Tort Remedies for Police Violations of Individual Rights

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INDIVIDUAL RIGHTS
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One of the great unsolved problems of criminal law administra-
tion is the gap which separates police practices from the theoretical
limitations imposed by the law governing arrests, searches and
seizures, and conditions of detention. While there is nothing ap-
proaching reliable statistical information, we do know that the in-
cidence of illegal arrest and search is very high. There are estimates
which place the number of illegal arrests each year at several
million or more, and despite their statistical unreliability they are
sufficient to demonstrate that our society permits an intolerably
high proportion of illegality in police practice. This is true even
though the number of illegal arrests is inflated by unrealistic
and unworkable restrictions in the law of arrest, which make
technically illegal some commonplace police practices. It is in this
context of our demonstrated inability to keep police action in
line that tort remedies for police violations of individual rights
need to be evaluated. The fact that these remedies have not served
as effective deterrents in the past should not obscure their potential
significance.

The importance of this potential is emphasized if we compare
the inadequacy of other available sanctions for the control of police
illegality. There are criminal penalties in existence providing for the
punishment of many types of police violation of individual rights,
but these are ineffective for the obvious reason that policemen and
prosecutors do not punish themselves. Although in most states

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1. Hall, Police and Law in a Democratic Society, 28 Ind. L. J. 133, 152, 154 (1953) (several million annually, and quoting other estimates going as
high as 3½ million or more) ; Warner, Investigating the Law of Arrest, 26 A. B. A. J. 151 (1940) (quotes estimates that 75% of all arrests are illegal in
some particular). See Note, Philadelphia Police Practice and the Law of
Arrest, 100 U. of Pa. L. Rev. 1182 (1952), finding that illegal arrests without
a warrant were widespread for minor offenses. In a sample totalling 770
arrests for all offenses, 75% of the arrests for assault and battery and dis-
orderly conduct were illegal.

2. Hall, supra note 1, at 158-159; Warner, The Uniform Arrest Act,

3. E.g., brief detention for questioning and identification, see Warner,
supra note 2, at 317-324, and some frisking when required for self-protection.
Id. at 324-327.

4. E.g., Hall, The Law of Arrest in Relation to Contemporary Social

5. “I should like to have brought to my attention any such case where
a prosecution has been successful, or even where a prosecution has been
instituted. It is absurd to suggest that any district attorney, or superior officer,
is going to take criminal action against one of his subordinates...” White v.
false imprisonment is a crime as well as a tort, in the last 15 years very few criminal false imprisonment prosecutions of police officers have been reported.\(^6\) Since 1921 there has been a federal statute making it a misdemeanor for a federal officer to participate in an unlawful search and seizure.\(^7\) In the intervening 34 years, however, there have been no reported prosecutions under this act, although there have been innumerable cases in the federal courts in which convictions have been reversed because of unlawful search and seizure.\(^8\) No criminal trespass actions arising out of illegal search and seizure have been found. While there have been more criminal prosecutions of state officers under the civil rights acts in recent years than under all other forms of criminal remedies combined, the total convictions have amounted to only 50 for the three years 1951-1953.\(^9\) These have been in extreme cases, usually involving the third degree,\(^10\) and we may well share the skepticism of Mr. Justice Douglas in Irvine v. California\(^11\) before we put much reliance in the ability of or the likelihood that the Department of Justice will supervise local police activity or intercede in any other than particularly outrageous situations.\(^12\)

Internal police discipline, while a less severe sanction than criminal prosecution of the offending police officer, is subject to the same defect. The police are under tremendous pressure to get results, and since much of the illegality occurs in the normal scope of police

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\(^6\) The only reported cases found since 1940 are Roberts v. Commonwealth, 284 Ky. 365, 144 S. W. 2d 811 (1940) (five years); Commonwealth v. Caudill, 314 Ky. 129, 234 S. W. 2d 499 (1950) (demurrer to indictment sustained, appeal by commonwealth to settle law); Kimbler v. Commonwealth, 269 S. W. 2d 273 (Ky. 1954) (conviction reversed); Montgomery v. State, 145 Tex. Crim. Rep. 606, 170 S. W. 2d 750 (1943). In Davis v. State, 72 Ga. App. 347, 33 S. E. 2d 728 (1945), the opinion does not indicate whether or not the defendant was a law enforcement official.

\(^7\) 18 U. S. C. § 2236 (1952). Malice is an element of the offense only if the unlawfully searched building is not a private dwelling.

\(^8\) E.g., United States v. Coffman, 50 F. Supp. 823 (S.D. Cal. 1943) (suppression of evidence at trial with strong condemnation of officers); Baxter v. United States, 188 F. 2d 119 (6th Cir. 1951) (same—court said officers "plainly violated § 2236").


\(^10\) E.g., Apodaca v. United States, 188 F. 2d 932 (10th Cir. 1951); Koehler v. United States, 189 F. 2d 711 (5th Cir.), cert. denied, 342 U. S. 852 (1951).


\(^12\) Such supervision may also encounter vigorous local opposition. See, e.g., N. Y. Times, Feb. 17, 1953, p. 1, col. 1 (opposition of Police Commissioner to FBI investigation of alleged brutality in New York police force on grounds that morale of the force was being injured).
activity, it is unlikely that internal discipline operates as a deterrent force except in unusual circumstances.

Nor do we know much about the actual deterrent effectiveness of the exclusionary rules barring the use of illegally obtained evidence or confessions obtained during a period of illegal detention prior to arraignment. The objective study of the efficacy of this device which Mr. Justice Murphy suggested in *Wolf v. Colorado* has still not been made, and there have been suggestions that the exclusionary rule may not measure up to the expectations of some of its proponents. In any event, the exclusionary rule deals with only the search and seizure aspect of police illegality. There is no analogous jurisdictional rule depriving a magistrate at preliminary examination of jurisdiction over any defendant who had been illegally arrested or illegally detained before being taken before the magistrate. While such a rule has been suggested, it would appear to be of doubtful deterrent value, for in most cases the police would be able to immediately re-arrest the defendant. It is also unworkable, for to be effective there would have to be a right of

13. See note 33 infra, text at notes 121-129 infra.
16. 338 U. S. 25, 41, 44 n. 5 (1949). In this opinion he reports the findings of his own survey, tending to show that where the exclusionary rule prevails the police are better trained to respect individual rights. Id. at 44-46.
17. See Note, Admissibility in State Courts of Evidence Obtained by Unreasonable Searches and Seizures, 35 Minn. L. Rev. 457 (1951). The writer reasons that because of the high number of illegal search cases in jurisdictions subscribing to the exclusionary rule, the rule has not been beneficial. This conclusion, however, does not follow. It is only in jurisdictions which have the exclusionary rule that an illegal search and seizure is ever litigated. The fact that there are still illegal searches in states following the exclusionary rule proves nothing, and aside from the study made by Mr. Justice Murphy, see note 16 supra, there is apparently no reliable information permitting a comparison of the incidence of illegal searches and seizures under the two rules.

Compare the observation that there have been a significant lack of cases alleging violations of fundamental rights by the FBI, who operate under the federal rules. Ernst, The Policeman and Due Process, 2 J. Pub. L. 250, 251 (1951).
18. Ker v. Illinois, 119 U. S. 436, 440 (1886) ("... for mere irregularity of the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should be tried at all..."); People v. Miller, 235 Mich. 340, 209 N. W. 81 (1926). Contra: Commonwealth v. Krubeck, 23 Pa. County Ct. 35, 38 (1899) ("As the arrest of the defendant was not lawful, the subsequent proceedings based upon it are void").
immediate appeal, which opens up a vista of prolonged additional delay.

This may suggest that the problem is insoluble within the present philosophy of criminal law administration. Morris Ernst, for example, says, "I see no hope for a change in attitude of our police except through the basic examination of our attitudes towards prosecutions." He believes that our "anti-social police mores" are an inevitable by-product of the win-at-all-costs approach of American prosecutors, and that the remedy is in the British attitude towards prosecution, that "the Crown cannot win and the Crown cannot lose." There is unquestionably much truth in this view, but before the rather fatalistic conclusion to which it leads is accepted in full, it is in order to re-examine the role tort remedies might play in alleviating this highly unsatisfactory situation.

We have ample precedent in our law for the use of civil sanctions as a means of enforcing criminal statutes where widespread use of the criminal sanction is impracticable or impossible. We induce private plaintiffs to enforce the antitrust laws by offering them triple damages plus the cost of the suit, including reasonable attorney's fees. The Emergency Price Control Act envisioned criminal enforcement as the exception and the provision for minimum liquidated damages in any suit was designed to encourage private actions as a primary enforcement device. A similar technique has been employed in statutes providing for liquidated damages, which may total many times the actual loss, in actions against public officers who take greater fees than are allowed by law. Somewhat analogous is the qui tam suit encouraging private enforcement of a public right, in this case by a disinterested informer who is given a share in the proceeds.

20. Ernst, supra note 17, at 251.
22. "OPA cannot . . . punish all violators who deserve criminal penalties. No prosecution should be recognized unless the case has clear significance for enforcement beyond the administering of deserved punishment." See OPA Manual § 9-1702, quoted in Dession, Criminal Law Administration and Public Order 198-202 (1948).
23. 50 U. S. C. § 925 (1946): "In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, but whichever of the following sums is greater: (1) [triple damages] or, (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine." 24. E.g., Neb. Rev. Stat. § 33-147 (1952) (if any officer takes greater fees than allowed, "he shall forfeit and pay the sum of fifty dollars to the party injured"). This has been construed as a provision for liquidated damages and not a penalty. Graham v. Kibble, 9 Neb. 182 (1879).
25. For an example see United States ex rel. Marcus v. Hess, 317 U. S.
On the surface there is considerable similarity between false imprisonment and the inflated or liquidated damages utilized in the foregoing remedies, as is demonstrated by an examination of the way in which false imprisonment damages can also be inflated. While the false imprisonment plaintiff may have an actual out-of-pocket loss such as lost wages, counsel fees or premiums on bail bonds, these are often absent entirely and usually amount to little in any case. In order that it may be worthwhile for the plaintiff to sue, under the fiction of providing reparation there can be verdicts up to many times any actual monetary loss which has been sustained. In many jurisdictions punitive damages are also allowed, but even without punitive damages a comparable result is permitted. In assessing “actual” damages, the jury is given wide scope in attaching a dollar value to immeasurables such as the sense of humiliation, distress, disgrace or outrage, or the usually fictional damages to reputation. This may include the value of special factors which affect the degree of mental anguish, such as filthy, unsanitary or unheated conditions in a jail.

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537 (1943). The action of *qui tam* ("one who sues for the king as well as himself") was “intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side... It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.” United States v. Griswold, 24 Fed. 361 (D. Ore. 1885), aff’d, 30 Fed. 762 (1887).

26. See, e.g., Daily v. State, 190 Misc. 542, 75 N. Y. S. 2d 40 (Ct. Cl. 1947), in which defendant, who was falsely arrested, subjected to the third degree and held in jail overnight recovered (1) $1,700 for actual losses due to assault and battery, and (2) $5,500 for pain and suffering and (3) $1,500 for one night’s false imprisonment. See also, e.g., Roher v. State, 279 App. Div. 1116, 112 N. Y. S. 2d 603 (1952) (lost wages plus $1,000); Dedman v. McKinley, 238 Iowa 886, 29 N. W. 2d 337 (1947) ($500 for 15 minutes detention, no monetary loss).

A plaintiff will frequently resort to desperate arguments to maintain the fiction that he is getting reparation. “Appellee claimed to have been embarrassed by the incident to the extent that he subsequently shunned his former haunts and friends; that he felt when he was around other people that his arrest was being commented upon; and, that for fear she would hear of his arrest and incarceration, he had twice requested his mother to postpone proposed visits.” Hicks v. Matthews, 261 S. W. 2d 207 (Tex. Civ. App. 1953), rev’d on other grounds, 266 S. W. 2d 846 (Tex. 1954).


28. See cases cited note 26 *supra*. Particularly against private defendants, courts may permit very liberal damages, Farrel v. Livingston, 344 Ill. App. 488, 101 N. E. 2d 599 (1951) ($15,000 for 28 hours imprisonment), but will also leave undisturbed very low recoveries, Schnafer v. Price, 124 S. W. 2d 940 (Tex. Civ. App. 1939) ($100 for false arrest and six days in jail).

The higher damage ceiling which this fiction permits serves the same purpose as punitive damages30 and has probably encouraged suits by many persons whose actual pecuniary loss would never have justified going to court. That this has been of some effectiveness is demonstrated by reference to the trespass remedy for an illegal search and seizure, where usually only actual losses can be recovered.31 The trespass remedy is completely impotent;32 while there continues to be a steady trickle of reported false imprisonment cases.

Despite the fact that the inflation of the measure of damages is apparently the only thing that is keeping the false imprisonment remedy alive at all, there is some tendency to eliminate the fiction that makes this possible. Las: year, for example, when an attorney was falsely imprisoned and illegally searched pursuant to the execution of a flagrantly illegal practice of the Baltimore police force, his humiliation was given a monetary value of one cent.33 In the absence of proof of pecuniary loss, the court did not place any value on the mental anguish and humiliation, which are the usual elements of damage in such cases. Obviously no one in Maryland whose rights

30. Morris, supra note 27, at 1183.
31. For a discussion of the trespass action and the difficulty of getting punitive damages, see Wolf v. Colorado, 338 U. S. 25, 41-44 (1949) (dissenting opinion). See also note 27 supra. For an example of the difficulty of showing actual damages see Taylor v. Fine, 115 F. Supp. 68 (S.D. Cal. 1953) (no damage under open fields doctrine).
32. Only one reported case was found in the last ten years, Deaderick v. Smith, 33 Tenn. App. 151, 230 S. W. 2d 406 (1950), discussed at note 119 infra. One of the rare cases is Silva v. MacAuley, 135 Cal. App. 249, 26 P. 2d 887 (1933) (recovery allowed for unlawful seizure of truckload of crabs and for deprivation of use of truck), which was the only holding the California Supreme Court apparently found to support its assertion that there are civil remedies for unlawful searches, People v. Gonzales, 20 Cal. 2d 165, 169, 124 P. 2d 44, 46 (1942) (rejecting Weeks exclusionary rule). Other courts which have rejected the exclusionary rule on the same reasoning have also had a hard time finding authority for the existence of the trespass remedy. E.g., Wolf v. Colorado, 338 U. S. 25, 30 (1949); People v. Defore, 242 N. Y. 13, 19, 150 N. E. 585, 586-587 (1926).
33. Mason v. Wrightson, 109 A. 2d 128 (Md. 1954). "... the Commissioner of Police of Baltimore City issued a general order that the police: 'search for possession of dangerous weapons on all persons coming under police suspicion.' The Captain ... issued a written order to his subordinates to carry out the Commissioner's order. As a result, during January and February, 1953, one hundred and twenty-nine taverns in the District were entered by the police and the male patrons were 'frisked' or (as euphemistically described) 'patted down' in a search for concealed weapons." Id. at 129. It was conceded that the practice was illegal, even though any evidence obtained would have been admissible under Md. Ann. Code Gen. Laws art. 35, § 5 (1951), see Salsburg v. State, 346 U. S. 545 (1954). Plaintiff was frisked against his will under this order, the trial court gave a judgment for the defendant because there was no proof of pecuniary loss, and this was reversed and judgment entered for plaintiff with nominal damages of one cent.
are similarly invaded will bring an action in the future, notwithstanding the court's apparent belief that, by permitting a recovery of one cent, it had avoided taking "the first step down the path leading to the destruction of the right." Should this apparent restriction of the recovery in false imprisonment to "nominal damages" in the absence of an actual monetary loss become general, false imprisonment will join trespass for illegal search in the graveyard of useless remedies. Whatever effectiveness false imprisonment has as a deterrent is dependent upon the fictional measure of damages, which encourages some plaintiffs to enforce the public policy against police illegality for their own selfish ends.

Why, then, if this is the theory of the remedy, has false imprisonment been a comparative failure as a deterrent device? One of the commonest explanations is the rarity of potential cases in which the defendant is financially responsible. The difficulties of trying to collect a judgment from a police officer have been so fully elaborated elsewhere that we need only note that there is still no discernible trend toward such obvious solutions as governmental liability for false imprisonment, subjecting the officer's wages to garnishment, or liberalization of the application of the law of suretyship in the limitations imposed upon actions on police officers' bonds. Indeed, if there is any trend at all it is in the opposite direction, as witness the exclusion of actions for false arrest, false imprisonment and assault and battery from the Federal Tort Claims Act.

There is, however, a more important reason for the inefficacy of tort remedies as deterrents to police illegality. In 1886, in *Ker v. Illinois*, the Supreme Court pointed out that the defendant, who had been kidnapped in Peru and brought back to the United States

34. Mason v. Wrighton, *supra* note 33, at 131. Thus the civil remedy to which the United States Supreme Court referred in upholding the Maryland statute admitting illegally obtained evidence, see note 33 *supra*, has been virtually destroyed. *Salsburg v. State*, *supra* note 33, at 354.


37. 28 U. S. C. § 2680(h) (1952). See also note 82 *infra*. This exception, which reveals "an abundance of caution," was apparently motivated by the asserted difficulty of defending such suits, the fear that judgments against the government would be out of proportion to the damages actually suffered, and a fear that it would lead to inflammatory cases, such as those arising out of third degree allegations against the FBI. *Note, The Federal Tort Claims Act*, 56 Yale L. J. 534, 540-547 (1947). The fact that trials under the act are to the court without a jury would seem a sufficient answer to these objections.
for trial, "would probably not be without redress, for he could sue [the kidnapping officer] in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action. Whether he could recover a sum sufficient to justify the action would probably depend upon moral aspects of the case, which we cannot here consider [Italics added]."

For most potential tort plaintiffs the "moral aspects of the case" are not very favorable. Very few of them are persons who are respectable in the sense that they have some measure of status and financial security in society and have acquired the kind of reputation which will be "damaged" by illegal police activity. Most police action operates at lower levels of society and the great majority of persons who are subjected to illegal arrests or searches and who are therefore potential tort plaintiffs come from the lowest economic levels, or minority groups, or are criminals or suspected of criminality. For such people "the rules . . . are little more than mere pretensions." It is not surprising that attorneys are reluctant to take their cases because of the small chances of a recovery "sufficient to justify the action," and fear of police retribution may also be a substantial factor in deterring such plaintiffs from bringing suit.

The "moral aspects" of the cases of these potential plaintiffs ruin their chances of success in court. They lack the minimum elements of respectability which must be present to form a base upon which the fiction of reparation can operate.

The result is that the theory of damages in false imprisonment is successful as an inducement to sue only for the respectable plaintiff who can come into court with relatively clean hands. The existence and continued use of false imprisonment may operate as a substantial force in deterring police unlawfulness against persons who are of this class. It is certainly a good guess that the police are

38. 119 U. S. 436, 444 (1886).
40. Id. at 154.
42. For an interesting example of this, see Butcher v. Adams, 310 Ky. 205, 220 S. W. 2d 398 (1949). Here a judgment for defendant was affirmed even though the evidence disclosed that as a matter of law there had been a false arrest and imprisonment. The court reasoned that although there should have been a directed verdict for the plaintiff, a reversal was not warranted as there could be no substantial damages because the plaintiff, having a prior criminal record, could not have been humiliated by the arrest. See also cases discussed at note 67 et seq.
43. However, even many respectable persons who might be able to obtain judgments do not sue. This is due not only to the lack of financially responsible defendants, but also to the desire to forget about the unpleasantness and the feeling that exoneration in the criminal proceedings is sufficient vindication.
likely to think twice before arbitrarily arresting or searching an
apparently respectable citizen, although of course other factors be-
sides the threat of a civil suit are also responsible for such an
attitude.\textsuperscript{44} Such restraint is less likely, however, if the potential
subject of police illegality is a skid row "bum" or a gambler\textsuperscript{45} or a
prostitute\textsuperscript{46} or has a record of prior arrests.\textsuperscript{47} For such plaintiffs the
tort measures of damages are a hindrance rather than an induce-
ment to sue, for the defendant officers can prove the plaintiff’s bad
reputation in mitigation of damages and so poison him in the eyes
of the jury. The failure to provide, as in the Emergency Price Con-
trol Act,\textsuperscript{48} for minimum liquidated damages which can be recovered
in any case results in the action having little deterrent value where
a deterrent is most needed. Probably the greatest police abuse is
harassment of persons who are vaguely suspect due to prior crimi-
nal conduct, low economic status or membership in a racial minority
group.\textsuperscript{49} But the same factors which make such persons bait for an
illegal arrest or search also effectively bar them from prosecuting
a tort action. Thus, if tort law is to fulfill its potential as a sanction
to discourage police illegality, the character of the plaintiff must be
irrelevant, at least to the extent of recovering minimum damages
set at a level sufficient to make a suit worthwhile.

Of course this problem goes to the heart of our philosophy of
criminal law enforcement. The right embodied in the Fourth
Amendment to be free from unlawful invasions of the security of
the person or the privacy of the home is a protection extended “to
all equally—to those justly suspected and accused, as well as to the

See also Warner, \textit{supra} note 1, at 153: “Seldom have I talked to five
or six police officers without finding that one of them had at some time in
his career been sued for false arrest.”

44. A policeman, for example, may fear that an apparently respectable
person might have sufficient influence to make trouble for him by complaints
to his superior officers.

45. \textit{E.g.}, Long v. Mann, 259 Ala. 17, 65 So. 2d 500 (1953).

false imprisonment but jury returned verdict for defendant).

47. Butcher v. Adams, 310 Ky. 205, 220 S. W. 2d 398 (1949) (plaintiff
who had prior record could not have been humiliated and therefore was not
damaged).

48. See note 23 \textit{supra}.

49. See Hall, \textit{supra} note 1, at 153; Note, \textit{Use of Vagrancy-type Laws for
the Arrest and Detention of Suspicious Persons}, 59 Yale L. J. 1351 (1950);
Dedman v. McKinley, 238 Iowa 886, 29 N. W. 2d 337 (1947) (police arrested
girl for “investigation,” apparently because they thought she was white
and her escort was a Negro); Mason v. Wrightson, 109 A. 2d 128 (Md. 1954)
(false imprisonments and illegal searches on an organized basis); Bower v.
State, 135 N. J. L. 564, 53 A. 2d 357 (1947) (girl arrested for investigation
because her face was dirty and she was wearing blue jeans).
innocent." But if the same right is being litigated, not in a criminal court, but in a common law action of false arrest or false imprisonment, there will be no pretense of equality of treatment of the guilty and the innocent. Under the federal rule an unlawful search and seizure is not validated because it subsequently appears that the defendant is guilty; we release many patently guilty defendants because of the illegality of the method by which the incriminating evidence has been obtained. If the same victim prosecutes a tort action, however, the fact that he is guilty may bar him completely or at the least will discredit him in the jury's eyes.

This clash in attitude towards remedies for police illegality is reflected in the positions taken when balancing protection of individual rights against the requirements for effective law enforcement. While the policy argument that the police must be given some leeway in order that they can enforce the law has been given deciding weight in many criminal cases, it is not all-prevailing. Thus, when the frequent "appeal to necessity" was made in United States v. Di Re, the Supreme Court replied: "But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment."

The tort law, however, often fails to reflect this philosophy which is so fundamental to the administration of the criminal law. In California the policy of "promoting the fearless and effective administration of the law" has been carried so far that, in a startling group of recent cases, the judicial immunity from civil liability has apparently been extended to all law enforcement officers. The immunity of public officers from civil liability has been extended from judges, Bradley v. Fisher, 13 Wall. 335 (U.S. 1871), to grand jurors, e.g., Hunter v. Mathis, 40 Ind. 356 (1872), to public prosecutors, Watts v. Gerking, 111 Ore. 641, 222 Pac. 318 (1924), to minor executives, Yoselli v. Goff, 12 F. 2d 396 (2d Cir. 1926), and to fire inspectors, Springfield v. Carter, 175 F. 2d 914 (8th Cir. 1949). White v. Towers, supra note 54, is apparently the first case extending it to all law enforcement officials. But see Restatement, Torts § 656, comment d (1938) (extends immunity only as far as public prosecutors; the privilege "does not apply to all persons whose functions it is to aid in the enforcement of the criminal law").

51. See cases cited in notes 50 supra, and 52 infra.
52. 332 U. S. 581, 595 (1948) (opinion by Mr. Justice Jackson).
55. The immunity of public officers from civil liability has been extended from judges, Bradley v. Fisher, 13 Wall. 335 (U.S. 1871), to grand jurors, e.g., Hunter v. Mathis, 40 Ind. 356 (1872), to public prosecutors, Watts v. Gerking, 111 Ore. 641, 222 Pac. 318 (1924), to minor executives, Yoselli v. Goff, 12 F. 2d 396 (2d Cir. 1926), and to fire inspectors, Springfield v. Carter, 175 F. 2d 914 (8th Cir. 1949). White v. Towers, supra note 54, is apparently the first case extending it to all law enforcement officials. But see Restatement, Torts § 656, comment d (1938) (extends immunity only as far as public prosecutors; the privilege "does not apply to all persons whose functions it is to aid in the enforcement of the criminal law").
officers. In *White v. Towers*, an "investigator" for the State Fish and Game Commission was held to be a peace officer and as such "shielded by the cloak of immunity from civil liability for alleged malicious prosecution." The court was favorably impressed by the reasoning of a Kansas decision, applying to public prosecutors, that while individuals need protection from abusive exercise of police power, civil liability is not required because the public official "is at all times under the wholesome restraint imposed by the risk of being called to account criminally for official misconduct, or of being ousted from office on that account." It is not clear that the immunity was extended to false imprisonment actions in *Coverstone v. Davies*, but the dissenting opinion in that case and a subsequent California Appellate Court case have so construed it. It probably makes no difference, for the *Coverstone* case validated an arrest that would clearly be illegal in most jurisdictions. Even if the immunity does not include false imprisonment, it is apparent that most arrests will be held legal to promote the policy of not "hamper[ing] law enforcement officers in their every day enforcement of the law."

Even without such an extreme result as California’s, the development of the tort actions has served the same policy end. The measure of damages, defenses and evidentiary rules which have

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58. Id. at 730, 235 P. 2d at 211.
59. Smith v. Parman, 101 Kan. 115, 117, 165 Pac. 663 (1917). Compare note 6 supra, to the effect that only four criminal prosecutions against law enforcement officers for false imprisonment are reported for the whole country for the years 1940-1954, and of these two did not result in conviction.
60. 38 Cal. 2d 315, 239 P. 2d 876 (1952).
61. "The majority of this court is, apparently, determined that no action for false arrest, false imprisonment or malicious prosecution shall lie against anyone connected with the enforcement of the law. . . ." Id. at 324, 239 P. 2d at 881.
62. Miller v. Glass, 274 P. 2d 669 (Cal. App. 1954). The court reasoned that as there is immunity from malicious prosecution, which requires that the plaintiff prove malice on the part of the defendant, the same immunity must have been intended to apply to false imprisonment, with its lesser proof requirements for the plaintiff.
63. Coverstone v. Davies, 38 Cal. 2d 315, 321, 239 P. 2d 876, 879. The court was concerned lest “Peace officers would be reluctant to make arrests. . . .” *Ibid.* As to the danger of such reluctance, see note 1 and accompanying text supra.
grown up with them have had the practical effect of importing a clean hands doctrine into the remedies. Whether or not this has been a conscious development, its effect has been to give law enforcement officers freedom of action at the expense of individual rights. The following examples illustrate the way in which the tort remedies, instead of being available “to all equally,” have for this reason never realized their deterrent potential.

(1) Proof of Prior Reputation.—Where the plaintiff is not convicted of the crime for which he was arrested, his prior reputation can be shown for three purposes: (a) to impeach his credibility as a witness; (b) to mitigate damages by showing that his reputation was such that it would not have been damaged by an arrest or by showing that his prior record of arrests or imprisonment negated the inference that he suffered mental anguish; and (c) to mitigate damages by showing probable cause for the arrest, thereby negating the inference that the defendant acted wantonly or maliciously. The first two of these are self-explanatory, but proof of reputation as supporting probable cause for an arrest raises some problems.

In many jurisdictions a showing of probable cause for the arrest will be a complete defense to an action for false imprisonment, even where the arrest was for a misdemeanor which the officer thought was being committed in his presence but which in fact was not committed. For this purpose “mere suspicion is not enough,” but

64. For an indication that it is at least partly conscious, see the way in which some courts have tried to discourage even the respectable plaintiffs from suing. Thus in Walton v. Will, 152 P. 2d 639 (Cal. App. 1944), the dissenting judge in a decision affirming a verdict wrote: “... it is with poor grace that one seeks pecuniary compensation for the discomfort of two days confinement in a jail because he was unfortunately imprisoned under the honest belief of the officer that he was the author of a serious crime. To be subjected to such inconvenience, however regrettable, is but one of the infrequent penalties of membership in a complex society and should be endured with stoicism.” Id. at 643. The most recent decision showing the hostility of the California court to the action of false imprisonment even when a private person is the defendant is Peterson v. Robison, 277 P. 2d 19 (Cal. 1954).

65. The common law view, adopted by the Restatement, was that an officer could arrest without a warrant for a crime less than a felony only if the arrestee was committing a breach of the peace in his presence; this has been extended by statute in most jurisdiction to all offenses, e.g., Okla. Stat. Ann. tit. 22, § 196 (1937). But if the offense less than a felony has in fact not been committed, “a mistaken belief or the part of the actor, whether induced by mistake of law or of fact and however reasonable ... does not confer a privilege to arrest....” Restatement, Torts § 119(c), comment o (1934). But cf. id. § 142 (reasonable belief that arrestee participating in a riot a defense). The Restatement has adopted a complicated system grading crimes according to their severity and determining the scope of the privilege to arrest accordingly. Id. §§ 118-144.

But in many jurisdictions probable cause will justify an arrest for an offense the officer reasonably believes is being committed in his presence, with no distinction being drawn between a felony and a misdemeanor. E.g.,
there must be "a judgment based on personal knowledge acquired through the senses at the time of the arrest, or based on inferences properly to be drawn from the testimony of the senses." This would usually seem to rule out evidence of suspicion based on prior reputation, for with rare exceptions this would be irrelevant to what the senses revealed at the time of the arrest.67

Where proof of probable cause will not be a complete defense, however, and the purpose of evidence tending to show it is only to mitigate damages, vague suspicion alone may be admissible. Thus in Goodwin v. Allen66 two officers searched the plaintiff's house without any other authority than their statement that "we are walking warrants," arrested her, and charged her with keeping a lewd house. She was subsequently acquitted of that charge. The arrest took place in May, 1946, but to show probable cause for the arrest the defendant was permitted to introduce evidence that the reputation of her house was bad in 1943, 1944 and 1945, and that specific acts of lewdness had occurred there in 1944. Though this was admitted solely for the purpose of mitigation of damages, it is not surprising that the jury returned a verdict for the defendants. This judgment was reversed because the evidence "demands a finding" that the arrest was illegal, but the same collateral attack on the plaintiff's reputation will be possible on the retrial.

Defendants also won verdicts in two cases where the police, after making the arrest which was challenged in the false imprisonment action, found that the plaintiff in one case had lottery tickets in his possession69 and in the other was unlawfully carrying a concealed weapon.70 Evidence of these acts of criminal possession were

67. There may be instances where what the officer knows about the reputation of the person will support the reasonableness of his acting on the inferences drawn from what his senses perceive at the time, but this cannot be a substitute for a showing of reasonable cause based on his perception at the time. Thus even when an individual has a "questionable past" and his "history and record alone" might seem to justify what the officer did, this is not enough. Odinetz v. Budds, 315 Mich. 512, 518, 24 N. W. 2d 193, 195 (1946).
69. Long v. Mann, 259 Ala. 17, 65 So. 2d 500 (1953).
70. De Hart v. Gray, 245 S. W. 2d 434 (Ky. 1952).
admitted in mitigation of damages, though it is hard to understand how the possession could constitute probable cause for an arrest made before the possession was discovered.

(2) Effect of Conviction.—At common law, if the potential plaintiff had been convicted of the offense for which he was arrested, his false imprisonment action would probably fail because he would be disqualified as a witness, for the testimony of the plaintiff is almost essential to his cause of action. While Tennessee apparently now stands alone in perpetuating this disqualification, it is generally true that the conviction can be shown to impeach the plaintiff’s credibility as a witness.

This is probably enough to make a verdict for the defendant a certainty in any case where conviction followed the plaintiff’s arrest, and no case was found in which a recovery was obtained under these circumstances. To ensure this result, however, in a number of states conviction is a complete defense to an action of false arrest or imprisonment, on the ground that it establishes a conclusive presumption of probable cause. The theory seems to be that, no matter how unwarranted the arrest, if the officers happen to get the right man, the whole proceedings are valid ab initio. This result may be due in part to confusion of false imprisonment with the action of malicious prosecution, where termination of the criminal proceedings in the plaintiff’s favor is a requirement. But in false arrest and imprisonment, the issue is whether or not the plaintiff was falsely arrested under the circumstances as they existed when the arrest occurred, and no subsequent events can

71. In De Hart v. Gray, supra note 70, the criminal prosecution for carrying the concealed deadly weapon was not prosed because the pistol was excluded as illegally obtained evidence. This did not prevent its admission in the civil action.

72. In the De Hart case the court said: "... the amount of recovery may be somewhat influenced by testimony showing mitigating circumstances, such as facts negating malice, or showing that the person sought to be charged acted in good faith. Consequently such evidence is obviously competent." Id. at 436.


74. E.g., Minn. Stat. § 610.49 (1953).


76. Prosser, Torts 867 (1941). Such confusion was apparently responsible for the decision in Smoker v. Ohl, supra note 75.
legalize it if it was illegal when it was done.\textsuperscript{77} Conviction may raise a strong inference of probable cause, but to make this conclusive is erroneous. If the police, for example, round up 50 suspects in a dragnet operation and, as a result of the interrogation which this makes possible, one of the suspects is subsequently convicted, the conviction does not establish probable cause for the arrest.

The disposition of a case short of conviction may also have the effect of eliminating any right to sue in false imprisonment, as where a police officer releases a person he has arrested in return for a waiver of the right to sue for damages. Such waivers may be provided for by statute,\textsuperscript{78} and the practice may be common in other types of cases.\textsuperscript{79}

(3) Effect of Imprisonment.—Where conviction is followed by imprisonment, the chances that the potential plaintiff will be able to prosecute his action are slim indeed. Even if his conviction does not destroy his right of action, the obstacles to prosecuting a civil suit from a prison cell are almost insuperable, and the Supreme Court in \textit{Ker v. Illinois}\textsuperscript{80} was probably wrong when it assumed that the convicted and imprisoned defendant could have his tort action. In about one-third of the jurisdictions the doctrine of civil death suspends the right to sue during the duration of imprisonment,\textsuperscript{81} which usually includes any time spent on parole.\textsuperscript{82} Where this dis-


\textsuperscript{78} \textit{E.g.}, Mass. Ann. Laws c. 272, §§ 45, 46 (Supp. 1954) (provides for release of drunks "upon recovery" on condition that person so released waives any claim for damages which he might otherwise have had against arresting officer).

\textsuperscript{79} "There is also evidence in the record from which it could be found that the complaint was filed by the police officers against these plaintiffs to avoid the possibility of lawsuits for false arrest and imprisonment. Mr. Mock, father of one of the plaintiffs, testified that Captain Cook, one of the defendants here, called him to his office and remarked that a complaint had not been filed against the boys but that unless they (the police) were released from liability they would have to do so to protect themselves." Coverstone v. Davies, 38 Cal. 2d 315, 326, 239 P. 2d 876, 880 (1952) (dissenting opinion). There is no information which would permit a judgment as to the frequency of such bargaining.

\textsuperscript{80} \textit{See} text at note 38, supra.


\textsuperscript{82} Parole "is in legal effect imprisonment." Anderson v. Corall, 263 U.S. 193 (1923). In New York the Civil Death disability was relaxed to permit suits by most parolees, N. Y. Penal Law § 510, "with respect to matters other than those arising out of his arrest or detention." This is another illustration of the limitations with which the tort remedies are encumbered. \textit{Contra}: Nibert v. Carroll Trucking Co., 82 S. E. 2d 445 (W.Va. 1954) (suspension only while actually confined—can sue if on parole).
ability does not exist, the plaintiff still has to get from prison to court in order to testify, and the writ of habeas corpus ad testificandum is extremely limited. In a California case the writ was denied on the grounds, among others, that the expense of the trip from the prison to testify was for a private purpose, thus was not an allowable public expense, and involved an unnecessary risk for the warden.83 Recently in Chicago an action was brought by a federal prisoner alleging deprivation of his civil rights by Chicago police officers at the time of his arrest. When the suit came up for trial the plaintiff was incarcerated in Alcatraz, the motion for a writ of habeas corpus ad testificandum was denied, and the case called and dismissed. The Seventh Circuit held that, while the complaint stated a cause of action, the Illinois district court was powerless to issue a writ for the production of a prisoner who was outside its jurisdiction.84

Potential plaintiffs who are in prison, therefore, usually must wait until they are released to get their tort remedy. In the meantime the statute of limitations may run,85 or the defendant may be able to get the civil suit dismissed for lack of prosecution.86 Where neither of these results follows under state law, the cause of action and its supporting evidence may grow stale, as in the case of a New York convict who was required to wait until release to prosecute his claim, and whose earliest possible release date is 1993.87

It is frequently assumed that the unimportance of false imprisonment as a vehicle for enforcing the public policy against police illegality is due to the financial irresponsibility of the defendants and "not because of any inherent defect in the remedy itself."88 This analysis, however, indicates that there are also problems of damages, proof and accessibility to the courts which must be met if the tort actions are to serve an effective deterrent purpose. Before discussing how these questions might be dealt with, however, a significant development in the field of civil remedies for police illegality will be examined.

84. Edgerly v. Kennelly, 215 F. 2d 420 (7th Cir. 1954).
85. In New York, however, the statute does not run and suit can be brought within two years of the time the disability is removed. N. Y. Ct. Cl. Act. § 10(5).
False Imprisonment as a Civil Rights Action

Although the decisions are conflicting, it now appears probable that a new civil action for police violation of civil rights is emerging in the federal courts. A number of actions have been brought in recent years alleging that facts amounting to false imprisonment or illegal search and seizure stated a cause of action under the civil rights statute providing that “every person” who, under color of law, subjects any citizen “to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding.”

Some of the courts of appeal have rejected this contention on the grounds that, if this is sufficient, “then every state court case of false imprisonment may be brought within federal jurisdiction by the mere unsupportable assertion that as a consequence of such false imprisonment the plaintiff was deprived” of his constitutionally protected rights. But the weight of authority in the interpretation of the civil rights acts seems to be against this view, although it does not follow that every fact situation sufficient to constitute false imprisonment will also make out a civil rights violation. Indeed, for a time following the decision in Picking v. Pennsylvania R. R., it appeared that the broad language of the act, applying to “every person,” overrode legislative and judicial immunity from civil suit, leading Judge Learned Hand to predict gloomily that “so far as we can see, any public officer of a state, or of the United States, will have to defend any action . . . in which the plaintiff, however irresponsible, is willing to make the necessary allegations.” Although this interpretation draws support from the Supreme Court’s decision in Ex parte Virginia, it is now generally held that despite the

94. 100 U. S. 339 (1879). In this case the Court upheld the indictment of a Virginia judge for violation of a statute prohibiting exclusion of Negroes from juries by “any officer or other person” charged with the selection of the jury panel. “We do not perceive how holding an office under a state, and claiming to act for the state, can relieve the holder from the obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.” Id. at 348.
sweep of the statutory language, it was not intended to abolish legislative and judicial immunity.18

Law enforcement officers who are not protected by judicial immunity, however, appear to be liable under some circumstances for illegal searches and seizures and false imprisonments. The criminal cases involving use of the third degree or summary punishment have established that where the acts amount to a denial of due process there is a violation of the civil rights statutes,66 and in these situations there would also be civil liability.97 In the case of an illegal search and seizure, whether there would be civil liability would depend upon whether the right of privacy secured by the Fourth Amendment is protected from state action by the Fourteenth Amendment. There have been strong dicta to this effect in Wolf v. Colorado,68 Stefanelli v. Minard,96 and Irvine v. California.100 In the last case, the Court not only assumed that this was "established" by Wolf v. Colorado,101 but some of the justices suggested that the police activities in that case may have constituted a criminal violation of the civil rights act.102 The only dissent to this proposition related to its practicability103 or to the propriety of the court in making such a suggestion.104 Despite this, a recent Seventh Circuit decision held that a complaint charging police officers with an illegal search and seizure did not state a cause of action.105 The case appears to turn, however, on the assumption that the illegal search was at

95. Brandhove v. Tenney, 341 U. S. 367 (1951) (civil rights action against Tenney Committee, civil rights act does not overthrow tradition of legislative immunity); Francis v. Crafts, 203 F. 2d 809 (1st Cir.), cert. denied, 346 U. S. 835 (1953) (judicial immunity, distinguishing Picking v. Pennsylvania R. R. because that case was decided "without benefit of the illumination" of Brandhove v. Tenney); Cawley v. Warren, 216 F. 2d 74 (7th Cir. 1954) (state's attorney immune).

96. E.g., Catlette v. United States, 132 F. 2d 902 (4th Cir. 1943); Clark v. United States, 193 F. 2d 294 (5th Cir. 1951).

97. The civil and criminal statutes will be construed as in pari materia. Picking v. Pennsylvania R. R., 151 F. 2d 240, 248 (3d Cir.), cert. denied, 332 U. S. 781 (1943); Geach v. Moynahan, 207 F. 2d 714 (7th Cir. 1953).

98. 338 U. S. 25, 27-28 (1949): "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. . . ."

99. 342 U. S. 117, 119 (1951). After quoting Wolf v. Colorado, supra note 98, the Court said: "There was disagreement as to the legal consequences of this view, but none as to its validity. We adhere to it."


101. Ibid.

102. Id. at 137-138.

103. Id. at 152 (Mr. Justice Douglas). See text at notes 11-12 supra.

104. Id. at 142 (Mr. Justice Black).

most a "temporary" denial of constitutional rights and that the plaintiff had not been damaged by the seizures.\textsuperscript{106}

If the Fourth Amendment is embodied in the concept of due process found in the Fourteenth Amendment, as seems almost certain, then "the right of the people to be secure in their persons, houses, papers, and effects," guarantees the individual's security "against unreasonable arrests as well as against unreasonable search."\textsuperscript{107} A false arrest is no less a violation of "the security of one's privacy against arbitrary intrusion by the police"\textsuperscript{108} than an illegal search, although there is a surprising dearth of litigation on this point.\textsuperscript{109} Both the cases which interpret the scope of the civil rights act in general and those holding that a false arrest and imprisonment stated a cause of action support this conclusion.\textsuperscript{110}

Assuming, then, that the cause of action lies, it will undoubtedly be limited to narrower confines than the state action for false imprisonment. The federal action requires not only the common law tort but a purposeful deprivation of constitutional rights.\textsuperscript{111} While the specific intent requirement of \textit{Screws v. United States}\textsuperscript{112} may have been due in part to the fact that that was a criminal case, it will

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\item[\textsuperscript{106}] But cf. \textit{Burt v. City of New York}, 156 F. 2d 791, 793 (2d Cir. 1946) (fact that plaintiff had other administrative remedies "is not an effective substitute for the damages" he may have already suffered).
\item[\textsuperscript{107}] \textit{Worthington v. United States}, 166 F. 2d 557, 562 (6th Cir. 1948).
\item[\textsuperscript{108}] See note 98 supra.
\item[\textsuperscript{109}] \textit{Worthington v. United States}, 166 F. 2d 557 (6th Cir. 1948) ; \textit{see Boyd v. United States}, 116 U. S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property") ; \textit{United States ex rel. Potts v. Rahb}, 141 F. 2d 45, 46 n. 1 (3d Cir. 1944) (history of Fourth Amendment shows it guarantees right to be secure against unreasonable arrests).
\item[\textsuperscript{110}] Cases in which the primary allegation was false arrest or imprisonment and where the complaint was upheld are \textit{Mueller v. Powell}, 203 F. 2d 797 (8th Cir. 1953) ; \textit{Dye v. Cox}, 125 F. Supp. 714 (E.D. Va. 1954) ; \textit{Refoule v. Ellis}, 74 F. Supp. 336 (N.D. Ga. 1947) (injunctive relief).
\item[\textsuperscript{111}] Complaints which contain allegations of false arrest or imprisonment among other allegations and which have been upheld are \textit{McShane v. Moldovan}, 172 F. 2d 1016 (6th Cir. 1949) ; \textit{Hague v. C.I.O.}, 101 F. 2d 774 (3d Cir.) ; \textit{modified}, 307 U. S. 496 (1939) ; \textit{Davis v. Turner}, 197 F. 2d 847 (5th Cir. 1952) ; \textit{Picking v. Pennsylvania R. R.}, 151 F. 2d 240 (3d Cir.) ; \textit{cert. denied}, 352 U. S. 776 (1945). See \textit{Culp v. United States}, 131 F. 2d 93 (8th Cir. 1942) (criminal case).
\item[\textsuperscript{112}] In the Fifth Circuit, \textit{compare Davis v. Turner}, \textit{supra}, with \textit{Yglesias v. Gulfstream Park Racing Ass'n}, 201 F. 2d 817 (5th Cir.) ; \textit{cert. denied}, 345 U. S. 993 (1953) (different judges reaching contrary conclusions). The right of action in the Fourth Circuit seemed uncertain, see \textit{Lyons v. Weitner}, 174 F. 2d 473 (4th Cir. 1949), and \textit{McCartney v. West Virginia}, 156 F. 2d 739 (4th Cir. 1946), but these decisions are distinguished in \textit{Dye v. Cox}, \textit{supra}.\footnote{\textsuperscript{111}} Failure to allege this intent resulted in granting the motion to dismiss, with leave to amend, in \textit{Dye v. Cox}, \textit{supra} note 110.
\item[\textsuperscript{113}] 335 U. S. 91 (1945).
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undoubtedly be applied in the civil actions. However, the criminal cases which have followed Screws have relaxed the requirement by the inferences on intent which they have permitted, and the officer need not be thinking in constitutional terms. Where the conduct of the defendant was such that he must have known that the search or arrest was illegal, the necessary intent can be implied, but many of the close cases of common law false imprisonment probably could not meet this requirement.

There are two ways in which the existence of this federal cause of action could prove to be a significant addition to the ill-supplied arsenal of civil remedies against police illegality. One involves the measure of damages which will be applied. There is almost no guidance here except for the vague statement in Hague v. C.I.O. that the action sounds in tort, that there can be exemplary damages, and that the measure of damages is "the value of the civil rights of which the appellees were deprived in the past and which are threatened with loss in the future." Will the federal courts follow the state cause of action for false imprisonment and examine injury to the plaintiff's reputation and measure the extent of his mental anguish according to his position in society? If this course is followed, the same blackening of the plaintiff's character which is such a characteristic defense in state actions will negate much of the usefulness of the civil rights action as a sanction. It would seem improper to follow this course, both because the civil rights statutes have an obviously deterrent purpose and because the "value" of a constitutional right is just as high for one person as another, regardless of their financial or social status. In Worthington v. United States the court said:

"The Fourth Amendment does not exclude from its protection a woman of the underworld. Police officers can no more violate her rights under the constitution than they can violate those of any other person. We have heard enough in these last years, throughout the world, of the knock on the door in the nighttime, the arrest, the ransacking search, and the prison cell.

114. Clark v. United States, 193 F. 2d 294 (5th Cir. 1951) (reckless disregard of constitution enough, purpose can be inferred from circumstances); Crews v. United States, 160 F. 2d 746 (5th Cir. 1947) (officer knows person arrested has right to trial, if he substituted his own trial by ordeal, jury would be justified in finding that such denial of constitutional rights was consciously and wilfully made).
116. 116 F. 2d 557, 568 (6th Cir. 1948).
to take warning. The constitutional rights of everyone are immediately imperiled when the rights, of even the outcast, the disdained, and the powerless, are trampled over with impunity.”

Whether this philosophy can be applied in civil actions seems very doubtful unless there is some provision for minimum liquidated damages. To the extent that the plaintiff can be shown to be one of “the outcast, the disdained, and the powerless,” it will be very easy to establish that there has been no damage in any conventional sense. The probability that this result will follow is illustrated by *Jennings v. Nester.* The plaintiff alleged an illegal search and seizure, but the court dismissed the complaint because it did not appear that he had suffered any damage and because the deprivation of constitutional rights was cured when plaintiff was given a trial from which the illegally obtained evidence was excluded. It is clear that the measure of damages in civil rights actions poses a very difficult problem if those actions are to afford any semblance of the equal protection which the Constitution extends to high and low alike.

The second change which the civil rights action brings about in the field of tort remedies relates to illegal search and seizure, for which even respectable plaintiffs have had no adequate remedy to date. The state court trespass action is almost useless because the actual damages are limited to injuries to property and punitive damages are both hard to obtain and are limited because they must bear some relation to the actual damages found. Of course an unlawful search and seizure can create the same kind of humiliation and damage to reputation that is involved in an unlawful imprisonment, and at least one court has drawn the obvious analogy to false imprisonment and permitted substantial damages in trespass because of the mental suffering and humiliation attendant upon an unlawful search which was viewed by neighbors. But that case appears to stand alone, and the fictional elements of damage allowed in false imprisonment find no parallel in trespass. But in an action under the civil rights statute a respectable plaintiff would seem to have prospects of a good recovery, and the high value placed on the right of privacy supports the right to substantial damages.

117. 217 F. 2d 153 (7th Cir. 1954). The plaintiff was convicted by the use of illegally obtained evidence, but obtained a new trial in which the evidence was not used and in which he was again convicted. The court seemed to think it important that “he has not suffered any additional imprisonment because of his first trial.”

118. See notes 27 and 31 supra.

Conclusion

This discussion has indicated some of the obstacles which prevent the tort remedies from fulfilling their potential as deterrents to police illegality. Realization of that potential is particularly important today to balance the increased powers which would be granted police officers by proposed liberalization of the law of arrest. Some of the proposals raise the distinct possibility that they will facilitate and thereby increase the incidence of some of the graver police abuses. An example is the proposed right to question and detain any suspect for up to two hours when the suspect fails to "explain his actions to the satisfaction of the officer."

If it is assumed that such a provision is desirable, it certainly should be complemented by a more effective control than any now in existence to prevent the development of the abuses to which it could easily be put.

Whether the tort remedies could develop into such a measure of control will depend upon the extent to which they are overhauled in the light of the deterrent objective. The essential steps in such a process are (1) governmental liability, (2) provision for minimum liquidated damages, and (3) restriction of the "clean hands" defenses which today keep most potential plaintiffs from going to court.

(1) Governmental liability is important not only to provide financially responsible defendants, but primarily so that the deterrent will be effective where it is needed—at the level where police policy is made. If cities are responsible for torts committed by officers who are known to be vicious and ill-tempered or dangerously insane or chronically alcoholic, the liability is likely to discourage the retention of such officers and compel a better police force. Most illegal arrests and searches probably arise within the scope of everyday police activity, a fact recognized by cities

121. Fernelius v. Pierce, 22 Cal. 2d 225, 138 P. 2d 12 (1943) (judgment against city manager and chief of police for death resulting from assault by officers who were known to defendants to have previously beaten many persons.
122. Bobo v. City of Kenton, 186 Tenn. 515, 212 S. W. 2d 363 (1948) (shooting by chief of police who was known to be insane and dangerous, but city not liable as police force is governmental function).
123. McCrink v. City of New York, 296 N. Y. 99, 71 N. E. 2d 419 (1947) (city liable for shooting by off-duty officer who was chronic alcoholic—city "may not with impunity retain in service an employee from whose retention danger to others may reasonably be expected").
125. See note 33 supra.
which allow the city attorney to defend officers sued for false imprisonment.\textsuperscript{126} Where the officer makes an illegal arrest under the orders of his superiors, while this may not excuse him, evidence of the fact will be admissible in mitigation of dangers.\textsuperscript{127} However justifiable this may be as an act of justice to the defendant, it should be irrelevant to the plaintiff's cause of action and illustrates the desirability of enforcing the sanction at the policy-making level. Furthermore, some police illegality is an inevitable concomitant of law enforcement.\textsuperscript{128} The expense should be borne by the state, which can spread the loss where actual monetary damage results\textsuperscript{129} and which is in the position to control and minimize the risk.

(2) If through the tort actions we expect private plaintiffs to carry a major part of the load of enforcing the public policy against police illegality, there must be an adequate inducement to sue. Analogous situations where minimum liquidated damages are provided by statute for this purpose have been noted above,\textsuperscript{129} and the successful plaintiff should be guaranteed at least some recovery and reasonable attorney's fees. This suggestion is applicable to both the tort and civil rights actions, and in the case of the latter liquidated damages are particularly appropriate because "there are many rights and immunities . . . which are not capable of money evaluation."\textsuperscript{130}

(3) Provision for minimum liquidated damages would make irrelevant the moral worth of the plaintiff, and would permit a judgment where the evidence made out a case as a matter of law, thereby avoiding the very real danger of jury nullification.\textsuperscript{131} The reputation or mental anguish of a plaintiff should be an issue only where he seeks special additional damages.

Some of the evidentiary practices which have been discussed are also relevant to efforts to restrict the clean hands defenses. Evidence to establish probable cause as justification for an arrest should be limited to the immediate circumstances surrounding the arrest, for

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\item Bucher v. Krause, 200 F. 2d 576 (7th Cir. 1952) (police erroneously suspected plaintiff, who thought he was being held up and was shot resisting arrest); Walton v. Will, 66 Cal. App. 2d 509, 152 P. 2d 639 (1944) (wrong person arrested by mistake). See Note, \textit{Arrest of Wrong Person}, 18 So. Calif. L. Rev. 162 (1944).
\item Bucher v. Krause, \textit{supra} note 128.
\item See notes 22-25 \textit{supra} and text thereto.
\item Hague v. C.I.O., 307 U. S. 496, 518, 529 (1938) (opinion of Mr. Justice Stone).
\item See text at notes 68-72 \textit{supra}.
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if vague suspicion aroused by prior criminal activity or bad reputation is admissible, it cripples the effectiveness of the sanction against harassment and dragnet mass arrests. Nor should subsequent conviction bar a tort action, and proof of conviction should be admissible only where it is actually relevant to the validity of the disputed arrest or detention.

Given such a development, the tort remedies offer what is perhaps the best hope of achieving increased control over police illegality. By placing the initiative for enforcement in the hands of injured persons who are offered a selfish motive for prosecuting the actions, it is possible to by-pass the insoluble problem of how to make a police force police itself. As was once said of the *qui tam* action, "prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel." To the extent that there is genuine interest in creating controls against police violation of individual rights, the development of tort remedies as an enforcement technique deserves much more examination and consideration than it has received.

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