352 1997 WL 255341 (U.S. May 19, 1997), that *Heck* bars damages claims for due process violations resulting in the deprivation of prisoners' good-time credits unless the good-time credits have been restored either within the state system or on habeas corpus review. *See id.* The Court repeated its misstatement that *Wolf v. McDonnell* did not allow § 1983 damages claims based on unconstitutional deprivations of good-time credits (see *supra* note 77) and stated that *Heck* bars due process damages claims whenever they "necessarily imply the invalidity of the deprivation of... good-time credits." *Edwards* at WL 255341. The *Edwards* Court did not mention *Heck*'s elements analysis and it apparently viewed the issue of *Heck*'s applicability to prison disciplinary hearings as settled by *Heck*'s dictum to that effect.

82. See *Patsy v. Board of Regents*, 457 U.S. 496, 498 (1982). In *Edwards*, the Supreme Court explicitly disapproved of some lower courts' practice of staying § 1983 cases while prisoners sought restoration of good-time credits. The Court stated that this violates *Patsy*, and the
In one situation, *Heck* has been applied in favor of plaintiffs seeking damages for unconstitutional confinement. Because *Heck* holds that a § 1983 damages claim in situations analogous to malicious prosecution does not accrue until the plaintiff's conviction has been voided, courts have held that the statute of limitations does not begin running until the conviction was voided even if the wrongful conduct occurred earlier. Thus, if the plaintiff's damages claim is based, for example, on a police officer's suppression of exculpatory evidence, the cause of action accrues on the date that the plaintiff prevailed in challenging the conviction and not on the date that the police officer should have turned over the exculpatory evidence. *Heck*'s rule thus applied has saved several § 1983 claims from the statute of limitations defense.

Although *Heck*'s effect on the timing accrual of claims challenging conduct leading to convictions has been widely employed in favor of § 1983 plaintiffs, as is often the case in § 1983 jurisprudence, courts have struggled to keep *Heck*'s positive effect for plaintiffs as narrow as possible. For example, a district court has held that a § 1983 plaintiff who was arrested but never convicted is not entitled to *Heck*'s delay in the accrual of causes of action arising out of the prosecution. The court held that *Heck*'s rationale applies only to § 1983 damages claims that challenge the legality of convictions or sentences, and not to actions by state criminal defendants where there has been no conviction. The court did not discuss whether the common law allows a state criminal defendant who had not yet been convicted to bring a malicious prosecution damages claim while the prosecution is still pending. The court did not refer to *Heck*'s common law elements analysis. The court acknowledged that this puts the state defendant in an awkward position since he may have to sue while state proceedings proper practice is to dismiss the § 1983 claim as not cognizable absent restoration of the good-time credits in some other forum. 1997 WL 255341.


84. See also Alvarez-Machain v. United States, 96 F.3d 1246 (9th Cir. 1996) (Federal Tort Claims Act (“FTCA”) claim challenging arrest did not accrue until acquittal).


86. *Prosser and Keeton on Torts* indicates that the common law action for malicious prosecution does not lie while criminal charges are still pending and that acquittal meets the favorable termination requirement. See Keeton et al., supra note 15, at 874-75. Thus, if the *Tribblet* court had looked to the common law, it should have held that *Heck*'s effect on the accrual of the § 1983 damages claim applies to acquitted defendants.
are pending, before he knows whether he will be convicted.\textsuperscript{87} Moreover, if the defendant is convicted, \textit{Heck} may require that the claim be dismissed.\textsuperscript{88} It is also likely that a federal court would stay a damages claim challenging the legality of a state prosecution while that prosecution was still pending, thus transforming the filing of the federal suit into a "hurry up and wait" exercise. The court did allow for the possibility that under these odd circumstances equitable tolling of the statute of limitations might excuse the delay, but because the plaintiff in the particular case did not argue equitable tolling, the court did not apply it.\textsuperscript{89}

Further, the courts have been strict regarding which claims are entitled to \textit{Heck}'s later accrual effect. For \textit{Heck} to delay the accrual of the cause of action to the date that the conviction is voided, it is necessary that the § 1983 claim be one that challenges the legality of the conviction. Otherwise \textit{Heck} does not apply and the cause of action accrues earlier. For example, a claim challenging a warrantless arrest for lack of probable cause does not necessarily implicate the legality of a subsequent conviction. Thus, the § 1983 claim might accrue on the date of the arrest, not on some date in the future when a state court voids the conviction.\textsuperscript{90}

Courts anxious to apply \textit{Heck} to bar § 1983 claims also appear willing to ignore procedural defaults when committed by the state as § 1983 defendant but not by the state prisoner turned § 1983 plaintiff. For example, even though the defendants did not make the argument, the Court of Appeals for the Seventh Circuit held that \textit{Heck} barred a damages claim over the procedures used in a prison disciplinary hearing.\textsuperscript{91} The court noted that it had previously held that \textit{Heck} was not jurisdictional,\textsuperscript{92} but nonetheless held that the fact that the defendants

\textsuperscript{87} See Tribblet, 1996 WL 364750, at *3.
\textsuperscript{88} See id.
\textsuperscript{89} See id.
\textsuperscript{90} See Brooks v. City of Winston-Salem, 85 F.3d 178, 182-83 (4th Cir. 1996). In Brooks, the court held that a claim challenging a warrantless arrest accrues on the date of the arrest while a claim challenging an arrest pursuant to a warrant that later turned out not to be supported by probable cause accrues on the date that the state proceedings terminate in favor of the accused. See id. However, equitable tolling might be available to delay the running of the statute of limitations in cases where the § 1983 plaintiff was incarcerated while claims were lost due to the running of the statute of limitations. See Tribblet, 1996 WL 364750, at *3 (plaintiff did not establish elements of equitable tolling); Alvarez-Machain v. United States, 96 F.3d 1246, 1248-50 (9th Cir. 1996) (Mexican national who was kidnapped by federal agents, tried and acquitted of drug charges in the United States, was entitled to equitable tolling on FTCA claims to which \textit{Heck}'s delay of the date of accrual did not apply).
\textsuperscript{91} See Dixon v. Chrans, 101 F.3d 1228, 1230 (7th Cir. 1996).
\textsuperscript{92} Subject matter jurisdiction can be raised at any time and even by the court sua sponte.
had not raised *Heck* in the district court did not preclude them from raising it for the first time in the court of appeals because "*Heck* grows out of well-established law . . . we decline to close our eyes to reality." 93 One would think that the fact that *Heck* 's principles are well-established would argue against allowing a party to raise it for the first time on appeal since novelty might be an excuse for not raising it at trial. Imagine if a criminal defendant or prisoner had failed to raise an element of "well-established" law; would the court of appeals refuse to blind itself to the reality that the defendant had been improperly convicted, or would it apply familiar rules of procedural default and deny the criminal defendant's claim?

It would be extremely onerous and a clear break from well-established patterns to require every plaintiff in every § 1983 case to identify the closest common law analog and superimpose its elements on those already required by the Constitution and statute. It may, however, be unrealistic to expect hundreds of lower court judges to radically alter their practices in § 1983 cases unless the Supreme Court repeats its *Heck* elements analysis in a series of cases. So perhaps *Heck* will not bring a significant change in § 1983 litigation, except in the context of prisoners challenging decisions that affect the length of their confinement. In fact, in the lower courts, post-*Heck* decisions look very similar, in form, to pre-*Heck* decisions in that they do not employ *Heck* 's elements analysis. 94

c. *Heck* 's Outcome: Toward a More Statutory Focus

It is unclear to me whether a criminal defendant should be able to pursue damages based on the unconstitutionality of his charge or conviction before he has been released on acquittal, appeal, habeas corpus, or in some other proceeding. The one clear exception that should be made from *Heck* 's rule is that a convict who cannot seek habeas corpus should be allowed to bring a damages action challenging his conviction. This would include prisoners who have been released because of the expiration of their sentences and convicts whose punishment did not include imprisonment. 95

93. *Dixon*, 101 F.3d at 1231.


95. Habeas relief may not be available in such circumstances because habeas relief is available only to someone in custody. *See* 28 U.S.C. § 2254 (1994); *Harts v. Indiana*, 732 F.2d 95 (7th Cir. 1984) (suspension of driver's license is not sufficient restriction on liberty to amount to "custody" for purposes of 28 U.S.C. § 2254).
For prisoners with very short sentences, or convicts who are fined or receive some other noncustodial punishment, the habeas remedy may not be available and they ought to be allowed to raise their constitutional challenges to their convictions in a damages action. In such cases, the § 1983 claim may be the only realistic avenue of relief.\textsuperscript{96}

The \textit{Preiser} rule would have to be expanded if it were to bar damages actions challenging the legality of convictions. The language of § 1983 grants the damages action in all these cases. However, the language of the statute also creates the equity action for release from prison that was rejected in \textit{Preiser}. The narrow exception recognized in \textit{Preiser} was based completely on the fact that a plaintiff seeking release from prison in a § 1983 case is, in essence, engaged in avoidance of the habeas statute's more restrictive procedural requirements, namely exhaustion of state remedies. \textit{Preiser} does not apply directly to Heck's damages action since Heck did not seek release from prison.

Despite the fact that \textit{Preiser} did not apply directly to damages actions, there was precedent for the Court's outcome, if not for its reasoning. The Court might have relied upon the interaction between the two statutes rather than on the new common law elements rule. The \textit{Heck} Court's reasoning, that once a claim for damages based on an unconstitutional conviction was upheld the state would feel obligated to release the prisoner, could have been employed in a more direct manner in an analysis of the interaction between the two statutes involved.\textsuperscript{97} Rather than rely on the common law, the Court might have confronted directly the relationship between § 1983 and the habeas statute. It might have concluded that damages for an unconstitutional conviction, before exhaustion, would undercut the exhaustion requirement of the habeas statute and therefore should not be allowed.

\textit{Preiser} is not the only precedent for a more statutory-focused approach. The Court has held, in another context, that a federal statute addressing one small area of potential constitutional tort violations

\textsuperscript{96} Even if habeas relief is not available, defendants are able to appeal their convictions. Some people might not have the resources to appeal a small fine, and a short sentence might expire before completion of an appeal. For these people, \textit{Heck} would effectively bar the § 1983 damages action. In \textit{Heck}, the Court did allow for the possibility that a pardon would be sufficient to satisfy the invalidation requirement. Thus, a person whose sentence involved only a modest fine might find it uneconomical to achieve "invalidation" so that a § 1983 damages action might be pursued. However, it may be extremely difficult and expensive to seek a pardon in some states, and it might take much longer than an appeal or habeas.

\textsuperscript{97} In fact, unless a lack of identity of the issues or parties precluded it, the judgment in the § 1983 case that the conviction was unconstitutional might have preclusive effect in state or federal post-conviction litigation.
displaces the § 1983 action for cases that fall within the purview of the narrower statute. The Court relied on the fact that the procedures for bringing an action under the narrower statute, which was aimed primarily at government conduct, were more complicated than those for a simple § 1983 claim and that all litigants would, if allowed, avoid the more onerous procedures by litigating under § 1983. If a narrower statute can completely displace the § 1983 claim, the Court might have held that the habeas statute partially displaces the § 1983 damages action, perhaps until the habeas remedy is exhausted.

Since damages cannot be awarded on habeas, the habeas action for release from confinement should not completely displace the § 1983 damages action. The fact that the only remedy under the habeas statute is release from confinement should not, however, preclude that statute from affecting the availability or timing of the § 1983 damages action. In fact, while the interaction between the two statutes is described above as an exhaustion regime, that is somewhat misleading because when a conviction is upheld by the state court and on federal habeas review, a damages remedy under § 1983 might be foreclosed by preclusion rules. It is well-established that preclusion rules bar relitigation in § 1983 actions of issues litigated in a state criminal proceeding. Thus, if the § 1983 plaintiff did not prevail in his state court or federal habeas challenges to his conviction, a subsequent damages action might not be available, not because he could not allegation element of a malicious prosecution action, but rather because his claims were barred by issue preclusion. In effect this would be the same as Heck: the § 1983 plaintiff challenging the legality of a conviction, even when the remedy sought is damages, is in reality a habeas corpus action and therefore state remedies must be exhausted. See Heck v. Humphrey, 997 F.2d 355, 357 (7th Cir. 1993), aff'd, 512


99. See id.

100. See Allen v. McCurry, 449 U.S. 90, 95-96 (1980).

101. The court of appeals in Heck recognized this. It affirmed the district court's dismissal of Heck's damages action on the ground that an action challenging the legality of a conviction, even when the remedy sought is damages, is in reality a habeas corpus action and therefore state remedies must be exhausted. See Heck v. Humphrey, 997 F.2d 355, 357 (7th Cir. 1993), aff'd, 512
would not be sufficient for a \$ 1983 damages action, but it is sufficient to preserve the availability of the habeas action.\(^\text{102}\)

The reasoning above concerning the relationship between the habeas corpus remedy and \$ 1983 is similar to the Court's treatment of the Tax Anti-Injunction Act.\(^\text{103}\) That statute bars federal court injunctions against state taxes unless there is no plain, speedy, and efficient state remedy.\(^\text{104}\) Despite the fact that Congress prohibited only injunctive relief, the Court has also barred declaratory and damages relief against state tax collection.\(^\text{105}\) The Court held that Congress' specification that injunctions should not be issued did not preclude the Court from relying on principles of comity—federal-state relations—to deny other forms of relief. Rather than treat the tax statute as pre-empting judicial abstention based on similar concerns, the Court treated that statute much like common law precedent by using it as an example of the importance of the principle that the Court might advance in contexts not strictly covered by it.

The Court could treat the relationship between the habeas statute and \$ 1983 similarly even if it does not believe that the habeas statute itself actually precludes a damages action challenging the constitutionality of a conviction. The Court's reasoning in the tax context applies easily to \textit{Heck}:

Petitioners will not recover damages under \$ 1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in \cite{Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943)}. We are convinced that such a determination would

\(^{102}\) On habeas, petitioners are required to raise all their challenges to their convictions in state court, and an exception to preclusion rules is made to allow them to raise the same issues in federal court on habeas review. An issue not raised in state court may not serve as the basis for a habeas petition—it is considered waived or forfeited. If \textit{Heck} had been decided under the reasoning discussed here, rather than under the elements analysis actually used, the Court presumably would have required that \$ 1983 damages plaintiffs raise all their issues on appeal or in habeas and that any issue not so raised would be waived. This would leave no way around preclusion.


\(^{104}\) For a discussion of this provision, see \textit{Rosewell v. LaSalle Nat'l Bank}, 450 U.S. 503 (1981).

be fully as intrusive as the equitable actions that are barred by principles of comity. Moreover, the intrusiveness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pape*, supra. Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety.\textsuperscript{106}

Similarly, damages based on the unconstitutionality of a conviction would be based on a finding that the conviction is unconstitutional and would, almost of its own force, necessitate the prisoner’s release. Further, § 1983’s no exhaustion rule would allow federal litigation before the prisoner pursued state post-conviction remedies.\textsuperscript{107}

Thus, the Court could have reached the same result in *Heck* by concentrating on the interaction between § 1983 and the habeas corpus statute and without creating this new and potentially massive influx of common law doctrines into § 1983 litigation. The virtue in this would be that the focus would remain on the statutes and their policies, which is preferable to the dubious, unprecedented, and potentially disastrous (for § 1983 plaintiffs) incorporation of common law elements in *Heck*. I can only speculate about the reasons that the Court chose the tack it did. The elements analysis was not mentioned in the Court of Appeals for the Seventh Circuit’s opinion or in any of the briefs on the merits in *Heck*.\textsuperscript{108} Its first mention appears to have been at oral argument before the Court. Asked whether Heck should be required, since § 1983 is like a tort cause of action, to make out the favorable termination element of a malicious prosecution tort claim, Heck’s attorney responded: “that argument has not been suggested at any point during the course of this litigation.”\textsuperscript{109} Perhaps Justice

\textsuperscript{106} *McNary*, 454 U.S. at 113-14.

\textsuperscript{107} The Court would need to create an exception to the rule that exhaustion of remedies is not required in § 1983 cases, since prisoners would be forced to exhaust their post-conviction remedies before seeking damages for unconstitutional convictions. The Court has already done so in *Preiser*, and, in effect, in *Heck*, by holding that the § 1983 damages remedy is not available unless the plaintiff prevailed in some other forum on a claim for release from confinement.

\textsuperscript{108} See *Heck*, 997 F.2d 355; Brief for Respondent, supra note 103. The Brief, id. at i, stated the questions presented as follows:

1. Whether a state prisoner attacking the legality of his conviction may circumvent the exhaustion requirement of 28 U.S.C. § 2254(b) by filing an action under 42 U.S.C. § 1983 and confining his prayer for relief to a declaratory judgment and money damages.

2. Whether a state prisoner’s action attacking the legality of his conviction that includes unexhausted claims should be dismissed without prejudice, rather than stayed, pending exhaustion of state remedies.

\textsuperscript{109} 1994 WL 665259, at *8 (Transcript of Oral Argument in *Heck* v. Humphrey, 512 U.S. 477 (1994). Query whether the Court should have affirmed based on an argument never raised by the Respondent. *Cf. Albright v. Oliver*, 114 S. Ct. 807, 809, 812 (1994) (plaintiff may have had a Fourth Amendment claim but he could not prevail on that basis since he made no argument based on the Fourth Amendment).
Scalia's general preference for common law explains why he chose to ground his opinion on the applicability of common law elements to § 1983 claims. The other members of the majority may not have considered the potential ramifications of this new rule or realized that requiring the elements of the closest common law action was a significant new requirement for § 1983 litigation. Perhaps because reasoning directly under the two statutes would appear to be judicial tinkering with congressional mandates, the majority preferred the appearance of objectivity and basis in precedent that the common law approach provided. However, the common law actually provides only a veneer of objectivity together with a host of new difficulties as discussed below. Whatever the reasons, the Court's rule in *Heck* created an unnecessary and significant injection of common law concepts into § 1983 litigation. Only time will tell if it sticks and, if so, what effect it will have.

d. *Heck's Common Law Elements Analysis as Inconsistent with Basic Section 1983 Principles*

Although the rule of *Heck*, that a prisoner may not seek damages based upon the unconstitutionality of his or her convictions unless the conviction has somehow been declared invalid, may be sound, the analysis in *Heck* is inconsistent with prior law in several ways and troubling as a normative matter. The first break with past doctrine is the broad requirement of common law elements for the § 1983 action. The Court previously stated that there are "two essential elements to a § 1983 action": 1) action under color of law and 2) a violation of a constitutional right.\(^\text{110}\) This statement was somewhat inaccurate even when it was made because there were always additional elements as well, including the requirement that the defendant be a person; that the violation be caused by the defendant; and for the award of more than nominal damages, that the plaintiff suffer injury of the sort compensable under common law principles. However, none of these elements goes to the nature and content of a cognizable claim or imposes significant additional requirements for § 1983 actions in the same way that the common law elements required under *Heck* does.\(^\text{111}\)

In fact, Justice Scalia's opinion is quite extreme on the relationship between § 1983 and analogous common law. Basically, he stated


\(^{111}\) Justice Souter discussed this in his *Heck* dissent, 512 U.S. at 491-96.
that claims not allowed under the common law should not be allowed under § 1983. Justice Souter, in dissent, argued that the majority’s statement of the “favorable termination” element is actually inconsistent with the common law because under the common law a malicious prosecution case could not be maintained once a conviction had occurred.\footnote{See id. at 494.} Under the common law, the fact of conviction proved that there had been probable cause for the prosecution.\footnote{Presumably, lack of probable cause should also be an element of the § 1983 claim since it is apparently an element of a malicious prosecution action.} Justice Scalia disputed Justice Souter’s claim that there is an absolute rule against a malicious prosecution action after a conviction, but he also stated that if there were such a rule it “would, if anything, strengthen our belief that § 1983, which borrowed general tort principles, was not meant to permit such collateral attack.”\footnote{See Heck, 512 U.S. at 484-85 n.4.} This reveals the power of the new requirement that § 1983 plaintiffs prove the elements of the most analogous common law action: If they cannot do so, they have no § 1983 claim.

Suppose the majority agreed with Justice Souter that, once a conviction had occurred, the common law cause of action for malicious prosecution was forever barred, even if subsequently the conviction was held invalid. Suppose also that Heck convinced a court that, under the circumstances, it was unconstitutional for the officials involved to prosecute him. He would have proven action under color of law that deprived him of a constitutional right. Yet under the majority’s analysis he would have no § 1983 claim because under the common law the most analogous common law tort action was not available. The Court’s assumption that Congress intended for § 1983 remedies to be unavailable whenever no common law remedy exists seems to be exactly the opposite of the more sensible notion that the absence of suitable remedies was part of the motivation for Congress’ providing the § 1983 action. This result turns the relationship of § 1983 and state law on its head, since the most compelling situation in which the § 1983 action should be available is where there is no other remedy for unconstitutional conduct.

This illustrates the difficulty the Court has had in creating the proper relationship between § 1983 and state tort law. In some circumstances, the existence of state remedies has been cited as a reason against recognizing the § 1983 claim.\footnote{Cf. Parratt, 451 U.S. at 543-44.} For example, Justice Kennedy
has argued that the existence of adequate state remedies should bar civil rights claims beyond those contexts in which that is already the case.\textsuperscript{116} The Court has often attempted to distinguish between legitimate § 1983 claims and ordinary tort actions. Yet \textit{Heck} takes the opposite view and holds that the absence of a tort claim counsels \textit{against} recognition of the § 1983 claim. In the vernacular, this is known as having it both ways.

At bottom, \textit{Heck} amounts to the rejection of the theoretical basis of \textit{Monroe v. Pape}'s holding that the § 1983 action is available without regard to state law. \textit{Monroe} held that the § 1983 remedy is available regardless of whether or not the state provided a remedy for the conduct involved,\textsuperscript{117} and that even given a state remedy, the § 1983 plaintiff did not have to first seek a remedy under state law.\textsuperscript{118} As Louise Weinberg pointed out, the true innovation of \textit{Monroe} was its recognition of the offensive damages remedy of the constitutional tort action for constitutional violations.\textsuperscript{119}

The competing vision of constitutional enforcement was presented by Justice Frankfurter in his \textit{Monroe} dissent.\textsuperscript{120} There, he argued that constitutional rights should ordinarily not be used as a sword to achieve a damages remedy but rather only as a shield against official conduct.\textsuperscript{121} Justice Frankfurter apparently thought that victims of official torts should sue under state common law and that the Fourteenth Amendment would come into play if the state recognized a defense based on their official status and duties. The Constitution might be employed by plaintiffs as a reply to the defense.\textsuperscript{122}

This alternative is just what \textit{Heck} requires as a matter of substance, although procedurally \textit{Heck} twists things around somewhat. Plaintiffs under \textit{Heck} must establish the elements of the nearest state common law analog. If they cannot, they lose their cases not because

\begin{itemize}
  \item \textsuperscript{116} See Albright v. Oliver, 114 S. Ct. 807, 818-19 (1994) (Kennedy, J., concurring).
  \item \textsuperscript{118} See \textit{id.} at 183.
  \item \textsuperscript{119} See Weinberg, \textit{supra} note 25.
  \item \textsuperscript{120} See \textit{Monroe}, 365 U.S. at 202-59 (Frankfurter, J., dissenting).
  \item \textsuperscript{121} See \textit{id.} at 245.
  \item \textsuperscript{122} See \textit{Monroe}, 365 U.S. at 211 (Frankfurter, J., dissenting). This is the regime that the federal government presented as the alternative to the \textit{Bivens} action under which victims of constitutional violations by federal officials sue for damages. See \textit{Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-92 (1971)} (creating damages remedy against federal officials whose conduct violates the Constitution). The Court created that cause of action in the \textit{Bivens} case in the face of the government's argument that victims should be forced to sue under state law and that the Constitution would be relevant only as a reply to the federal officials' defense based on their official status and duties. See \textit{id.}.
\end{itemize}
there was no constitutional violation, but because they cannot make out a state tort claim. Under Justice Frankfurter's alternative regime, this would also be true because government official defendants in a state tort action could defend based on either the plaintiff's failure to make out the elements of the tort claim or their official status. If the plaintiff does not successfully allege or prove the state tort aspects of the claim, the constitutionality of the defendant's conduct would be irrelevant and the court would not reach it. Establishing a constitutional violation is necessary, under Frankfurter's view, to overcome the defense based on official privilege. Under *Heck*, the same result occurs: if the plaintiff cannot allege and prove the elements of the analogous common law action, the constitutionality of the defendant's conduct is never reached. Thus, in the course of deciding the narrow issue in *Heck*, the Court has managed to reject, sub-silentio, the foundations of thirty-five years of constitutional tort doctrine. The independence of the § 1983 remedy is gone.

Another inconsistency with prior law, which grows out of the first, is that under *Heck* there may be situations in which statutory state of mind requirements will be imposed on § 1983 actions despite the Court's earlier rejection of such requirements. Before *Heck*, the Court had firmly held that the only state of mind requirements in § 1983 cases arose from the underlying constitutional violations and not from the statute itself. Once action under color of law and a constitutional violation were established, § 1983 was, in essence, a strict liability provision. State of mind requirements vary among tort actions, and if courts require each § 1983 plaintiff to plead and prove the elements of the most analogous tort, there will likely be many situations in which § 1983 plaintiffs will be required, as a matter of the statute, to prove that the defendant acted with a state of mind differ-

123. I hesitate to argue that *Heck* overrules *Monroe* since the claim that *Monroe* is overruled has been made before. Some wrongly believed that *Parratt* overruled *Monroe* because *Parratt*’s focus on the availability of state remedies is in tension with *Monroe*’s holding that state remedies are irrelevant to the availability of the § 1983 action. However, it should have been clear that *Parratt* was about the constitutional claim of a violation of procedural due process, and not about whether state remedies preempt the § 1983 action. *Heck*, on the other hand, is about whether the § 1983 remedy is available and thus is a better candidate for overruling or at least seriously undercutting *Monroe*.

ent from that required to establish the underlying constitutional violation.

A good example of a state of mind requirement that might be imposed in a § 1983 action is the tort raised by Justice Souter in his *Heck* dissent: abuse of process. According to Justice Souter's description of that tort, if a court holds that abuse of process is the most closely analogous tort to a particular § 1983 claim, the plaintiff would have to prove that the defendant acted in bad faith or with a wrongful purpose in employing legal process. This would be in addition to any state of mind requirement contained in the constitutional provision under which the plaintiff was suing. For example, if the claim were based upon the Fourth Amendment, the most common source of claims challenging arrests, the plaintiff might have to prove both the unreasonableness of the arrest as a constitutional matter and the malice of the defendant as a statutory element.

3. Common Law and the Distinction between Torts and Section 1983 Actions

Despite my argument that *Heck*’s analysis works an important and significant change in the law, its rule that all § 1983 plaintiffs must prove the elements of the most closely analogous § 1983 claim is not completely without precedent, although it had appeared that the Court rejected it in its earlier incarnation. Early in the post-*Monroe* development of the § 1983 action courts sometimes asked whether a particular tort, when committed by a local official, was a violation of § 1983. The question was asked in this way, at least in part, because of the courts’ impression of § 1983 as a tort-like remedy that would, of necessity, share many features of common law tort actions.

*Whirl v. Kern* is an excellent example of a lower court case that analyzes a § 1983 action largely in common law terms. That case was an action for damages brought by an arrestee who had been held in jail “awaiting trial” for nine months after all charges against him had been dismissed. The court found the common law background

127. 407 F.2d 781 (5th Cir. 1968). *Whirl* is included in at least one major casebook on constitutional torts, see CHARLES F. ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION, CASES AND MATERIALS (2d ed. 1992), and is discussed in Sheldon H. Nahmod, *Section 1983 and the ‘Background’ of Tort Liability*, 50 IND. L.J. 5, 14-16 (1975). Nahmod is critical of the *Whirl* court’s focus on state law for the elements of the § 1983 claim. See id. He calls the decision “influential.” *Id.* at 13.
128. *See Whirl*, 407 F.2d at 785.
highly relevant to both the elements of the § 1983 claim (the elements of false arrest and false imprisonment cases are discussed) and to the scope of the good faith defense that might be available to such torts. While the Whirl court did acknowledge that § 1983 plaintiffs must establish that the Constitution was violated, the court's analysis of the claim is drawn largely from the common law, as is the court's analysis of whether the jailer's good faith should be a defense to the false imprisonment.

This focus on common law elements in § 1983 cases was not adopted by the Supreme Court before Heck. When cases raising similar concerns began making their way to the Supreme Court, the Court addressed the issues in significantly different terms from the lower courts that pushed the tort analogy as far as the court in Whirl. Perhaps the Court recognized the inconsistency between the Whirl methodology and Monroe v. Pape. The Supreme Court has focused much more on the constitutional aspects of the cases to decide whether liability should exist. The Court did continue to look to tort concepts for guidance on matters like causation and damages, but in deciding whether conduct gave rise to a constitutional claim under § 1983, the issue was whether the challenged conduct violated constitutional norms, and not whether the elements of a common law tort were present. In fact, the Court worked hard to distinguish tort law from § 1983 claims, and repeatedly attempted to create doctrines to ensure that common law torts were not automatically redressible under § 1983 when committed by government officials. The Court repeatedly stated that § 1983 was not a "font of tort law" and resisted the argument that state tort law created interests that were protected from government deprivation without due process.

An important case in which the Court resisted creating a § 1983 case out of every common law tort committed by a state official is Paul v. Davis. In that case, the plaintiff had been placed by the

129. See id. at 790-91, 793-94.
130. See id. at 790-92, 793-96.
131. As discussed below, the Court has looked to common law for guidance in shaping the contours of constitutional provisions. This is another significant point of influence of common law on § 1983 actions, but it is, nonetheless, distinct from the Heck doctrine since it involves defining constitutional rights, not specifying § 1983 elements when a constitutional violation is present.
sheriff on a list of active shoplifters even though he had not been convicted of any offense. The plaintiff sued, claiming that doing this without a hearing violated his due process rights. The Court rejected the claim that defamation by a government official automatically deprived the victim of liberty without due process. The Court held that a liberty interest would be violated only if the defamation resulted in some restriction on the plaintiff, such as inability to find employment or exclusion from places of business. Again, the Court's focus was not on common law elements but rather on the constitutional aspects of the case; in this case, on defining the liberty interests protected under the Due Process Clause of the Fourteenth Amendment. In fact, the Court viewed the question as whether there was a constitutionally protected interest at stake, and decided there was not, despite its conclusion that the interest in reputation was protected under state tort law.

The motivation behind the Court's rejection of the claim in Paul is made crystal clear in its opinion. The Court did not want to create a § 1983 case out of every common law tort committed by a local government official. The Court stated that "Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment." The Court characterizes the plaintiff's claim as a "classical claim for defamation actionable in the courts of every State." The Court is seeking to separate tort and § 1983, not merge them.

The separation of tort concepts from constitutional tort issues reached its high water mark in Parratt v. Taylor. In that case, a state

135. See id. at 696.
136. See id. at 696-97; id. at 720-21 (Brennan, J., dissenting).
137. See id. at 693.
138. See id. at 710-12.
139. See id. at 712 (plaintiff's "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law" but is "neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"). Insofar as this amounts to a holding that state tort law is not sufficient to create interests protected by the Fourteenth Amendment, I have argued that this conclusion is inconsistent with the basics of due process law. See Beermann, supra note 53, at 328-29.
141. Id. at 697.
142. It would not be inconsistent with Paul to require that all § 1983 plaintiffs be able to allege and prove the elements of a tort claim. Paul most clearly states that it would not be sufficient to do so: it does not address whether it would be necessary. Nonetheless, my reading of Paul and the cases that follow it is that alleging and proving the elements of a common law action was neither necessary nor sufficient for a successful § 1983 claim.
prisoner's mail order hobby kit was received by the prison but never delivered to the prisoner who ordered it.\textsuperscript{144} The prisoner sued, arguing that he had been deprived of his property without due process since no hearing had been held before his property was lost or stolen.\textsuperscript{145} The Court in this case, as mentioned above, stated that there were two essential elements to a § 1983 claim: action under color of law and a constitutional violation.\textsuperscript{146} The Court denied the claim on the purely constitutional ground that under the circumstances it was unrealistic to suppose that the state could have provided a pre-deprivation hearing and that the state's post-deprivation tort remedy provided all the process that was due.\textsuperscript{147} The Court did not explore the elements of the common law torts that might have been committed.

The Court continued its effort to separate constitutional tort issues from common law concepts by overruling \textit{Parratt v. Taylor}'s apparent holding that negligent conduct could amount to a violation of the Fourteenth Amendment. The Court ruled that negligent conduct could not "deprive" a person of a protected interest within the meaning of the Fourteenth Amendment.\textsuperscript{148} The Court separated constitutional concepts from their tort law counterparts, relying on the language of the Fourteenth Amendment, particularly its use of the word "deprive", and its view that creating a Fourteenth Amendment claim out of every negligent injury inflicted by an official would trivialize the Amendment by reducing it to the level of a garden variety common law tort claim rather than maintaining it as a higher level constitutional doctrine.\textsuperscript{149}

I argued in an earlier article that the Court should constitutionalize state tort law to the limited extent that torts committed by government officials violate the Constitution when compensation is not available within the state system to the same extent that such compensation is available if the tortfeasor were a private party.\textsuperscript{150} I argued that the Court's effort in \textit{Paul} to distinguish reputation from other personal interests that are protected from deprivation without due

\begin{itemize}
\item \textsuperscript{144} See \textit{id.} at 530.
\item \textsuperscript{145} See \textit{id.}
\item \textsuperscript{146} See \textit{id.} at 535.
\item \textsuperscript{147} See \textit{id.} at 543.
\item \textsuperscript{148} See Daniels v. Williams, 474 U.S. 327 (1986).
\item \textsuperscript{149} See \textit{id.} at 331-33.
\item \textsuperscript{150} See Beermann, \textit{supra} note 53. I thought at the time and still believe that this is the best understanding of \textit{Parratt v. Taylor}'s holding that random and unauthorized injury inflicting conduct by an official violates due process if there is no adequate state remedy. Basically, the Court held that either the state provides a remedy or there is a due process violation and a remedy via a § 1983 action is available.
\end{itemize}
process was unsuccessful.\textsuperscript{151} My proposal was that the federal Constitution requires states to compensate victims of official torts.\textsuperscript{152} Those § 1983 plaintiffs making this claim would need to prove two elements, a state tort and the lack of compensation. The first element would, in turn, require proof of the elements of the relevant tort claim, not as a § 1983 requirement, but rather to make out the constitutional violation of an uncompensated government tort. This would not apply to all § 1983 claims, but only in those cases in which the plaintiff is alleging the particular constitutional violation of an uncompensated tort.

I am somewhat insecure about my conclusion that prior to 
\textit{Heck} the Court's program was to maintain a barrier between § 1983 concepts and common law tort concepts. The dean of § 1983 scholars, and the organizer of this Symposium, Sheldon Nahmod, argued the opposite in an important article published in 1989.\textsuperscript{153} In a line of cases beginning with \textit{Pierson v. Ray} and including \textit{Carey v. Piphus}, \textit{Paul}, \textit{Parratt}, and \textit{Daniels}, Professor Nahmod saw a movement away from constitutional rhetoric and toward tort rhetoric.\textsuperscript{154} In contrast, he cited \textit{Monroe}, \textit{Monell v. Department of Social Services},\textsuperscript{155} and \textit{Owen v. City of Independence},\textsuperscript{156} as cases in which constitutional rhetoric dominated.\textsuperscript{157}

Upon reflection, I am constrained to conclude that while I see the tendencies that Professor Nahmod relies upon for his conclusion, I disagree with Professor Nahmod's characterization of the cases as a move toward tort rhetoric. Many commentators on § 1983, myself included, have devoted themselves to attempting to expose the analytic weaknesses in the doctrinal bases the Court has used to weaken the § 1983 remedy. I place Professor Nahmod's effort in that category, and I have found the effort difficult, perhaps due to the lack of sustained judicial support for the expansive view of § 1983 liability.

Professor Nahmod did point out the importance of tort concepts in § 1983 decisions, and some decisions strongly support his conclusion on the movement from constitutional to tort rhetoric. For exam-

\textsuperscript{151} Id. at 289.

\textsuperscript{152} See id. at 300-23.


\textsuperscript{154} See id. at 1725-31.

\textsuperscript{155} 436 U.S. 658 (1978) (overruling \textit{Monroe}'s holding that cities were not persons subject to § 1983 liability). Ironically, \textit{Monell} also rejected the application of a plaintiff-friendly rule of tort law, vicarious liability, in favor of a statutory and constitutionally-influenced rule that municipalities are liable under § 1983 only for their own policies or customs. See id. at 691-95.

\textsuperscript{156} 445 U.S. 622 (1980).

\textsuperscript{157} See Nahmod, supra note 153, at 1721-25.
ple, he is correct that in Carey, had the Court focused on the importance of protecting constitutional rights, or perhaps embraced the view that confining government within constitutional limits should be of paramount importance, it might not have so easily adopted the common law measure of damages for § 1983 cases. Instead, the Court might have approved substantial damage awards based solely on the loss of the right. The limitation of § 1983 damages to common law remedies expands the domain of common law to the detriment of constitutional values.

However, Carey does not represent a sudden invasion of tort concepts into § 1983 after a substantial period of relative absence. The genesis of the common law immunities in modern civil rights litigation actually pre-dates Monroe and they were firmly in place before Monell or Owen. Further, Monroe itself relied on the common law for its view of state of mind requirements for § 1983 actions. The difference there was that the common law concept was pro-plaintiff, while in the main the Court has adopted common law doctrines when they disfavor plaintiffs, perhaps because the statute itself strongly favors plaintiffs. In later cases such as Paul and Parratt, Professor Nahmod acknowledges that one might argue they "uphold[ ] the special status of § 1983 as different in kind from tort law." He believes, however, that this would be wrong, and describes Paul as follows:

The Court first described the proposed § 1983 action as the functional equivalent of a state tort action and then declared that state remedies were adequate, sending the matter to state courts where it belonged. The Court was not really saving § 1983 for important cases but was rather using tort rhetoric to undermine § 1983.

The "undermining" tort rhetoric, according to Professor Nahmod, is not the importation of tort concepts into § 1983 actions, but is instead the Court's presentation of state court tort suits as an alternative that ought to be employed instead of the § 1983 action in certain cases. In the excerpt quoted above, Professor Nahmod denies that the Court chooses the cases that belong in state court based on their importance, and indeed many important civil rights cases are excluded from federal court based on tort rhetoric. However, the

158. See id. at 1727.
159. Id. at 1728. See also Michael Wells, Constitutional Torts, Common Law Torts, and the Due Process of Law, 72 CHI.-KENT L. REV. 617, 624 (1997) (In Paul "[t]he Court evidently feared that a decision in favor of the plaintiff would destroy the boundary between common law tort and the Constitution.")
160. This is his description of Paul but it applies just as strongly to Parratt.
162. See id.
members of the Court appear to be attempting to formulate doctrines for sorting between cases that they think present matters of legitimate federal concern and cases that they find do not rise above the level of state law torts. After all, Paul, Parratt, and Daniels are decisions on the substance of the Fourteenth Amendment and are not about § 1983 which, until Heck, was theoretically available whenever a violation of the Constitution was committed under color of law. The Court does, as Nahmod argues, often view a common law tort action as an adequate remedy, making a § 1983 action unnecessary. The Court has also been careful, however, to attempt to distinguish the domain of common law actions from the domain of constitutional remedies.

Requiring § 1983 plaintiffs to prove the elements of the most analogous common law action is also unattractive for other effects it is likely to have on § 1983 litigation. It creates uncertainty and is likely to complicate litigation when the parties dispute which common law action is most analogous to the plaintiff's claim. In Heck, for example, Justice Souter argued that Heck's claim might be closer to the tort of abuse of process than to malicious prosecution. He also argued that abuse of process is available "regardless of favorable termination or want of probable cause" but is based instead on a wrongful purpose in employing the legal process. One can imagine numerous epic legal battles over whether the plaintiff in a § 1983 action must prove some element of a common law cause of action that the plaintiff argues is not the most closely analogous to the plaintiff's constitutional claim.

Rather than engaging in the argument over whether Heck is a significant break with the past, or whether there was a movement from Constitution to tort in the period before Heck, perhaps it is more fruitful to reflect on what the Court has done with § 1983 over time. Undoubtedly, there is a great deal of litigation under the statute, and a large number of constitutional violations are presumably redressed either by settlement or after a finding of liability in litigation. With regard to some matters, such as exhaustion of remedies, the definition of "under color of," and § 1983's state of mind and causation standards, the Court has allowed quite expansive liability. However, the

164. Id. at 495 (citing the RESTATEMENT (SECOND) OF TORTS § 682 illus. 1 (1977)).
165. Other issues may also arise under the Court's analysis, such as whether defendants should be able to raise all common law defenses in § 1983 actions that would be available in the most analogous common law action. See, e.g., Burton v. Waller, 502 F.2d 1261, 1274 (5th Cir. 1974) (holding that common law "privilege of individual police officers to fire in self defense or to quell a riot are such common law defenses and may be asserted in response to the § 1983 cause of action to the same extent that they are relevant to the pendant Mississippi law claim").
Court, for whatever reason, has employed a number of strategies to narrow the reach of the § 1983 action. Many of these simply cannot be squared with the statutory language. With regard to common law doctrines, the Court has been selective. It has not adopted common law elements wholesale so that a plaintiff only needs to establish the elements of a common law action against an official in order to prevail. However, when common law elements would limit plaintiffs’ ability to succeed on their claims, the Court has adopted them, most notably in Heck, but also with regard to damages rules and the immunities. The common law may merely present a convenient source of norms to limit what the Court views as an overly broad statute.

II. Common Law and Constitutional Rights Protected under Section 1983

A. Constitutional Rights and Section 1983

Constitutional law also has significant effects on § 1983 litigation because § 1983 functions mainly as a constitutional enforcement mechanism. As constitutional rights expand and contract, and as the contours of the rights change, constitutional tort litigation of necessity changes as well. Over the past couple of decades it has seemed clear that the Court has been motivated to narrowly define certain constitutional rights by the fear that they might otherwise give rise to a flood of litigation as constitutional tort suits.

The best example of this is the movement in procedural due process cases from Parratt v. Taylor to Daniels v. Williams. Parratt’s holding, that random and unauthorized official torts are not procedural due process violations unless the state does not provide an adequate remedy, may have been motivated by the desire to prevent all official torts from becoming constitutional tort cases. But after Parratt, it appeared that a great number of official torts might become due process violations because state immunities and other doctrines might render state remedies inadequate. When confronted with the question whether a state remedy could be adequate even though the defendant officials were immune from the damages remedy sought, the Court side-stepped the issue and held that negligent infliction of injuries was not a “deprivation” as that term is used in the Fourteenth Amendment. This holding was clearly motivated by a desire to head off constitutional tort litigation in negligence cases.

Actually, the Court sometimes seems more willing to narrow constitutional provisions than the statutory provisions of § 1983. In some
areas, the Court has resisted adding procedural requirements or restrictions to § 1983. For example, it has refused to require exhaustion of state administrative or judicial remedies prior to a § 1983 suit, and it has held that "deprivation" in § 1983 itself includes negligent conduct, although, as noted above, it later held that negligent conduct does not "deprive" a person of an interest protected under the Fourteenth Amendment. It is somewhat unusual for the Court to read the same word in a statute more broadly than the constitutional provision the statute enforces; in other cases, the statutory provision is read more narrowly than its constitutional counterpart. While the Court has not generally been shy about shaping § 1983 to meet its policies, perhaps if it did so even more it would not find it necessary to shape the Constitution with constitutional tort litigation in mind.

In fact, I have always found this enterprise a bit troublesome for a variety of reasons. It seems illegitimate, perhaps even perverse, for the Court to narrow the reach of the Constitution because Congress has commanded an effective remedy for violations and an earlier Court made a strong commitment to honor that command. The narrowing of rights might also affect constitutional enforcement in areas other than constitutional tort litigation. This could leave government free to act in ways that, in the absence of the specter of constitutional

169. I have, however, joined in this movement. I have argued that simple torts committed by government officials do not normally present constitutional problems unless compensation is not available under state law. See Beermann, supra note 53, at 284-300. I argued there that failure to compensate is a taking and that therefore the constitutional claim did not accrue unless and until the state refused to provide compensation. See id. at 321-23. Thus, I would institute an exhaustion requirement for some constitutional torts—those founded on a due process violation where the tortious conduct itself was random and unauthorized within the meaning of Parratt v. Taylor so that a predeprivation hearing would not be required. This argument was made with the realities of the Court's somewhat hostile attitude toward constitutional tort litigation in mind. While I might have preferred to argue that official torts might themselves be constitutional violations, I thought that this constitutional exhaustion regime was more likely to achieve judicial acceptance and thus better than the alternative which was likely to be no claim at all based on negligent conduct.
tort litigation, the Court might find beyond the government's constitutional power.

Michael Wells, in his article in this Symposium, makes a very interesting point that constitutional tort litigation is the only situation in which some constitutional rights are enforced. For example, the only way that excessive force in an arrest will be litigated is when the arrestee sues the officer. The degree of force used in effecting the arrest will not be relevant in the criminal trial the way that a search or seizure without probable cause might affect the admissibility of evidence. This means that all doctrine regarding some rights arises, of necessity, within the context of constitutional tort doctrine. This might relieve some of my anxiety because narrowing those rights in light of the broad scope of § 1983 will not have negative spillover effects into other areas. However, I am not convinced. If § 1983 did not exist, victims of official torts, as discussed above, might still sue under state common law. Officials would defend based on their official status and duties, and the Constitution would be employed by plaintiffs as a reply to the defense. Thus, the rights that are only relevant to constitutional tort litigation would still be enforceable, albeit in a slightly different procedural posture.

B. Constitutional Law and Common Law

We have seen that one strategy the Court has used to manage constitutional tort litigation is to reshape constitutional provisions when they are perceived as contributing to an excess in constitutional tort litigation and liability. Insofar as constitutional law is influenced by common law, this is another point of influence of common law on constitutional tort litigation. From the early days of the Constitution, courts have referred to common law for guidance in constitutional interpretation. However, the common law connection has become increasingly important in recent times, perhaps owing to the influence of Justice Scalia on the Supreme Court.

In this Subsection, I discuss briefly a pair of developments in constitutional law that have had significant impact on constitutional tort litigation: first, the increasing reference to common law in constitut-

170. See Wells, supra note 159, at 619-23.
171. See Monroe, 365 U.S. at 211 (1961) (Frankfurter, J. dissenting).
172. This should not be surprising, given roots the Constitution has in British law, where constitutional law functions as a branch of the common law and given the common law's long tradition and judicial pedigree. See generally William R. Casto, James Iredell and the American Origins of Judicial Review, 27 CONN. L. REV. 329 (1995).
tional decision-making and second, the movement away from substan-
tive due process analysis and toward stating constitutional claims,
whenever possible, in terms of particular provisions of the Bill of
Rights and not as violations of due process. This latter development
has some relationship to the common law issues that occupy this Arti-
ble but also is important enough in its own right to discuss even if it is
somewhat beyond the scope.

1. The Influence of Common Law on Constitutional Analysis

The common law has always been an important source of consti-
tutional law and the relationship between constitutional law and pre-
existing common law has always been a subject of constitutional
discourse. Common law can influence constitutional law in a variety
of ways. First, for some provisions, the common law has provided the
standards that the Court determines are constitutionally compelled.
For example, in a recent case, the Court relied heavily on the exist-
ance of a common law requirement that police officers knock and an-
nounce their purpose before breaking into a dwelling to serve a
warrant to determine that the Fourth Amendment may be violated if
officers serving warrants do not engage in that procedure.\textsuperscript{173} Second,
the absence of a common law tradition has been cited as a source of
suspicion counting against the constitutionality of a legislative innova-
tion or against a particular reading of the Constitution.\textsuperscript{174} Third, the
common law is an important source of the liberty and property inter-
ests which gain protection under the due process clauses. Fourth, the
common law has often served as a foil against which constitutional
provisions are measured. In such cases, constitutional claims are re-
jected as stating no more than a simple common law claim. These
categories are analyzed in reverse order.

In the constitutional tort area, the relationship between common
law and the Constitution becomes somewhat more complicated be-
cause tort concepts are prevalent at the statutory and constitutional
levels. As discussed above,\textsuperscript{175} Professor Nahmod has found the inter-
action between common law and the Constitution part of a trend away
from Constitutional rhetoric and toward tort rhetoric in constitutional
tort decisions.\textsuperscript{176} While it may be true that the Court has been much

\textsuperscript{174} See Connecticut v. Doe, 501 U.S. 1, 16-17 (1991); Hans v. Louisiana, 134 U.S. 1, 15-16
(1890); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 432-50 (1793) (Iredell, J., dissenting).
\textsuperscript{175} See discussion supra notes 153-62 and accompanying text.
\textsuperscript{176} See Nahmod, supra note 153, at 1721-31.
more attentive to the common law heritage of many claims presented as constitutional torts, the Court's reasoning appears to be part of a struggle to segregate the worlds of common law and constitutional law, rather than an effort to erase the constitutional world by recharacterizing it as part of tort law.

Although it has long been accepted that the § 1983 action is available even if there is also a state tort remedy,\(^{177}\) it appears that the Court does not find the need for the § 1983 action to be acute when there is an effective common law remedy.\(^ {178}\) The Court has rejected claims based upon reasoning that the claim would "trivialize" the Fourteenth Amendment, turn it into a "font" of tort law that would displace state tort law, or because it is a simple tort claim against a state official and not a constitutional claim. The existence of a common law background that would recognize the claim counts against recognition of the constitutional claim.

The question then becomes whether, if a state abandoned the relevant branch of common law, the Court might be more receptive to the claim. To take an example, in *Paul v. Davis*,\(^ {179}\) one line of argument the Court relied upon in rejecting the claim in that case was that it was no more than a simple defamation claim against a state official, and such a claim should be brought under state common law, not as a constitutional claim. The interest in one's reputation, reasoned the Court, was but one of many that the state might protect, but was not, in and of itself, of constitutional status.\(^ {180}\) But, if a state abandoned its defamation law and decided that damage to reputation no longer stated a claim upon which relief would be granted, there would be a serious issue as to whether a constitutionally protected liberty or property interest remained upon which a due process claim might be founded.\(^ {181}\) Without a state law basis for holding that the interest in reputation is a protected liberty or property interest, the claim is less viable than before. This means that the existence of a tort action should strengthen, rather than weaken, the constitutional tort action.


\(^{179}\) 424 U.S. 693, 708-10 (1976).

\(^{180}\) See id. at 711-12.

\(^{181}\) Property interests by and large arise out of state law. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Beermann*, supra note 53, at 301-10.
Thinking about this issue in light of Heck leads to even more difficulty. Assuming that Heck requires that all § 1983 plaintiffs plead and prove the closest tort law analog to the particular § 1983 claim, what if there is no close analog, because the particular claim is unknown to the common law? Either the Heck requirement would have to be abandoned, or it would be relied upon to reject the § 1983 claim on the ground that § 1983 was intended only to recognize claims similar to those recognized by the common law.

Another way in which the common law has been influential in constitutional law is that the absence of a common law tradition for a practice has been cited as a reason to be suspicious of the practice when a claim of unconstitutionality is presented. Stated differently, this means that when a claim is made that a particular government practice is unconstitutional, if the practice was accepted under the common law, it is more likely to be upheld; and if it was unknown under the common law, it is more likely to be struck down. This is an essentially conservative theory: placing suspicion on legislative innovation and privileging traditional judicial doctrine.

Perhaps the most important way that the common law and constitutional law interact is the Court’s reliance on the common law for a great deal of the content of constitutional provisions. This has an obvious effect on constitutional tort litigation because as constitutional rights shift, so too do the possible bases for a constitutional tort action. Justices Scalia and Thomas have led the Court in the movement toward reliance on common law in constitutional cases in recent times, although the use of common law understandings to inform constitutional law dates back to the beginning of federal constitutional law.

The theory under which the common law is looked to as a source of constitutional norms is similar to the reasoning that leads courts to interpret § 1983 against a common law background. The Court is op-

182. In Connecticut v. Doe, 501 U.S. 1 (1991), the Court held an attachment procedure unconstitutional. One of the factors the Court relied upon was that attachment was “unknown at common law.” Id. at 16. In Chisholm v. Georgia, Justice Iredell argued strongly against interpreting Article III to allow suits in federal court against unconsenting states, largely on the ground that such suits were unknown to the common law and therefore were not within the contemplation of the framers. 2 U.S. (2 Dall.) 419, 432-50 (1793) (Iredell, J. dissenting). This view prevailed in Hans v. Louisiana, 134 US. 1 (1890).

183. Under some constitutional provisions, a longstanding common law pedigree is directly relevant to the constitutional standard. For example, insofar as a substantive due process claim depends on an allegation that a practice is contrary to fundamental principles underlying our society, it is unlikely that such a claim will prevail against a longstanding common law practice, since that common law practice must have been thought by the judges creating it to be consistent with the fabric of society, not in fundamental conflict with it.

184. See, e.g., Chisholm, 2 U.S. (2 Dall.) 419.
erating under the principle that certain constitutional provisions were meant to constitutionalize common law protections of the interests protected by the common law. Thus, the common law is relied upon as consistent with the intent of the framers.

An examination of recent cases in which the common law has played an important role in recognizing constitutional rights casts some doubt on the utility of the common law and also casts doubt on how seriously the proponents of this analysis actually take the common law. On the utility of the common law, because common law doctrines are distilled from the decisions of numerous jurisdictions over substantial periods of time, it is often difficult to state with any confidence what the common law actually is. The Court does not look to the common law of a particular state, and the doubts that the Court has expressed in another context over the existence of a general common law separate from the decisions of particular state courts do not deter it from attempting to create a general common law in this context. Uncertainty over the meaning of the common law not only contributes uncertainty to the meaning of the relevant constitutional provision, it also casts doubt on the intent-based basis for looking to the common law. If the common law was not clear, or if there was conflict among jurisdictions, it is difficult to maintain the argument that the framers intended that the common law provide the basis for constitutional interpretation.

More fundamentally, the Court’s behavior suggests that the common law plays more of a justificatory role than it functions as an actual source of constitutional norms. The Court, even when purporting to apply a common law doctrine to a constitutional question, may be unconcerned with whether its decision is actually consistent with the common law norm. For example, in the knock and announce case discussed above, the Court relied heavily on a long common law tradition recognizing the “knock and announce” rule, as it is referred to, in finding that the Fourth Amendment requires knock and an-
nounce.\textsuperscript{190} The Court, however, recognized that the common law rule was not well-established in felonies,\textsuperscript{191} but adopted it for such cases anyway.

The Court's "adoption" of a rule that did not really apply leaves the appearance that the common law is not truly the source of the norm but rather a justification for the creation of a new constitutional right. Perhaps the common law was relied upon because that was the only way that some members of the Court would agree with the decision. But why? Perhaps they believe that the common law is the most legitimate source of constitutional doctrine, and while it did not actually apply to the case, at least it made them feel better because they could deny to themselves and others that they had engaged in the bugaboo of judicial activism. The lack of an actual common law basis for the rule in the case makes the reliance on the common law a falsification, and it also makes the decision appear legally justified when, at least on the basis put forward, it is not.


In recent years, the Supreme Court has disfavored analyzing constitutional questions under substantive due process and has favored an approach under which claims are located, whenever possible, within a particular provision of the Bill of Rights. This is an important development, both for constitutional tort law and also for constitutional theory generally.

In fact, several of the leading cases in this line in which claims were channeled away from substantive due process and into particular constitutional provisions have been constitutional tort cases.\textsuperscript{192} In an action for damages for the unnecessary shooting of a prisoner during a prison disturbance, the Court held that the claim should be analyzed under the Eighth Amendment and not due process.\textsuperscript{193} The Court more recently held that a claim for damages based on an unfounded criminal prosecution raised a Fourth Amendment issue rather than a due process issue.\textsuperscript{194} In the latter case, because the plaintiff's attorney disavowed any Fourth Amendment claim, perhaps due to a mistake

\begin{itemize}
  \item \textsuperscript{190} See id. at 1916-18.
  \item \textsuperscript{191} See id. at 1918.
  \item \textsuperscript{192} Michael Wells' article details many of the areas in which this has occurred. See Wells, supra note 159.
  \item \textsuperscript{193} See Whitley v. Albers, 475 U.S. 312, 326-27 (1986).
  \item \textsuperscript{194} See Albright v. Oliver, 114 S. Ct. 807, 813-14 (1994).
\end{itemize}
over when the statute of limitations would begin running on such a claim, the Court did not reach the merits.\textsuperscript{195}

Michael Wells' article in this Symposium is an attack on the Court's refusal to engage in substantive due process analysis of the sort of conduct that often leads to constitutional tort litigation.\textsuperscript{196} Courts should find cases like police brutality, excessive force, inadequate medical care in prison, and others, according to Wells, to raise substantive due process issues, and courts should not force these cases into constitutional provisions where they do not really fit.\textsuperscript{197} Wells argues persuasively, for example, that excessive force claims against police officers or prison guards do not fit easily into the Fourth or Eighth Amendments and that inadequate medical care claims do not fit well into Eighth Amendment analysis.\textsuperscript{198}

Wells admits that in some cases his argument has little practical significance because whatever doctrine the Court chooses, the standards and the results are likely to be the same.\textsuperscript{199} However, Wells argues that in many cases, substantive due process analysis would force the courts to look directly at what, for him, should be the key question in a constitutional tort situation: whether there was an abuse of power by the defendant official.\textsuperscript{200} His argument depends on the following reasoning. There are some cases that cannot be forced into a particular provision of the Bill of Rights. In those cases, the Court has employed a substantive due process test that has, as its standard for liability, that the official's conduct was arbitrary, oppressive, or an abuse of power.\textsuperscript{201}

I agree with Wells that there is merit in using substantive due process standards in constitutional torts cases. Official conduct that is outrageous or substantially beyond the moral standards of society should give rise to constitutional tort liability, and perhaps the discourse in constitutional tort cases would improve if the focus were on the outrageousness of the official conduct rather than on the particulars of an ill-fitting constitutional provision.\textsuperscript{202} However, I am not so sure that it is accurate to state that the Court has held that an abuse of government power or arbitrary or oppressive conduct violates sub-

\textsuperscript{195} See id. at 814.
\textsuperscript{196} See Wells, supra note 159.
\textsuperscript{197} See id. at 626-35.
\textsuperscript{198} See id. at 626-28.
\textsuperscript{199} See id.
\textsuperscript{200} See id. at 654.
\textsuperscript{201} See id. at 635-47, citing Collins v. Harker Heights and Daniels v. Williams.
\textsuperscript{202} See Whitman, supra note 26, at 275, discussed in Wells, supra note 159 at 650.
stantive due process. The cases upon which Wells principally relies are all cases in which the Court denied the claims and mentioned the standards in terms of what would be a better claim. The Court has expressed extreme reluctance to recognize new claims under substantive due process. That leaves some room for uncertainty over what the test would be in a case in which the Court was willing to find liability. It may be, given the Court's resistance to constitutional tort litigation, that an actual substantive due process standard would be extremely difficult to meet and that plaintiffs are better off if they can base their claims on a particular provision of the Bill of Rights.

Although the phenomenon of rejecting substantive due process analysis is not directly related to the issue of common law influence on § 1983, it does have great effects on constitutional tort litigation. However, Wells argues that the substantive due process analysis might be heavily influenced by common law, because under substantive due process "most common law torts, including defamation, implicate constitutionally protected 'liberty.'"203 It may be, as Wells seems to believe, that more rights would be recognized if substantive due process were the governing provision for constitutional tort litigation. I am somewhat skeptical, however, that changing provisions would have much effect except perhaps to disable the Court from creating the false appearance that it is not making law in the cases in which it finds a violation of a particular provision when, under Wells' analysis, the claim would be better founded on substantive due process.

Conclusion

The influence of common law concepts has long been felt in § 1983 actions under the twin theories that Congress created a "species of tort liability" and that Congress did not intend to overrule well-established common law rules that would otherwise apply in tort litigation. However, *Heck v. Humphrey* represents a potentially radical break with the past in that if its analysis is applied to all § 1983 cases, it eliminates the independent § 1983 action and makes the § 1983 remedy depend upon the existence of a common law claim under the circumstances giving rise to the civil rights action. This, more than any other development in § 1983, is a direct attack on Congress' effort to provide a remedy where the common law may have been deficient. It is the ultimate application of the canon of construction that statutes in derogation of common law should be strictly construed.
That the common law might aid the Court in undercutting congressional intent is not, in and of itself, necessarily bad, unless one accepts the theory that congressional intent should govern in a strong way in statutory matters. This Article has argued very strongly in favor of the primacy of congressional intent in § 1983 actions, and in favor of fidelity to the text of § 1983. Happily, these traditionally strong legal arguments coincide with effective enforcement of constitutional rights against government oppression, and stand against misrepresenting the Court's political decisions regarding civil rights liability as legal ones.

204. See Beermann, Critical Approach, supra note 4, at 92-94.