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"Vicarious Immunity" of Private Persons in Section 1983 Actions: "An Unexamined Assumption"

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Notes

"VICARIOUS IMMUNITY" OF PRIVATE PERSONS IN SECTION 1983 ACTIONS: "AN UNEXAMINED ASSUMPTION"[1]

In most federal circuits, when all the "state" defendants in an action under 42 U.S.C. § 1983 are accorded immunity, so are any private defendants who have allegedly acted in concert with them. After tracing the evolution of this doctrine of "vicarious immunity" and weighing the arguments for and against it, the author proposes the rejection of the doctrine and the adoption in its stead of a subjective and objective good faith standard for private section 1983 defendants alleged to have acted in concert with state officials.

IN RECENT YEARS the number of suits brought under 42 U.S.C. § 1983[2] has burgeoned.[3] Although the vast majority of

1. The phrase was used by Justice Frankfurter in his dissent in Monroe v. Pape, 365 U.S. 167 (1961): "a statutory interpretation which started as an unexamined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration." *Id.* at 220–21.

2. 42 U.S.C. § 1983 (1970) provides that:

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

3. In fiscal year 1960, 280 federal cases were filed under all the civil rights acts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1960 ANNUAL REPORT OF THE DIRECTOR 232, table C2. This figure accounted for 0.5% of the civil workload. *Id.* at 230, table C2. In fiscal 1977, 19,079 "private" (*i.e.*, where the United States was not a party) civil rights cases were filed in federal court, comprising 14.6% of the civil docket. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR 317–318, table C2. Because the United States cannot sue or be sued under § 1983, United States v. Biloxi Mun. School Dist., 219 F. Supp. 691 (S.D. Miss. 1963), *aff'd on other grounds sub nom.* United States v. Madison County Bd. of Educ., 326 F.2d 237 (5th Cir.), *cert. denied*, 379 U.S. 929 (1964), only private civil rights cases were counted. The total number was computed by adding 7,750 civil rights prisoner petitions to 11,329 private suits under the general heading of civil rights. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR 318, table C2. The exact number of these private civil rights actions that were brought under § 1983 cannot be determined because the civil filing forms used by the Administrative Office of the United States Courts do not ask courts to distinguish between the different civil rights statutes.

these suits are against state officials,[4] section 1983 actions against private persons are not uncommon.[5] Courts have deemed private parties to be acting "under color" of state law and thus amenable to section 1983 in two situations: when they exercise a function traditionally performed by the state[6] or when they engage in joint activity with the state.[7] In either situation, private persons are utilizing the power of the state, and consequently, section 1983 requires them to exercise that power within its constitutional bounds. Since 1965, however, several courts have severely limited the liability of the private individual who acts in concert with a public official by holding that when the official is himself immune from section 1983,[8] the private individual is too since he has not conspired with a person against whom a valid claim can be asserted.[9] Thus, this private defendant benefits vicariously from the immunity accorded the public official.

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4. For the purposes of this Note, "state officials," "public officials," and "public servants" are used interchangeably. Each refers to an employee or official of a state or subdivision of a state. The Supreme Court has determined that the District of Columbia is not a "State or Territory" within the meaning of § 1983. District of Columbia v. Carter, 409 U.S. 418 (1973).

5. McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 RUT.-CAM. L.J. 65, 81 (1976).

6. *E.g.*, Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) (landlord enforcing a lien, historically a function of the sheriff); Larkin v. Bruce, 352 F. Supp. 1076 (E.D. Wis. 1972) (private person bringing a public nuisance action under a state statute that permits him to proceed in place of the state attorney general), *appeal dismissed*, 483 F.2d 1407 (7th Cir. 1973); Decarlo v. Joseph Horne & Co., 251 F. Supp. 935 (W.D. Pa. 1966) (private detective making an arrest).

7. *E.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (conspiracy between a store employee and a policeman to deny service to a white teacher in the company of black students); Due v. Tallahassee Theatres, Inc., 333 F.2d 630 (5th Cir. 1964) (an exhibitor and a county sheriff acting in concert to enforce racial segregation in a theater); Kissinger v. New York City Transit Auth., 274 F. Supp. 438 (S.D.N.Y. 1967) (a company, under contract with the New York City Transit Authority to sell advertising, refusing to accept anti-war posters).

8. A wide range of state officials have a qualified immunity from § 1983. Only three have an absolute immunity: legislators, Tenney v. Brandhove, 341 U.S. 367 (1951); judges, Pierson v. Ray, 386 U.S. 547 (1967); and prosecutors, Imbler v. Pachtman, 424 U.S. 409 (1976). *See* text accompanying notes 51-87 *infra*.

9. The doctrine of "vicarious immunity" is established in five circuits: Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977); Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975); Waits v. McGowan, 516 F.2d 203 (3rd Cir. 1975); Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); and three district courts outside these circuits: Dennis v. Hein, 413 F. Supp. 1137 (D.S.C. 1976); Harley v. Oliver, 404 F. Supp. 450 (W.D. Ark. 1975), *aff'd on other grounds*, 539 F.2d 1143 (8th Cir. 1976); Stambler v. Dillon, 302 F. Supp. 1250 (S.D.N.Y. 1969). Only the First Circuit has refused to apply the doctrine and has held instead that private persons who conspire with an immune state official may be liable under § 1983. Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976); *accord*, Slotnick v. Staviskey, 560 F.2d 31 (1st Cir.

While the section 1983 immunities of certain state officials may well be justified, it is the contention of this Note that these immunities should not be vicariously enjoyed by private persons. Part I of the Note gives a brief overview of the Supreme Court's interpretation of section 1983. Part II examines in more detail the Court's construction of section 1983 immunities for certain public officials. The following part demonstrates how the doctrine of vicarious immunity has extended these immunities to private persons. The Note concludes by taking issue with this doctrine and by proposing instead a section 1983 defense of subjective and objective good faith for private persons who act in concert with state officials.

I. THE BACKGROUND AND SCOPE OF SECTION 1983

Section 1983 was enacted as section 1 of the Civil Rights Act of 1871.[10] The Act, which became known as the Ku Klux Klan Act, was passed in response to rampant, organized atrocities perpetrated by the Klan against blacks and white Republicans.[11] While other sections of the Act were designed to reach the lawless activities of the Klan,[12] section 1983 was aimed primarily at the inaction of state and local authorities in the face of this lawlessness.[13] Thus, it provided a federal remedy for deprivations of

1977) (dictum), *cert. denied*, 434 U.S. 1077 (1978). *See* text accompanying notes 98–156 *infra*.

In Sparkman v. McFarlin, No. 75–129 (N.D. Ind. May 13, 1976), *rev'd*, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978), the district court followed the principle of vicarious immunity that had been established in the Seventh Circuit. On appeal, however, only the issue of judicial immunity reached the Supreme Court. While the Court did not consider the issue of vicarious immunity, it did note the split in the lower courts. 435 U.S. at 364 n.13.

10. Act of April 20, 1871, ch. 22, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1970)).

For a more comprehensive discussion of the background of § 1983, see *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135–1190 [hereinafter cited as *Section 1983 Developments*].

11. *See* CONG. GLOBE, 42 Cong., 1st Sess. 152–58 (1871); D. CHALMERS, HOODED AMERICANISM 8–21 (1965).

12. Sections 2–5; *see* CONG. GLOBE, 42d Cong., 1st Sess., app., at 335–36 (1871).

13. "[T]he remedy created was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." Monroe v. Pape, 365 U.S. 167, 175–76 (1961) (emphasis original).

For an example of alleged inaction by state officials in response to the Klan's atrocities, see CONG. GLOBE 42d Cong., 1st Sess., app., at 505 (1871) (remarks of Sen. Pratt):

> [O]f the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples.

constitutional guarantees by state officials.

To prevail under section 1983, a plaintiff had to demonstrate: (1) that he had been deprived of a right, privilege, or immunity secured by the Constitution or federal law, and (2) that this deprivation had occurred under color of state law.[14] While the broad language of the statute promised an accessible and effective vehicle for redressing constitutional deprivations, its vagueness left the scope of the statute susceptible to judicial manipulation.[15]

In the *Slaughter-House Cases*,[16] a post-Reconstruction Supreme Court was called upon to decide which privileges and immunities were secured by the Constitution through the fourteenth amendment. In keeping with its policy of limiting the role of the federal government,[17] the Court held that the privileges and immunities mentioned in article IV, section 2[18] were state created rights.[19] In a much criticized opinion,[20] Justice Miller reasoned that article IV did not create these rights, but merely ensured that whatever fundamental rights a state granted its own citizens would not be denied to citizens of other states.[21] Since these fundamental privileges and immunities originated in the states, they were left to the state governments for protection and were not subject to the supervision of the federal government.[22] Thus, the ef-

14. *See* note 2 *supra*.

15. "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues." United States v. Williams, 341 U.S. 70, 74 (1950) (Frankfurter, J.).

16. 83 U.S. (16 Wall.) 36 (1873).

17. *E.g.*, C. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 22–23 (1912).

18. U.S. CONST. art. IV, § 2, cl. 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

19. 83 U.S. (16 Wall.) at 78.

20. *E.g.*, Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 24–25 (1954); Gressman, *The Unhappy History of Our Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1337–38 (1952). *Contra*, P. PALUDAN, A COVENANT WITH DEATH 268 n.37 (1975).

21. 83 U.S. (16 Wall.) at 77.

22. *Id.* at 78. Justice Miller built on dictum in Corfield v. Coryell, 6 Fed. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230). In *Corfield*, Judge Washington construed the "privileges and immunities" of article IV, section 2 to be "fundamental; which belong, of right, to the citizens of all free governments," *id.* at 551, and suggested that these rights might fall under the following headings: "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . ." *Id.* at 551–52. While the opinion has been much cited, it is unclear whether its interpretation of the provision guaranteed substantive rights secured by the Constitution or merely ensured that visitors to a state would be treated the same as local citizens. Justice Miller gave it the latter construction, while Justice Field emphasized that the privileges and immunities are those that "*belong to the citizens of all*

fect of the *Slaughter-House* decision was to eliminate practically all civil rights from the protection of the fourteenth amendment.

Alongside this narrow interpretation of the fourteenth amendment emerged the state action or "under color of state law" requirement.[23] As the Court explained in the *Civil Rights Cases*:[24]

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. . . . Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges . . . .[25]

Thus, the fourteenth amendment did not reach the actions of private individuals but only those of state governments or state officials.

In dictum, the *Civil Rights Cases* laid the foundation for the next assault on the fourteenth amendment by stating that if illegal conduct was not "sanctioned in some way by the State," it did not amount to state action.[26] Relying on this dictum, the Court, in *Barney v. City of New York*,[27] dismissed a suit to enjoin the construction of a subway tunnel where the plaintiff alleged that such construction would constitute a taking of his property without due process of law, in violation of the fourteenth amendment.[28] The Court stated that unauthorized activity by public officials in violation of state law was not "action by the State," and consequently, no basis for federal jurisdiction existed.[29] Although *Barney* was substantially cut back by subsequent decisions,[30] it was generally

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free governments." 83 U.S. (16 Wall.) at 97 (Field, J., dissenting) (emphasis original). Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 9–12 (1949).

23. Insofar as the 1871 Civil Rights Act was passed to enforce the fourteenth amendment, "under color" of law is read as coincident with "state action." United States v. Price, 383 U.S. 787, 794 n.7 (1966) (and cases cited therein); Brief for United States at 45, United States v. Classic, 313 U.S. 299, 326 (1941) (where the issue was first argued). *Contra*, Monroe v. Pape, 365 U.S. 167, 216–18 (1961) (Frankfurter, J., dissenting in part).

24. 109 U.S. 3 (1883).

25. *Id.* at 11; *see* Virginia v. Rives, 100 U.S. 313, 318 (1879), where the Court, in dictum, stated: "The provisions of the Fourteenth Amendment . . . all have reference to State action exclusively, and not to any action of private individuals."

26. 109 U.S. at 17.

27. 193 U.S. 430 (1904).

28. *Id.* at 430–33.

29. *Id.* at 437.

30. *E.g.*, Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913); Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907).

accepted that action prohibited by the state was not state action.[31] Thus, the illegal conduct of state officials that section 1983 was designed to reach was now beyond its scope.

The Supreme Court's narrow construction of both privileges and immunities, and state action severely limited the use of section 1983. In fact, until the Court's seminal decision in *Monroe v. Pape* in 1961,[32] the statute lay virtually dormant.[33] The foundation for *Monroe* was laid in two cases that involved violations of criminal provisions of the 1870 Civil Rights Act.[34] In *United States v. Classic*,[35] the Court held that the conduct of state election officials, although illegal, had occurred under color of state law: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[36]

This interpretation was affirmed four years later in *Screws v. United States*.[37] Writing for a plurality of four, Justice Douglas held that the fatal beating of a young black had been administered under color of law:

> Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law.[38]

Thus, at least in a criminal context, state officials could be held liable for illegal or unauthorized conduct if it occurred under "pretense" of law.

The stage was set for *Monroe*.[39] In circumstances only too

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31. *E.g., Section 1983 Developments, supra* note 9, at 1161 n.139; *see, e.g.*, Monroe v. Pape, 365 U.S. 167, 212–17 (1961) (Frankfurter, J., dissenting in part).

32. 365 U.S. 167 (1961).

33. *E.g., Section 1983 Developments, supra* note 9, at 1161; *see* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Remedy?*, 26 IND. L.J. 361, 363 (1951) (stating without citation that from 1871 to 1920 only 21 cases were brought under § 1983. SHEPARD'S UNITED STATES CITATIONS (6th ed. 1968) indicates only 15 Supreme Court cases involving § 1983 during the 51-year period). Until *Monroe*, the most successful use of § 1983 was in the area of voting rights. *See* Comment, *supra* at 370.

34. Act of May 31, 1870, ch. 114, §§ 6, 7, 16 Stat. 140 (current version at 18 U.S.C. §§ 241, 242 (1970)).

35. 313 U.S. 299 (1941).

36. *Id.* at 326.

37. 325 U.S. 91 (1945).

38. *Id.* at 111.

39. 365 U.S. 167.

similar to the atrocities that inspired section 1983,[40] police, without a warrant, allegedly broke into and ransacked the home of a black family. The Court found that the plaintiff's fourth amendment right to be free from unreasonable searches had been violated.[41] The defendants contended, however, that they had not acted under color of law since their conduct had not been authorized by state law or custom.[42] The Court, again per Justice Douglas, held that the interpretation given "under color of law" in the criminal setting was applicable to civil cases as well.[43] Thus, it was settled: the "ultra vires" defense of public officials was no longer available in section 1983 suits.

Of course, *Monroe* alone did not cause the deluge of section 1983 actions that were filed in the next seventeen years.[44] In addition to occurring under color of law, the deprivation must involve a right, privilege, or immunity secured by the Constitution. Although Justice Miller's majority opinion in the *Slaughter-House Cases* has made the privilege and immunities clause of the fourteenth amendment a "dead letter,"[45] the Court subsequently has given expansive readings to both the due process and equal protection clauses. As a result, the number of constitutionally protected rights has mushroomed. This coupled with *Monroe's* interpretation of "under color" has been the impetus for the vast increase in section 1983 filings.

II. SECTION 1983 IMMUNITIES

The recent flood of section 1983 litigation has placed an increasing burden on the federal courts.[46] Part of this burden has been dissipated by Supreme Court decisions which have granted either absolute[47] or qualified[48] immunity to state officials acting in

40. *Id.* at 203 (Frankfurter, J., dissenting in part); *see* Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 277–78 (1965).

41. 365 U.S. at 171.

42. *Id.* at 172.

43. *Id.* at 187.

44. *See* note 3 *supra.*

45. *See* text accompanying notes 16-22 *supra.*

46. *See* note 3 *supra.*

47. Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators).

48. Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (superintendents of mental hospitals); Wood v. Strickland, 420 U.S. 308 (1975) (school board members); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governors, university presidents, officers and members of national guards); Pierson v. Ray, 386 U.S. 547 (1967) (policemen).

their official capacity.[49] This portion of the Note examines the standards the Court has applied in establishing these immunities in order to provide a framework for determining if and to what extent private persons who act in concert with state officials should be immune from section 1983 liability.

The sweeping remedial language of section 1983[50] neither mentions nor suggests immunity. Yet, rather than apply the statute literally and thereby expose every state official to a standard of strict liability, the Court has generally relied upon common law principles of immunity. Beginning with *Tenney v. Brandhove*,[51] the Court held that state legislators acting within their official capacity are immune from suit under section 1983.[52] The Court reasoned that the doctrine of legislative immunity was so well established by both federal[53] and state[54] constitutional provisions

49. While normally only an absolute immunity will defeat a suit prior to trial, both types of immunity effectively decrease the number of § 1983 filings by deterring potential plaintiffs from suing. An official who enjoys an absolute immunity will prevail at the outset, as long as he can establish by pleadings or affidavit that his actions were within the scope of his immunity. On the other hand, a qualified immunity requires the defendant to prove that he acted in good faith and usually does not avoid a trial. *But cf.* Procunier v. Navarette, 434 U.S. 555 (1978) (defendant prison officials, accused of interfering with a prisoner's mail, prevailed on a motion for summary judgment by establishing that they acted in good faith as a matter of law, since at the time of their actions no constitutional right concerning the correspondence of convicted prisoners had been clearly established).

In addition to restricting the use of § 1983 by creating immunities for various state officials, the Court has also narrowed the scope of the statute by its recent § 1983 decisions which have expressed a concern for states' rights. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977) (no cruel or unusual punishment in light of adequate local supervision of the administration of corporal punishment in public schools); Paul v. Davis, 424 U.S. 693 (1976) (finding no federally protected interest in reputation to sustain cause of action in a defamation suit against local police officials); Rizzo v. Goode, 423 U.S. 362 (1976) (finding no persuasive pattern of law enforcement intimidation that would justify abrogating broad principles of federalism applicable to internal disciplinary affairs of state agencies).

50. "*Every* person who, under color of *any* statute . . . subjects . . . *any* . . . other person to the deprivation of *any* rights, privileges, or immunities . . . *shall be liable* . . . ." 42 U.S.C. § 1983 (1970) (emphasis added).

51. 341 U.S. 367 (1951).

52. *Id.* at 379.

53. U.S. CONST. art. I, § 6 provides in part that:

> Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Some have contended that judicial immunity is, by implication, constitutionally protected. Bauers v. Heisel, 361 F.2d 581, 588–89 (3d Cir. 1966) (abrogation of judicial immunity would deprive states of republican form of government guaranteed by article IV, § 4 of the Constitution); *Ex parte* Virginia, 100 U.S. 339, 362 (1879) (dissenting opinion)

and by common law[55] that if Congress had intended to eliminate the doctrine, it would have done so expressly. In support of this argument, the Court noted that legislators are naturally staunch advocates of legislative freedom, and if they were to curtail legislative immunity, they would be unlikely to do so in a covert manner.[56] Moreover, the Court approved of the policy rationale underlying the immunity: namely, that legislators should be free to act without fear of reprisal in performing their official duties.[57]

Similarly, in *Pierson v. Ray*,[58] the Court held that judges acting within their jurisdiction are immune from section 1983.[59] The Court relied on essentially the same reasoning as it had in *Tenney*. It found absolute immunity for judges to be solidly grounded at common law[60] and clearly warranted by the need to protect the

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(independence of state in federal union requires independence of state judicial as well as legislative officials), *noted in* Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 324 n.13 (1969). Legislators, however, enjoy the only immunity that is explicitly guaranteed by the Constitution.

54. When *Tenney* was decided, 41 of the 48 states had analogous constitutional provisions establishing legislative immunity. 341 U.S. at 375.

55. *Id.* at 373–74, 377 (discussing Coffin v. Coffin, 4 Mass. 1, 27 (1808) and Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810)).

56. 341 U.S. at 376.

57. *Id.* at 373.

58. 386 U.S. 547 (1967).

59. *Id.* at 554–55.

60. *Id.* at 553–54 (discussing Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872)). The plaintiff in *Bradley* alleged that he was maliciously disbarred by the defendant judge. The court held that judges are not liable "for their judicial acts, even when such acts are in excess of their jurisdiction" (for example, convicting someone of a nonexistent crime). In dictum, *Bradley* stated that when judges act in the complete absence of subject matter jurisdiction, they are not immune from civil suit. *Id.* at 351–52.

Citing *Bradley*, the *Pierson* Court observed that "few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . ." 386 U.S. at 553–54. *Contra*, 386 U.S. 547, 563–64 (Douglas, J., dissenting in part) (discussing *Ex parte* Virginia, 100 U.S. 339 (1879)); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 325–27 & nn.29–32 (1969). It is interesting to note that *Bradley* was decided after the 1871 Civil Rights Act was passed. A proper legislative inquiry would have considered Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868). *Randall* differed from *Bradley* in that it suggested that judges may be liable for corrupt or malicious judicial acts. *Id.* at 536.

The recent Supreme Court case of Stump v. Sparkman, 435 U.S. 349 (1978), shed new light on the scope of judicial immunity. The plaintiffs in *Stump* sued a judge for approving a sterilization petition. Justice Stewart, in dissent, opined not that the defendant judge acted without jurisdiction but that his approval of the petition did not constitute a judicial act. *Id.* at 365 (Stewart, J., dissenting). In both *Bradley* and *Pierson*, there was no question that the defendant judges' conduct was judicial in nature. As a result, neither opinion defined what constitutes a judicial act. In *Stump*, the Court stated that the "factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*,

objectivity and integrity of judicial decisionmaking.[61] The Court reasoned that Congress would have provided specifically for the abolition of judicial immunity had it so intended.[62]

A second aspect of *Pierson* involved three police officers accused of false arrest and imprisonment and the defense available to them under section 1983. The Court did not expressly consider the legislative intent towards policemen. It did, however, examine the common law defense to false arrest and the policy behind it.[63] Relying on the dictum in *Monroe v. Pape*[64] that section 1983 "should be read against the background of tort liability. . . ."[65], the Court accorded the police officers the defense of good faith and probable cause—the same defense available to them in a common law tort action for false arrest and imprisonment.[66]

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whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.* at 362.

61. "[I]t is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." 386 U.S. at 554 (quoting Scott v. Stansfield, [1868] L.R. 3 Ex. 220, 223), *quoted in* 80 U.S. (13 Wall.) at 349–50 n.‡. Moreover, *Pierson* reasoned that a judge's "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." 386 U.S. at 554.

62. 386 U.S. at 554–55. Chief Justice Warren treated the issue of legislative intent summarily, simply stating that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554.

Justice Douglas disagreed. Quoting from the Reconstruction debates, he contended that the statute was aimed at lawlessness due in part to judges who were in many instances "wholly inimical to the impartial administration of law and equity." *Id.* at 559 (Douglas, J., dissenting in part) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (remarks of Rep. Rainey)). Moreover, Justice Douglas pointed out that every legislator who spoke to the question of judicial immunity assumed that judges would be liable under the statute. 386 U.S. at 561 (Douglas, J., dissenting in part). These legislators, however, were all opponents of the 1871 Civil Rights Act and might naturally have tended to exaggerate what they considered to be the ill effects of the legislation.

63. 386 U.S. at 555.

64. 365 U.S. 167 (1961).

65. 386 U.S. at 556 (quoting Monroe v. Pape, 365 U.S. at 187).

66. The *Pierson* Court's use of the *Monroe* dictum has caused courts much confusion. In *Monroe*, the Court analogized to tort law to demonstrate that a less stringent standard of intent was required by § 1983 than the willfulness that was necessary under a criminal statute. *Pierson* extended the tort analogy to § 1983 defenses. By citing to the Restatement of Torts and a treatise on torts, *Pierson* suggested a strict application of the relevant tort defense. Many courts have accepted this rigid interpretation, *see, e.g.*, Anthony v. White, 376 F. Supp. 567 (D. Del. 1974) (discussed in Bristow, *§ 1983 An Analysis and Suggested Approach*, 29 ARK. L. REV. 255, 277 (1975)) (deciding a § 1983 suit by applying § 662 of the Restatement of Torts), without recognizing that the divergent policies of § 1983 and tort law may sometimes require different results. Nahmod, *Section 1983 and the*

A review of *Tenney* and *Pierson* reveals that the Court has developed a two-step approach to establishing section 1983 immunities. *Tenney* demonstrated that the threshold issue in a section 1983 immunity analysis is one of statutory construction—namely, did Congress intend that there be no immunities under section 1983? By holding that state legislators are immune from section 1983 suits, the *Tenney* Court clearly indicated its conviction to answer this question in the negative. The second step of the analysis involves weighing the importance of the common law immunity to determine whether a similar immunity should be accorded under section 1983. Here, the Court examines the policy behind the immunity and decides whether such an immunity is necessary to protect the office of the relevant official. In *Tenney* and *Pierson*, resolving this issue in the affirmative meant applying the common law immunity intact to section 1983.

Scheuer v. Rhodes[67] added a third tier to the Court's construction of section 1983 immunities. In *Scheuer*, the Court was concerned with the defenses of executive officials. *Scheuer* began with the same two-step analysis used in *Tenney* and *Pierson*. As in *Tenney*, it first reasoned that section 1983 had not been intended to be read in derogation of common law principles of immunity.[68] Next, the Court considered the importance of an immunity for executive officials and concluded that some immunity—absolute or qualified—was warranted, reasoning that it was better to permit some injuries to remain unredressed than to inhibit forthright executive decisionmaking.[69] At this point in its

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"Background" of Tort Liability, 50 IND. L.J. 5, 10-11 (1974): "Because constitutional interests are at stake, deterrence, as furthered by the private enforcement of fourteenth amendment guarantees, might be more important under section 1983 than it is under tort law." *Id.* (footnote omitted). *See* Monroe v. Pape, 365 U.S. 167, 196 n.5 (Harlan, J., concurring): "It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection."

Moreover, courts are in conflict as to whether *Pierson* requires an application of the pertinent state common law defense or whether it mandates a federal constitutional standard. *Compare* Thamel v. East Hartford, 373 F. Supp. 455 (D. Conn. 1973) (defense of good faith and probable cause not available to police officers in a § 1983 suit for false arrest for a misdemeanor, since under Connecticut law a misdemeanor must occur in the officer's presence in order for him to act on it without a warrant) *with* Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974), *and* Diamond v. Morland, 395 F. Supp. 432 (S.D. Ga. 1975) (both courts according police officers the federal constitutional defense of probable cause in cases involving § 1983 actions for false arrest for a misdemeanor).

67. 416 U.S. 232 (1974).

68. *Id.* at 243-44.

69. *Id.* at 241-42.

analysis, the Court added a new wrinkle. Instead of adopting the common law immunity intact,[70] it balanced the need to protect executive conduct with the objectives of section 1983 and held that executive officers would not be liable under section 1983 where they had acted upon "reasonable grounds . . . , coupled with good-faith belief . . . ."[71] Thus, by considering the purposes of section 1983, *Scheuer* rejected the absolute immunity granted executive officials at common law and instead accorded them only a qualified immunity.

The first section 1983 immunity case confronted by the Court after *Scheuer* was *Wood v. Strickland*.[72] In *Wood*, the Court applied a similar three-tier analysis in determining the immunity to be accorded school board officials. First, recalling the prior cases, the Court observed that in enacting section 1983 Congress did not preclude the application of common law principles of immunity.[73] Second, after surveying the common law, the Court concluded that under it, school officials enjoyed immunity with respect to "all good-faith, nonmalicious action taken to fullfill their official duties,"[74] and that absent this qualified immunity, individuals would be deterred from serving on school boards and those that did would be fearful of making independent and forceful decisions.[75] On the other hand, an absolute immunity would be unjustified, since its benefits would be outweighed by "the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations."[76]

In the third step of its analysis, the Court balanced the need to protect school board members from being intimidated from properly performing their duties with the need to maintain the viability of section 1983.[77] Accordingly, the Court concluded that a school board member should be immune from section 1983 liability only if he has acted both in subjective good faith (*i.e.*, with an honest belief) and in objective good faith (*i.e.*, with due care).[78]

The next full Supreme Court opinion recognizing an immunity

70. Both Spalding v. Vilas, 161 U.S. 483 (1896) and Barr v. Matteo, 360 U.S. 564 (1959), had established an absolute immunity for executive officials.

71. 416 U.S. at 247.

72. 420 U.S. 308 (1975).

73. *Id.* at 316–17.

74. *Id.* at 318 n.9.

75. *Id.* at 319–20.

76. *Id.* at 320.

77. *Id.* at 319–20.

78. *Id.* at 322.

under section 1983 was *Imbler v. Pachtman*.[79] In establishing an absolute immunity for prosecutors, *Imbler* added a possible fourth step to the Court's three-tier approach to section 1983. *Imbler* began its analysis by noting that the language of the statute suggests strict liability.[80] By reviewing the section 1983 immunity precedents, however, the Court demonstrated that this interpretation has not prevailed.[81] Moreover, the Court cited *Tenney* as establishing that "§ 1983 is to be read in harmony with general principles of tort immunities . . . rather than in derogation of them."[82]

Next, *Imbler* examined the common law and found that, in general, prosecutors have historically enjoyed absolute immunity from civil suits.[83] The Court then considered the import of such an immunity and decided that it was necessary to protect the prosecutor's role.[84] Like *Scheuer* and *Wood* before it, *Imbler* did not simply adopt the common law immunity. Rather, it queried whether the same policies that supported an absolute immunity at common law were similarly applicable under section 1983. The Court concluded that if prosecutors were accorded anything less than absolute immunity from section 1983 actions, their prosecutorial functions would be unacceptably inhibited.[85] Furthermore, the Court noted that prosecutors could be controlled by criminal sanctions and professional discipline.[86]

The Court narrowed the situation to which its holding would apply by adding a fourth step to its section 1983 analysis. Using a functional analysis, *Imbler* held that when a prosecutor was acting in a quasi-judicial capacity, either by initiating a prosecution or presenting a case, he had an absolute immunity from section 1983

79. 424 U.S. 409 (1976). In O'Connor v. Donaldson, 422 U.S. 463 (1975), the Court remanded the issue of a state mental hospital superintendent's liability under § 1983 so that it could be considered in light of *Wood*.

80. 424 U.S. at 417.

81. *Id.* at 417–19.

82. *Id.* at 418.

83. *Id.* at 421–22.

84. *Id.* at 422–23.

85. *Id.* at 427–28. The Court explained that "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* at 424–25. Moreover, as with a judge, claims against a prosecutor will drain his time and divert his energies from the primary responsibilities of his office. *Id.* at 425. *See generally* Note, *Delimiting the Scope of Prosecutorial Immunity From Section 1983 Damage Suits*, 52 N.Y.U. L. REV. 173, 180–83 (1977).

86. 424 U.S. at 429.

liability.[87] The functional analysis that *Imbler* employed is relevant only when determining the immunity of an official who wears more than one hat. However, the three-tier approach used by the *Scheuer* and *Wood* Courts can be applied to any section 1983 defendant—even the private defendant.

III. THE DEVELOPMENT OF "VICARIOUS IMMUNITY"

Although section 1983 is generally considered a remedy for abuse by public officials, it has been broadened to include private defendants. As previously noted, when private individuals exercise a function traditionally performed by the state, they are clothed with the authority of the state and therefore act under color of state law.[88] In the 1970 decision *Adickes v. S.H. Kress & Co.*,[89] the Supreme Court held that private persons who willfully participate in joint activity with state officials act under color of law for purposes of section 1983.[90] The expansion of the under color requirement in *Adickes* was based on *United States v. Price*,[91] a case which, like those cases relied upon in *Monroe*, involved the criminal counterpart of section 1983.[92] In *Price*, three police officers allegedly conspired with fifteen private individuals to murder three civil rights workers by releasing them from jail, thwarting their "escape," and eventually killing them.[93] As to the private defendants, the Court held:

87. *Id.* at 430–31. Under a functional analysis, a prosecutor enjoys an absolute immunity similar to that of a judge when the prosecutor functions in a quasi-judicial role. When the prosecutor operates in an investigatory capacity, carrying out police-like activities, he has only a qualified immunity similar to a police officer's. Note, *supra* note 85, at 187–90; *see, e.g.*, Hampton v. City of Chicago, 484 F.2d 602, 608–09 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); Robichaud v. Ronan, 351 F.2d 533, 536–37 (9th Cir. 1965). *Imbler* did not comment on whether it would have granted only a qualified immunity had the defendant been acting in an investigatory manner. 424 U.S. at 430–31.

Procunier v. Navarette, 434 U.S. 555 (1978), is the most recent Supreme Court case to establish an immunity under § 1983. *Procunier* is an anomaly since it abandoned the mode of analysis developed in prior § 1983 immunity cases. *Id.* at 568 (Stevens, J., dissenting). Instead of fashioning an immunity by balancing the interests of the role of the defendant prison officials with the policies of § 1983, the Court summarily applied the qualified immunity that it had previously articulated in *Wood* even though *Wood* had expressly limited its holding to the context of school discipline. 420 U.S. at 322.

88. *See* note 6 *supra.*

89. 398 U.S. 144 (1970).

90. *Id.* at 152.

91. 383 U.S. 787 (1966).

92. 18 U.S.C. § 242 (1970).

93. 383 U.S. at 790.

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.[94]

In *Adickes*, the defendant store refused to serve lunch to a white school teacher who was in the company of six black students.[95] The teacher alleged that the defendant had deprived her of her right not to be discriminated against on the basis of race and that the refusal to serve her resulted from a conspiracy between the defendant and a policeman.[96] The Court found that the under color requirement was satisfied, holding that a private party involved in a conspiracy with a state official could be liable under section 1983.[97] This holding promised to establish a far-reaching precedent by exposing a new class of persons to section 1983 liability. Five years prior to *Adickes*, however, in *Haldane v. Chagnon*,[98] the Ninth Circuit had extended the immunity of a state court judge to two private attorneys who had allegedly conspired with the judge.[99] In so doing, *Haldane* introduced the principle of vicarious immunity. The development of this doctrine would, to a significant extent, frustrate the use of *Adickes* as a means of imposing section 1983 liability on private defendants.

The suit in *Haldane* arose from a divorce proceeding during which the presiding judge had ordered that one of the parties, Eldon Haldane, undergo a psychiatric examination.[100]As a result of having been subjected to the examination, Haldane brought a section 1983 damage claim for over ten million dollars against the trial court judge, the judge who had signed the order for the mental examination, and two attorneys and a bailiff who had been either directly or indirectly involved in filing the petition for the examination.[101] Arguing pro se, Haldane stated in a rambling

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94. *Id.* at 794.

95. 398 U.S. at 149.

96. *Id.* at 147–48.

97. *Id.* at 152. The Court also held that the plaintiff could establish a § 1983 claim against the private defendant if she could prove that she was denied service because of a custom of racial segregation in public restaurants that had "the force of law by virtue of the persistent practices of state officials." *Id.* at 167. This was the first time the Court had examined the "custom or usage" language of § 1983. *See* note 2 *supra.*

98. 345 F.2d 601 (9th Cir. 1965).

99. *Id.* at 604–05. *Haldane* had Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959), as precedent for finding that private persons who conspire with state officials act under color of state law. *Id.* at 298.

100. 345 F.2d at 602.

101. *Id.*

complaint that the defendants had conspired to violate a number of his constitutional rights.[102] The case was dismissed by the district court, and Haldane appealed, attempting to join ten more defendants and to increase his damage claim to twenty-three million dollars.[103]

The Ninth Circuit found the defendant judges and the bailiff immune from section 1983 liability.[104] As to the defendant attorneys, the court held:

> The attorneys were not State officers, and they did not act in conspiracy with a State officer against whom appellant could state a valid claim. It follows that they did not and could not, commit the alleged wrongful acts "under color of state law or authority;" hence they are not subject to liability under the Civil Rights Act.[105]

The holding in *Haldane* implies that had the state officers not been immune, the private defendants would have committed the alleged illegal acts under color of law.[106] Yet, by stating that the attorneys were not under color of law because they did not conspire with a public official against whom a valid claim could be stated, the court extended the immunity of the state officials to the private defendants.[107] There was no precedent for such a rationale. The cases cited by the court merely stood for the proposition that private attorneys do not act under color of state law.[108] Thus, the doctrine of vicarious immunity began as a mere as-

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102. *Id.* Haldane's complaint was not available, but the following sample from his brief is typical of his legal writing style:

> THE COURT OF STAR CHAMBER was thought to have been abolished in 1641. Not so; it exists today, headquartered at 111 N. Hill St., Los Angeles . . . presided over by Pierson Hall, J., who conducts the judicial business of the United States in the dark, ex parte, without notice or hearing . . . . The Constitution *HAS BEEN DESTROYED* in all the HALDANE cases. DUE PROCESS OF LAW now lies GROUND TO DEATH in state and federal courts within the Ninth Circuit, the authority and jurisdiction of the SUPREME COURT, nullified by the local Hitlers, Himmlers, and Stalins ON THE BENCH, AT THE BAR.

Brief for Appellant at 5–6, Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965) (citations omitted).

103. Brief for Appellees (Byrne and Fortas) at 2, Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965).

104. 345 F.2d at 604.

105. *Id.* at 604–05.

106. *Id.*

107. *Id.*

108. Skolnick v. Spolar, 317 F.2d 857, 859 (7th Cir. 1963); Skolnick v. Martin, 317 F.2d 855, 857 (7th Cir. 1963); Bottone v. Lindsley, 170 F.2d 705, 706 (10th Cir. 1948), *cert. denied*, 336 U.S. 944 (1949); Swift v. Fourth Nat'l Bank, 205 F. Supp. 563, 566 (M.D. Ga. 1962).

sumption based on inapplicable citations.[109]

The first court to apply *Haldane* was the Southern District of California in *Shakespeare v. Wilson*.[110] The plaintiff's suit was based on nine unsuccessful civil suits and one criminal prosecution in which she had been acquitted.[111] She brought an action under sections 1981–1986 against sixty defendants, including twenty-one judges and several private defendants.[112] Arguing pro se, she alleged vague acts of misconduct and attempted to give them a constitutional color by inserting references to due process and equal protection.[113] Judicial immunity defeated the claims against the state officials.[114] A section 1985(3) claim against the private defendants, alleging a conspiracy between them and various judges, was dismissed on the basis of *Haldane*.[115]

In 1969 the vicarious immunity principle gained momentum when it was applied for the first time outside of the Ninth Circuit.[116] In *Stambler v. Dillon*,[117] the plaintiffs, unsuccessful in three civil actions, brought suit in the United States District Court for the Southern District of New York, seeking five hundred thousand dollars in damages from the judge who had ruled against

109. *See* note 1 *supra*.

110. 40 F.R.D. 500 (S.D. Cal. 1966).

111. *Id.* at 502–03. The court explained:

> This action filed in pro per. is a typical example of the kind of action being filed with increasing frequency under the provisions of the Civil Rights Acts of 1871, 42 U.S.C. §§ 1981–1986. Having been defeated in state court proceedings and being unhappy and somewhat humiliated and frustrated by the results of such proceedings, these persons lash out at judges, attorneys, witnesses, court functionaries, newspapers and anyone else in convenient range, terming all of them corruptly evil and charging them with perjury and conspiracy in a last desperate effort to re-litigate the issues on which they have once lost and hoping to secure sizeable damages to boot.

Id. at 502.

112. *Id.* at 503.

113. *Id.* For a similarly pleaded § 1983 suit, which also was dismissed with reference to *Haldane*, see Sykes v. California, 497 F.2d 197 (9th Cir. 1974): "Sykes' complaint is typical of an increasing number of actions brought under the Civil Rights Statutes, whereby a plaintiff seeks to vindicate solely state law claims by peppering his allegations with frequent, vague references to due process and equal protection." *Id.* at 202.

114. 40 F.R.D. at 503, 504–05.

115. *Id.* at 504.

116. In dictum, the United States District Court for the Northern District of New York had stated that a private person "could not conspire with [a judge] who is immune under the Civil Rights Act." Jemzura v. Belden, 281 F. Supp. 200, 206 (N.D.N.Y. 1968). Presumably, the court meant that a private individual does not act under color of law when he conspires with an immune judge. For support, the court cited *Haldane* and Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948), apparently assuming the latter was precedent for *Haldane*. *See* note 108 *supra* and accompanying text.

117. Stambler v. Dillon, 302 F. Supp. 1250 (S.D.N.Y. 1969).

them, the opposing parties, their counsel, a trial witness, and various other private individuals.[118] The plaintiffs, appearing pro se, alleged in conclusory language that the defendants had conspired to deny them due process and equal protection.[119] The court ruled that the judge's actions were within the scope of his judicial capacity and that under *Pierson*[120] he was immune from liability.[121] As to the private individuals, the court cited *Haldane* and *Shakespeare* and held that these defendants could not be "liable under § 1983 because they did not act in conspiracy with a state official against whom a valid claim could be stated. Consequently, their allegedly wrongful actions were not done under color of state law . . . ."[122]

Certain similarities emerge from this trilogy. All were prompted by adverse verdicts in state court; in effect, the plaintiffs were attempting to use the civil rights statutes to appeal the state court judgments.[123] All the cases were argued pro se—often in broad, rambling, and conclusory language stating what appeared, at least on their face, to be frivolous claims. In each instance the plaintiffs were suing everyone "in convenient range"[124] and demanding seemingly excessive damages. In sum, it appears that the plaintiffs in these suits, whether knowingly or unknowingly, were abusing the judicial process. As a consequence, when various section 1983 immunities defeated the claims against all the defendants save the alleged private co-conspirators, the *Shakespeare* and *Stambler* courts were perhaps less apt to scrutinize a precedent that by its application would dismiss the claims against the remaining defendants and in so doing, achieve seemingly just results.

By the middle of 1975, the Fifth,[125] Third,[126] and Seventh[127] Circuits had fallen in line and adopted the doctrine of vicarious immunity. Yet not one court that had applied the doctrine had ever mentioned any underlying policy justifications. The Seventh

118. *Id.* at 1252.
119. *Id.*
120. 386 U.S. 547 (1967).
121. 302 F. Supp. at 1254–55.
122. *Id.* at 1255.
123. *E.g.*, Shakespeare v. Wilson, 40 F.R.D. 500, 504 (S.D. Cal. 1966).
124. *Id.* at 502.
125. Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970).
126. Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975).
127. Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975).

Circuit, in *Grow v. Fisher*,[128] was the first court to discuss the rule and to question its rationale.

Claude Grow claimed that the defendants, a prosecutor and five private individuals, had acted in concert to deprive him of various constitutional rights.[129] The court found that the prosecutor, in deciding whether or not to prosecute, had acted in a quasi-judicial capacity and thus was absolutely immune from section 1983 liability.[130] The *Grow* court then briefly discussed the principle of vicarious immunity. After first questioning the doctrine, the court suggested a possible rationale for the rule: if private persons were brought under the umbrella of immunity, they would be less fearful of the consequences of "getting involved" and reporting crime to the authorities.[131] In the end, although the Seventh Circuit had previously adopted the principle of vicarious immunity, it expressly refused to decide *Grow* on this basis.[132] Instead, it dismissed the claims against the private defendants on other grounds, and the doctrine remained intact.[133]

One year later, in *Dennis v. Hein*,[134] the South Carolina District Court applied the doctrine of vicarious immunity and endorsed the policy rationale that *Grow* had suggested.[135] In *Dennis*, the lessor of a truck swore out a criminal warrant against the lessee in order to collect an unpaid bill, charging breach of trust with fraudulent intent. The warrant was signed by the county magistrate, and the lessee was subsequently arrested, jailed, and

128. 523 F.2d 875 (7th Cir. 1975).

129. *Id.* at 876-77. The complaint stated that "Amy J. Blanche signed a criminal affidavit charging plaintiff Claude Grow with having unlawfully assaulted and battered with intent to gratify sexual desires said Amy Blanche's daughter, defendant Linda K. Blanche (McElfresh), then sixteen (16) years of age." *Id.* at 876. The affidavit was approved by a state prosecutor who proceeded to bring Grow to trial. Although Amy Blanche, Linda Blanche, Paula Eaton (Webb), and Lee Blanche all testified against Grow, he was found not guilty. *Id.* Grow alleged that after the trial, Lee Blanche attacked him with a blackjack, and that Grow swore out an affidavit against him. Although the prosecutor's office approved Grow's complaint against Blanche and had him arrested, Blanche was never brought to trial. Grow further alleged that Lee Blanche had subsequently beaten him, that Fred Eaton had threatened to kill him, and that Amy Blanche had harassed him by telephone. *Id.*

130. *Id.* at 877.

131. *Id.* at 878.

132. *Id.*

133. The dismissal of the claim was based on the court's determination that, entirely apart from the issue of immunity, the plaintiff had developed only general, conclusory allegations insufficient to establish that his constitutional rights had been violated by concerted action on the part of the private defendants and the state official. *Id.* at 879.

134. 413 F. Supp. 1137 (D.S.C. 1976).

135. *Id.* at 1141.

released only after posting bond in an amount approximately equal to the unpaid bill.[136] The lessee brought a section 1983 action against the lessor, alleging that he had conspired with the magistrate to deny the plaintiff his constitutional right not to be arrested or imprisoned illegally.[137] The court dismissed the case, finding that the magistrate enjoyed judicial immunity and that the immunity extended to the lessor.[138] The *Dennis* court reasoned that to permit courts "to entertain actions based on such allegations . . . of conspiracy between private citizens and judicial officers would subject every complainant in every case to potential liability," thereby deterring private citizen involvement in the treatment of crime.[139]

The Court of Appeals for the First Circuit, in *Kermit Construction Corp. v. Banco Credito Y Ahorro Ponceno*,[140] was the first court to refuse to extend official immunity under section 1983 to private co-conspirators. The plaintiff sued a bank, a construction company, and a court-appointed receiver for conspiring to avoid payment of a debt owed the plaintiff. The First Circuit decided that the receiver was an officer of the court and, as such, was entitled to judicial immunity. But it held also that the private defendants could not benefit from the receiver's immunity.[141] *Kermit* did not explain its decision not to extend official immunity to the private co-conspirators, nor did it acknowledge the contrary authority in other jurisdictions.

Slotnick v. Staviskey[142] afforded the First Circuit an opportunity to discuss its holding in *Kermit*. In *Slotnick*, the plaintiff alleged that various public officials and private parties had conspired to deprive him of a number of his civil rights.[143] The district court heard the case prior to *Kermit* and felt compelled to follow the precedent established in the other circuits.[144] Thus, it applied the doctrine of vicarious immunity and dismissed the

136. *Id.* at 1138.

137. *Id.* at 1139. The plaintiff also alleged malicious prosecution and abuse of process. The latter was based on the allegation that the lessor was using the office of the magistrate to collect his unpaid bills. *Id.* at 1138.

138. *Id.* at 1141.

139. *Id.*

140. 547 F.2d 1 (1st Cir. 1976).

141. *Id.* at 2, 3.

142. 560 F.2d 31 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). In the period between *Kermit* and *Slotnick*, the Sixth Circuit had adopted the doctrine of vicarious immunity. Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977).

143. 560 F.2d at 32.

144. *Id.*

claims against the private defendants.[145] In so doing, the court explained that to allow civil suits against parties allegedly conspiring with judges would force judges to serve as witnesses and explain their actions almost as if they themselves were on trial. To permit this, the court reasoned, would make judges vulnerable to indirect harassment and thus contravene one of the policies of absolute judicial immunity.[146]

On appeal, although the First Circuit affirmed, it did not apply the doctrine of vicarious immunity.[147] Instead, it dismissed the claims against the private defendants on the ground that the allegations of conspiracy were conclusory and not based on material fact.[148] In dictum, speaking only for himself, Chief Judge Coffin criticized the extension of immunity to private co-conspirators and approved the First Circuit's decision in *Kermit*:

> To hold otherwise would give an ill-conceived defense to judge and conspirator alike . . . . [W]hile others accord substantial weight to the embarrassment and inconvenience which a judge might suffer if he could be summoned into court as a witness, this writer looks upon such an interest as less important than that of bringing conspirators to book.[149]

Since *Slotnick*, the Southern District Court of New York[150] and the Fifth Circuit[151] have continued to apply the doctrine of vicarious immunity.[152] Neither court has acknowledged *Kermit*

145. *Id.*

146. Slotnick v. Stavisky [*sic*], No. 73-3954, proceedings at 38-40 (D. Mass., filed Sept. 23, 1976).

147. 560 F.2d at 33-34. In a footnote, Chief Judge Coffin suggested that the doctrine of vicarious immunity has been undercut by *Price* and *Adickes* since "[t]hese cases establish that private individuals who conspire with state officers are acting 'under color' of state law, whether or not the state official is actually joined in the suit." *Id.* at 33 n.1. The vicarious immunity of private persons, however, does not depend on whether the official is joined but on whether he is immune. For example, the *Dennis* court, after determining that the magistrate had acted within the scope of his jurisdiction, extended his immunity to his alleged private co-conspirator even though the magistrate was not a party to the suit. 413 F. Supp. at 1141. Moreover, since the issue of official immunity was not raised in either *Price* or *Adickes*, neither case considered the principle of vicarious immunity. As a result, these decisions did not affect the precedential value of the vicarious immunity line of cases.

148. 560 F.2d at 33-34.

149. *Id.* at 33 n.1.

150. Russell v. Town of Mamaroneck, 440 F. Supp. 607 (S.D.N.Y. 1977).

151. Perez v. Borchers, 567 F.2d 285 (5th Cir. 1978); Humble v. Foreman, 563 F.2d 780 (5th Cir. 1977).

152. In Briley v. California, 564 F.2d 849 (9th Cir. 1977), the Ninth Circuit inexplicably referred to the vicarious immunity language in *Haldane* as dictum and stated that "[i]t is unclear whether a private party who is clothed with immunity is liable under § 1983." *Id.* at 858 n.10.

or Judge Coffin's dictum in *Sloïnick*. Finally, in *Stump v. Sparkman*,[153] the Supreme Court noted the split between the First and Fifth Circuits.[154] Because the private defendants in *Stump* had previously been dropped from the suit, the principle of vicarious immunity was moot, and the Court confined its treatment of the issue to a citation of the conflicting authority.[155] *Stump* is the most recent case to note the issue of vicarious immunity, and thus, at present, the doctrine prevails in five circuits courts and three district courts outside these circuits.[156]

IV. A Proposed Replacement for the Doctrine of Vicarious Immunity: The Defense of Subjective and Objective Good Faith

As demonstrated in Part II, the Supreme Court has developed a three-tier approach to establishing section 1983 immunities. Such an analysis considers (1) the legislative intent of the statute, (2) the principles of immunity established under the common law, and (3) the interests which the particular defendant represents in light of the purposes of section 1983. In creating the doctrine of vicarious immunity, the Ninth Circuit in *Haldane*[157] did not take into account any of these considerations. Indeed, the only support given by the court for its holding was the illogical assertion that the private defendants could not have acted under color of state law because their alleged co-conspirators were immune from section 1983.[158] This portion of the Note attempts a more reasoned analysis of the doctrine of vicarious immunity. It concludes by taking issue with the doctrine and by proposing in its stead a more suitable defense for private persons who have acted in concert with public officials.

As previously noted, *Tenney*[159] and its progeny stand for the proposition that by enacting section 1983 Congress did not intend to impose a standard of strict liability for constitutional violations.[160] Rather, these cases indicate that at least certain individ-

153. 435 U.S. 349 (1978).
154. *Id.* at 364 n.13.
155. *Id.*
156. *See* note 9 *supra.*
157. 345 F.2d 601 (9th Cir. 1965).
158. *Id.* at 604–05.
159. 341 U.S. 367 (1951).
160. *See* text accompanying notes 51–82 *supra.*

uals are entitled to some kind of immunity under the statute.[161] The issue of whether private defendants should be immune from section 1983 never arose, however, since the statute was not aimed at private persons.[162]

Moreover, when section 1983 was enacted, there was no common law precedent for vicarious immunity.[163] What precedent there is today is based on the faulty logic of *Haldane*. In *Haldane*, the Court reasoned that a private person does not act under color of state law if the public official with whom he conspires is immune from suit under section 1983.[164] However, whether or not a public official is accorded immunity in no way alters the manner in which his alleged private co-conspirator has acted, and thus it seems absurd to argue that under these circumstances a private defendant has not acted under color of state law.[165]

At this point there appears to be no justification for the doctrine of vicarious immunity in either the legislative history of the statute or in the common law. The third step of the Court's analysis balances the purposes of the proposed defense with the objectives of section 1983. If vicarious immunity is to be justified, it must be on this basis.

Imposing liability under section 1983 can conceivably serve three objectives: (1) the deterrence of conduct proscribed by the statute, (2) the compensation of plaintiffs injured by such conduct, and (3) the retributive punishment of morally culpable section 1983 defendants.[166] The doctrine of vicarious immunity contra-

161. *See* text accompanying notes 51–87 *supra.*

162. *See* note 13 *supra.*

163. *See* text accompanying notes 99–100 *supra.*

164. 345 F.2d at 604–05.

165. The *Haldane* court's confusion may have stemmed from the belief that an immune public official does not act under color of state law and that consequently his private co-conspirator does not act under color of law. The immunity of a state official, however, does not mean that the official does not act under color of law, but that for the protection of the functions and responsibilities of his office, he avoids liability. *See also* W. PROSSER, THE LAW OF TORTS 970 (4th ed. 1971).

166. While deterrence and compensation are generally considered to be the two policy objectives of § 1983, *see* Bristow, *§ 1983: An Analysis and Approach*, 29 ARK. L. REV. 255, 274 (1975), a third objective may be the retribution of morally (as opposed to legally) culpable defendants. *See, e.g.*, Stengel v. Belcher, 522 F.2d 438, 444 (6th Cir. 1975); Palmer v. Hall, 517 F.2d 705, 707 (5th Cir. 1975), *cited in* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 464 n.66 (1978) (In both cases, punitive damages were awarded for aggravated § 1983 violations. Of course, rather than acting punitively, these courts may have been merely emphasizing the deterrence objective of the statute).

venes each of these objectives. By allowing a private person to escape liability because of the status and conduct of his alleged co-conspirator, the doctrine undermines the deterrence objective while denying compensation to plaintiffs who might otherwise have been granted relief. The third possible objective, retribution, may also be frustrated if a private person has violated an individual's constitutional rights in bad faith and has avoided liability merely because of his alleged co-conspirator's immunity. Nevertheless, if the countervailing policy considerations that support the doctrine of vicarious immunity outweigh the purposes of section 1983, the doctrine may well be justified.

There are two possible reasons for extending official immunity to private defendants: (1) to make it unnecessary for an official to participate in the trial of his alleged private co-conspirator, thereby protecting the official from harassment and the public from increased governmental costs;[167] and (2) to prevent private persons from being deterred from cooperating with state officials because of fear of prosecution under section 1983.[168] In regard to the first rationale, forcing an official to participate in a trial will consume government time and may result in the official's integrity being called into question, but this is a lesser harm than denying an individual a remedy for a constitutional deprivation and the public the deterrent effect of that remedy. Thus, the incremental benefit that an immune official and the government derive from vicarious immunity cannot justify upholding the doctrine.

Nor can the doctrine of vicarious immunity be justified on the basis of its impact on private individuals. As currently construed, a private person's liability depends entirely on the conduct and status of the official with whom he has allegedly conspired. When a private party acts in concert with a judge, he is absolutely immune so long as the judge acts within his jurisdiction; when the judge acts outside his jurisdiction, the private person enjoys no immunity. When an individual is involved in joint activity with a police officer, he is immune as long as the policeman exercises good faith and acts with probable cause.[169] When the police officer's conduct does not meet this constitutional standard, his private co-conspirator is accorded no immunity. Thus, because a

167. *See* text accompanying note 146 *supra*.

168. *See* text accompanying note 139 *supra*.

169. Except, of course, in those instances when this defense is unavailable to a police officer. *See* note 66 *supra*.

private person's liability is determined by the conduct and status of his co-conspirator, vicarious immunity will often cause unjust results. The individual who maliciously swears out a complaint will not be liable under section 1983 so long as his co-conspirator acts within his official immunity, while the person who in good faith enlists the help of a policeman may be found liable if the officer is subsequently found to have violated the Constitution in bad faith. The possibility of such unjustified liability may well deter private persons from cooperating with public officials. Therefore, it is specious to argue that the doctrine of vicarious immunity should be upheld because of its impact on private individuals.

If the objectives of section 1983 are to be reconciled with the need to encourage cooperation with public officials, a private person's liability must depend on *his* conduct and *not* that of his alleged co-conspirator. Before determining what defense a private party should be accorded under section 1983, it is necessary to decide whether an individual should be granted any defense at all. Under a standard of strict liability, the law would not discriminate between good faith errors and acts of malice. The consequences of such a policy would often be harsh and inequitable, and would presumably deter private persons from cooperating with state officials. To avoid this result, some immunity—absolute or qualified—should be established for private section 1983 defendants.

Although absolute immunity would encourage individuals to aid public officials, it would so severely undercut the purposes of section 1983 that the resultant harm would outweigh the benefit derived. An alternative would be to grant private persons a defense of subjective and objective good faith. This defense requires not only that a defendant believe in good faith that his actions are lawful but also that his belief be reasonable.[170] While such a standard would deter unconstitutional conduct, it would not unreasonably inhibit individuals from cooperating with public officials.

Unlike the defenses available under the doctrine of vicarious immunity, the subjective and objective good faith standard would attach to a private co-conspirator in all situations. Thus, a private defendant's liability would be determined by his actions and not by the conduct and status of his co-conspirator. While individu-

170. Bivens v. Six Unknown Fed. Narcotics Agents, 456 F.2d 1339, 1348 (2d Cir. 1972) (defining good faith defense available to federal agents).

als would be deterred from using the offices of the state to harass private persons, they would not be discouraged from aiding public officials. In this way, the defense of subjective and objective good faith better resolves the section 1983 policy tensions than the defenses available under the present doctrine of vicarious immunity.

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