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Wood v. Strickland: Objectifying the Standard of Good Faith for School Board Members in Defense to Personal Liability under Section 1983

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WOOD v. STRICKLAND: OBJECTIFYING THE STANDARD OF GOOD FAITH FOR SCHOOL BOARD MEMBERS IN DEFENSE TO PERSONAL LIABILITY UNDER SECTION 1983

The cloak of immunity from personal liability enjoyed by many governmental officials for unconstitutional activities undertaken in their official capacities has been a frequent source of controversy among the federal courts.[1] The swelling number of lawsuits seeking compensatory and punitive relief from police officers,[2] legislators,[3] judges,[4] and a

1. *See* Imbler v. Pachtman, 96 S. Ct. 984 (1976) (prosecutor held absolutely immune from personal liability for allegedly unconstitutional prosecution); Doe v. McMillan, 412 U.S. 306 (1973) (congressional committee members and their staffs held absolutely immune from liability under the speech and debate clause for invasion of privacy of D.C. school children in congressional report); Pierson v. Ray, 386 U.S. 547 (1967) (police officer performing official duties possesses qualified immunity in false arrest action, dependent upon establishment of good faith); Barr v. Matteo, 360 U.S. 564 (1959) (acting director of the Office of Rent Stabilization had absolute immunity from liability for libel); Tenney v. Brandhove, 341 U.S. 367 (1951) (members of California legislature held immune from civil liability for acts undertaken by official investigative committee); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974) (members of Utah State Board of Education were entitled to qualified immunity in action for damages brought by discharged professor, so long as they acted without malice); Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971) (probation officer performing "quasi judicial" function held immune from liability for omission of material facts and false statement of facts in submitted report); Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966) (county prosecutor held immune from liability for prosecution of a minor in contravention of New Jersey statute prohibiting such prosecution); Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964) (state district court judge, prosecuting attorneys, clerks of court, sheriffs, police and prison officials held immune from liability for actions undertaken in official capacities in contempt prosecution); Wade v. Bethesda Hosp., 356 F. Supp. 380 (S.D. Ohio 1973) (probate judge stripped of immunity for acting outside of his jurisdiction in ordering young girl to submit to sterilization). *See generally* Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937) [hereinafter cited as Jennings]; Note, *Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity*, 44 CALIF. L. REV. 887 (1956) [hereinafter cited as Note, *Subordinate State Officials*]; Note, *The Doctrine of Official Immunity Under the Civil Rights Acts*, 68 HARV. L. REV. 1229 (1955) [hereinafter cited as Note, *Doctrine of Official Immunity*].

2. Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Fisher v. Volz, 496 F.2d 333 (3rd Cir. 1974); Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974); Reed v. Philadelphia Housing Authority, 372 F. Supp. 686 (E.D. Pa. 1974); Moon v. Winfield, 368 F. Supp. 843 (N.D. Ill. 1973).

3. Doe v. McMillan, 412 U.S. 306 (1973); Tenney v. Brandhove, 341 U.S. 367 (1951); Hampton v. Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974); Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y. 1954).

4. Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974) (action by state prisoner alleging

variety of lesser administrative officials,[5] testifies to the fact that such individuals have been forced in increasing numbers to account for the actions which they undertake in their official capacities.[6] The result of

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that Texas state court judge and others conspired to have default judgment in divorce entered against him while he was in prison and could not attend the hearing); Blouin v. Dembitz, 367 F. Supp. 415 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 488 (2d Cir. 1973) (actions by husbands challenging constitutionality of New York statutes and judicial procedures by family court judges in adjudicating support rights of nonresident dependents).

5. Kirkland v. New York State Dept. of Correctional Servs., 374 F. Supp. 1361 (S.D.N.Y. 1974), *modified*, 520 F.2d 420 (1975) (class action on behalf of Black and Hispanic candidates challenging state civil service examination for office of Correction Sergeant); Klein v. New Castle County, 370 F. Supp. 85 (D. Del. 1974) (action by County Treasurer against County Executive, Chief Administrative Officer, Director of Finance and director of county complaint office seeking injunction from imminent removal and monetary damages); Scarrella v. Spannaus, 376 F. Supp. 857 (D. Minn. 1974) (action against State Attorney General, County Auditor, City Clerks, City Attorneys and others for refusal to place plaintiff's name on election ballot for Municipal Court Judge); Collins v. Schoonfield, 363 F. Supp. 1152 (D. Md. 1973) (action brought by pretrial detainees against certain jail officials); Salem Inn, Inc. v. Frank, 364 F. Supp. 478 (E.D.N.Y. 1973), *modified*, 422 U.S. 922 (1975) (action by operators of bar providing topless entertainment against police commissioner for enforcement of town ordinance prohibiting across the board non-obscene conduct in the form of topless dancing in any public place).

6. The majority of these suits have been filed pursuant to 42 U.S.C. § 1983 (1970) which mandates that

> [e]very 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.

The decade following the United States Supreme Court's landmark decision in Monroe v. Pape, 365 U.S. 167 (1961) produced a sudden proliferation of section 1983 actions. In *Monroe*, the Court expanded the scope of potential persons who act "under color of state law," by declaring that police officers who conducted an admittedly unconstitutional search were nevertheless operating within the perimeter of state authority. *Id.* at 183-87.

There are a variety of reasons for the sudden popularity of the civil remedy for constitutional infractions committed by state officers. One of the most significant advantages of seeking redress under section 1983 is that the plaintiff is relieved of the necessity of demonstrating a specific intent on the part of the official to violate constitutional mandates. This stringent intent requirement is mandated under the criminal counterpart to section 1983:

> Whoever, under color of any law, statute, ordinance, regulation or custom, *wilfully subjects* any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242 (1970) (emphasis added). The Supreme Court emphasized the "wilful intent" requirement in Screws v. United States, 325 U.S. 91 (1945). *Screws* involved

this closer scrutiny of executive, legislative, judicial and administrative activities is that such officers must now face the rising possibility of paying monetary awards from their own pockets if they infringe upon the constitutional rights of other individuals in the course of performing their delegated duties.

Of special interest in recent years[7] have been school board members—on both the local and state levels—who have been joined as individuals in actions for injunctive and compensatory relief brought by teachers,[8] non-professional personnel,[9] and students.[10] The majority of

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the assault and fatal beating of a black man by local law enforcement officials in Georgia. The Court concluded that what was then section 20 of the Criminal Code (presently 18 U.S.C. § 242) required that the defendants have the specific purpose of depriving the plaintiff of an express constitutional right, before a conviction could be sustained. *Id.* at 101. The Court noted that "a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness." *Id.* at 103.

In Monroe v. Pape, 365 U.S. 167 (1961), the Court reiterated the lack of "intent" required under a section 1983 action:

> In the *Screws* case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." 325 U.S. at 103. We do not think that gloss should be placed on § 1979 [1983] which we have here. . . . Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

Id. at 187. *See also* Berch, *Money Damages for Fourth Amendment Violations by Federal Officials of the Federal Bureau of Narcotics: An Explanation of Bivens*, 1971 L. & Soc. Order 43 [hereinafter cited as Berch].

7. The last several years have seen a sharp increase in judicial awareness of the constitutional rights of both teachers and school children. This has led to a concomitant interest in scrutinizing the role of school board members who define the standards which students and teachers must follow. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966); Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955). *See generally* Note, *Damages Under § 1983: The School Context*, 46 Ind. L.J. 521 at 521 (1970) (footnotes omitted) [hereinafter cited as Note, *Damages Under § 1983*].

8. Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974) (Associate Professor brought action for unlawful discharge of employment and stated cause of action because board acted unjustifiably); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (former probationary teachers stated a cause of action under section 1983 against elected members of the Board of Education upon the allegation that they were discriminatorily discharged because of their union membership); Courtney v. School Dist. #1, 371 F. Supp. 401 (D. Wyo. 1974) (teacher stated cause of action for wrongful termination of employment as well as libel and slander in the filing of a State Department of Education form); Gouge v. Joint School Dist. #1, 310 F. Supp. 984 (W.D. Wis. 1970) (teachers sought reinstatement and compensatory and punitive damages after non-renewal of employment contracts).

9. Hayes v. Cape Henlopen School Dist., 341 F. Supp. 823 (D. Del. 1972) (secretary to school district and her husband brought action seeking injunctive and monetary relief for refusal to rehire her to her former position); Gomez v. Board of Educ., 516 P.2d

these suits have been filed pursuant to the Federal Civil Rights Act,[11] based on constitutional infractions committed by board members in their decision-making role.[12] The issue in each of these cases has been whether the doctrine of official immunity should extend to individual members of a school district's policymaking unit; and if so, the extent of that immunity when individuals—rather than the school district as a governmental agency[13] are asked to monetarily compensate the plaintiff

679 (N.M. Ct. App. 1973) (bus driver brought action for alleged discriminatory failure to renew employment contract).

10. Wood v. Strickland, 420 U.S. 308 (1975) (two public high school students brought action claiming that their expulsion for bringing intoxicating liquor on to school grounds was improper and unconstitutional); Goss v. Lopez, 419 U.S. 565 (1975) (Ohio public school children brought class action for review of suspensions from school under Ohio statute); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970) (school authorities unjustifiably expelled two students in violation of the first and fourteenth amendments for writing off campus, and distributing at school a paper critical of the school administration); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) (students brought action for unlawful expulsion because the allegation of "misconduct" did not relate to any pre-established disciplinary rule).

11. 42 U.S.C. § 1983 (1970). *See* note 6 *supra* and accompanying text.

12. The section 1983 remedy has been used frequently and effectively by teachers seeking redress for discriminatory employment practices. *See* North Carolina Teachers Ass'n v. Asheboro City Bd. of Educ., 393 F.2d 736 (4th Cir. 1968) (suit to determine whether rights of black teachers displaced by desegregation of black schools were violated upon failure to re-employ them); Wall v. Stanly County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967) (teachers challenged non-retention of employment contracts because of shift in desegregation plan which resulted in decrease in allocation of teachers in black schools); Smith v. Board of Educ. of Morrilton School Dist., 365 F.2d 770 (8th Cir. 1966) (black teachers sought injunction requiring employment of high school teachers without regard to race and reassignment of elementary teachers without regard to race); Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966) (black teachers sought injunctive relief requiring employers to devise definite objective standards for employment of teachers on a basis other than race); Jones v. Dinwiddie County School Bd., 373 F. Supp. 1105 (E.D. Va. 1974) (white teacher brought action for restoration of lost salary, alleging that her employment was terminated because she voluntarily participated in desegregation of schools); Williams v. Kimbrough, 295 F. Supp. 578 (W.D. La.) *aff'd*, 415 F.2d 874 (5th Cir. 1969) *cert. denied*, 396 U.S. 10 (1970) (originally a class action on behalf of black students seeking relief for racially discriminatory operation of schools; court held that black teachers were dismissed on a discriminatory basis when the Board of Education replaced them with white teachers after court ordered desegregation of faculty). *See generally* Seitz, *Due Process for Public School Teachers in Nonrenewal and Discharge Situations*, 25 HASTINGS L.J. 881 (1974) [hereinafter cited as Seitz].

13. It has been held by several courts that the school district itself, existing as a municipal corporation, cannot qualify as a "person" under section 1983, and therefore, cannot be held accountable for damages under the Civil Rights Act. *See, e.g.*, Harvey v. Sadler, 331 F.2d 387, 390 (9th Cir. 1964); Kelly v. Wisconsin Interscholastic Athletic Ass'n, 367 F. Supp. 1388, 1392 (E.D. Wis. 1974); Davis v. Barr, 373 F. Supp. 740, 747 (E.D. Tenn. 1973).

for the deprivation of a constitutional right.[14]

The United States Supreme Court recently addressed itself to this issue in *Wood v. Strickland*.[15] The controversy involved two students who were expelled for violating a school regulation prohibiting the possession of alcoholic beverages on school grounds or at school functions.[16] Seeking injunctive and declaratory relief as well as monetary damages pursuant to section 1983,[17] the students claimed that the expulsion procedures were undertaken in a manner which deprived them of due process of law.[18] The gravamen of the students' complaint

14. *See generally* notes 70-107 *infra* and accompanying text.

15. 420 U.S. 308 (1975).

16. The regulation reads as follows:

. . . .

Suspension

. . . .

b. Valid causes for suspension from school on first offense: Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

. . . .

(4). The use of intoxicating beverage or possession of same at school or at a school sponsored activity.

Strickland v. Inlow, 348 F. Supp. 244, 245-46 (W.D. Ark. 1972).

17. The complaint named as defendants, P.T. Waller, the Principal of Mena High School, S.L. Inlow, then Superintendent of Schools, the Mena Special School District and the individual members of the Board of Education. The amended complaint sought compensatory and punitive damages against all defendants, "injunctive relief allowing [the students] to resume attendance, preventing [the defendants] from imposing any sanctions as a result of the expulsion, and restraining enforcement of the challenged regulation, declaratory relief as to the constitutional invalidity of the regulation, and expunction of any record of their expulsion." 420 U.S. at 310.

The remedy provided by the Civil Rights Act has been broadly construed to encompass all three forms of relief. The statute specifically provides that a person acting under color of state law shall be liable "in an action at law, suit in equity, or other proper proceeding for redress," for depriving any individual of a constitutional right. 42 U.S.C. § 1983 (1970). *See also* Scheuer v. Rhodes, 416 U.S. 232, 238 (1974) (held that the eleventh amendment does not present a jurisdictional bar to the section 1983 action for damages); Steffel v. Thompson, 415 U.S. 452 (1974) (a declaratory judgment may be issued independently of an injunction as a remedy in the section 1983 setting); Mitchum v. Foster, 407 U.S. 225, 229 (1972) (Congress plainly authorized the federal courts to issue injunctions in section 1983 actions). In the *Mitchum* case, the Court interpreted the possibility of injunctive relief quite broadly, holding that the section 1983 suit would constitute an exception to the federal anti-injunction statute, 28 U.S.C. § 2283 (1970), which normally prohibits an injunction against a pending state court proceeding. 407 U.S. at 242-43.

18. The application of the fourteenth amendment due process clause to the school context poses a host of complex questions concerning the extent to which students may be deprived of the substantive right to acquire an education and the procedural circumstances under which this deprivation may take place. A clearcut distinction between the "substantive" and "procedural" due process rights of both students and teachers is lacking under the existing case law. *See* note 20 *infra*.

in *Wood* was that the meeting at which the board members voted for expulsion was not conducted under the procedural safeguards which the Constitution mandates.[19] These procedural safeguards were defined by the Supreme Court in *Goss v. Lopez.*[20]

The initial meeting of the Mena Special School District Board of Education at which the one semester expulsion of Peggy Strickland and Virginia Crain was decreed did not comply with the *Goss* standards. The findings of fact of the district court were as follows: On February 18, 1972 the two named plaintiffs and a third student, Jo Wall, were urged to go to the principal by their home economics teacher, Mrs. Powell. At that time, they "confessed" to spiking the punch at a recent class function, with what the students' claimed were two twelve ounce bottles of malt liquor. Pursuant to the school regulation prohibiting such conduct,[21] the principal suspended the girls pending further action by the school board.[22] The Eighth Circuit Court of Appeals summarized the lengthy findings of fact by the district court with regard to this initial meeting:

> Without adequate notice to the students and with no notice to their parents, a special meeting of the school board was held the night of February 12, [1972] to consider the matter. The only people in attendance were the members of the Board, Mr. Inlow, Mr. Waller and Mrs. Powell. Mrs. Powell relayed the girls' statements [of regret] to the Board and she, along with Mr. Waller, recommended leniency. Shortly after these recommendations were made, a telephone call was received by Mr. Inlow [the substance of which was that one of the girls was involved in a fight after a basketball game that evening]. . . . With this, Mrs. Powell and Principal Waller withdrew their recommendations and "washed their hands" of the matter. The Board voted to suspend all three students for the balance of the semester.[23]

It was clear to the appellate court that procedural due process had been denied to the students at the February 12th meeting. The court noted that the procedural defect *may* have been cured at a subsequent meeting held March 2, 1972, because the girls and their parents were given notice "promptly" after the suspension and were later afforded the opportunity to present evidence. The district court directed verdicts for all of the named defendants, concluding that in the absence of a

19. 420 U.S. at 310.
20. 419 U.S. 565 (1975).
21. *See* note 16 *supra.*
22. 348 F. Supp. at 246.
23. Strickland v. Inlow, 485 F.2d 186, 188 (8th Cir. 1973).

showing of malicious ill will toward the students, the officials were immune from personal liability. The Eighth Circuit Court of Appeals reversed the decision, as to the board members only, on the ground that the students rights to "substantive due process" had been violated.[24]

The board members appealed the decision to the United States Supreme Court, which in turn fashioned a standard of "qualified immuni-

24. Strickland v. Inlow, 485 F.2d 186 (8th Cir. 1973). The directed verdicts awarded by the district court to the Principal, Superintendent and school district were affirmed. *Id.* at 191.

In its determination that the students experienced a violation of "substantive due process" the court of appeals emphasized the lack of evidence presented to the board to sustain a finding that the school regulation was violated. The court then summarily concluded—without specifying which constitutionally guaranteed rights had been violated—that the students were denied "substantive due process," and that they were entitled to have their records expunged and to return to school. *Id.* The court emphasized, however, that the school district was acting fully within its policy making authority by prohibiting the use or possession of intoxicants at school functions. *Id.* In the area of educational rights, there has been a lack of enumeration of the specific rights which are guaranteed by the due process clause. The Supreme Court has recently declared that a student's entitlement to public education may be a property right under the fourteenth amendment, if so recognized by the state, Goss v. Lopez, 419 U.S. 565, 572-76 (1975); however other decisions have been much more specific in delineating the substantive rights which students enjoy. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (students have a constitutional right to wear armbands protesting the Vietnam war, as part of free expression protected by the first amendment); Bannister v. Paradis, 316 F. Supp. 185 (D.N.H. 1970) (students have a limited constitutional right to wear clothes of their choice). It is clear, however, that substantive and procedural due process guarantees cannot be precisely categorized, and at times they tend to mesh. *See generally* Note, *Students Constitutional Rights in Public Secondary Education*, 14 WASHBURN L.J. 106 (1975) [hereinafter cited as Note, *Students Constitutional Rights*]; Note, *Education—Due Process for Washington Public School Students'*, 50 WASH. L. REV. 675, 676-80 (1975) [hereinafter cited as Note, *Washington Public School Students*].

While case law indicates that the Eighth Circuit Court of Appeals was justified in concluding that the students' procedural due process rights were violated in *Wood, see* note 18 *supra*, the majority's reliance upon the insufficiency of the evidence to support a judgment that substantive due process was violated does not comport with existing case law. If the court had based its conclusion on the denial of the students' rights to attend school, it would have had more basis in the existing case law. *See* Goss v. Lopez, 419 U.S. 565 (1975). However, the lack of solid evidence appears to be a procedural rather than a substantive basis for finding a due process violation.

The Supreme Court appears to have reversed the decision of the court of appeals with respect to the substantive due process claim; at the very least it casts doubt on the reasoning. Mr. Justice White, writing for the majority, notes that "[g]iven the fact that there *was* evidence supporting the charge against respondents, the contrary judgment of the court of appeals is improvident." 420 U.S. at 326. The Court implies that the regulation involved does not violate a substantive right of the students, for in citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968), the Court notes that it will not interfere with a discretionary judgment of a school board when the exercise of that discretion does not violate a specifically guaranteed constitutional right. *Id.*

ty" for school board members in such circumstances.[25] The standard enunciated by the Court appears to encompass both subjective and objective aspects.[26] On the subjective level, a defense of immunity will not be established on behalf of a board member "if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."[27] The focus of this portion of the

25. 420 U.S. at 322. *See* notes 108-32 *infra*, and accompanying text.

26. The tendency of courts to employ either a widespread "objective" criteria or a more personalized "subjective" standard in judging the conduct of an individual or determining the intentions of the parties is prevalent in a variety of areas of the law.

For at least a century, the objective theory of contracts has been dominant. A. CORBIN, CONTRACTS, §§ 106, 156-57 (one vol. ed. 1952). *See* Hotchkiss v. National City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911) *aff'd*, 201 F. 664 (2d Cir.), *aff'd* 231 U.S. 50 (1913); RESTATEMENT OF CONTRACTS § 227, comment *a* at 306 (1932). In tort law, as well, objective/subjective standards are widely employed. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 150 (4th ed. 1971). *See generally* Seavy, *Negligence —Subjective or Objective?*, 41 HARV. L. REV. 1 (1927).

Criminal law, on the other hand, relies almost solely upon the subjective intention of the particular party. *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 195-203 (1972); United States v. Byrd, 352 F.2d 570 (2d Cir. 1965) (omission of criminal intent as one of the enumerated essential elements in a charge of receiving an unauthorized fee in connection with official tasks constituted plain error); People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964) (reasonable and honest mistake of age is valid defense to a charge of statutory rape). *But cf.* United States v. Freed, 401 U.S. 601 (1971) (defendant convicted pursuant to 26 U.S.C. § 5812 (a) (1970) which makes it unlawful for any person "to receive or possess a firearm which is not registered to him, regardless of lack of "intent"). However, determination of whether a strict liability criminal offense has been committed comes closer to an "objective" standard, although it is the commission of the act itself, rather than either the objective state of mind of the reasonable person or the subjective intention of the defendant which is to be examined. *See generally* Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107; Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

27. 420 U.S. at 322. It is unclear from the majority opinion exactly what the Court means by "malicious intention" in the school context. The district court judge instructed the jury that a decision against the board members could only be made upon a finding that they acted with "ill will" or committed a "wrongful act done intentionally without just cause or excuse." 348 F. Supp. 244, 248 (W.D. Ark. 1972). This is clearly a "subjective" test; recovery hinges upon the state of mind of the particular board member at the time that the decision was made or carried out. *See generally* Jennings, *supra* note 1. *See also* Kelley v. Dunne, 344 F.2d 129, 133 (1st Cir. 1965) (postal inspector made search without consent or warrant or reasonable belief that there was a warrant, and was not immune from tort liability).

The exact nature of what will constitute "malicious" action is open to speculation. Few cases have dealt with a precise definition in the realm of school disciplinary proceedings. In the factual context of the *Wood* case, it would appear that the action of the teacher, the principal and the members of the board in "washing their hands" of the entire matter and suspending the students immediately after receiving the telephoned information that one of the girls had been involved in a fight at a basketball game was evidence of a sense of ill will, *see* note 17 *supra*. The Court never specifically touches

Court's test is, of necessity, on the state of mind of the particular individual at the time the official action was taken. The board member's actions will also have to stand scrutiny under a much more objective standard of conduct in order to establish a defense of immunity according to the *Wood* majority opinion, for the defense is now impermissible if the board member "knew *or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected . . . ."[28] The Court combines both the subjective and the objective criteria into one standard of conduct to be applied to the individual school board member, labeling it a test of "good faith."

> A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[29]

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upon this apparently arbitrary action, although it certainly could be implied that such action was taken because of a sense of ill will at the moment, rather than because of a considered review of the evidence from the incident in question (the spiking of the punch).

28. 420 U.S. at 322 (emphasis added).

29. *Id.* The "good faith" test is far from a new concept in the doctrine of official immunity for public officials under section 1983. *See* notes 33-45 *infra* and accompanying text. The "good faith" test has traditionally been regarded as an objective standard —what would the reasonable person acting in the role of the particular official do in the questioned situation? *See, e.g.*, McLaughlin v. Tilendis, 398 F.2d 287, 290-91 (7th Cir. 1968); Nebraska Dep't. of Roads Employees Assoc. v. Department of Roads, 364 F. Supp. 251, 257 (D. Neb. 1973); Kirstein v. Rector and Visitors of the Univ. of Va., 309 F. Supp. 184, 189 (E.D. Va. 1970).

In the recent past, the Court has emphasized the "reasonable grounds" necessary for a defense of good faith; it can only be assumed that this means acceptable with regard to an objective community defined standard of reasonableness. Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

Of necessity, even the most objective standard must contain some elements of subjectivity. Surrounding circumstances are crucial to any determination of how the reasonable person would be expected to act in any given situation. This is certainly the case in the law of torts, where negligence is defined as the failure to do what the reasonable person would be expected to act in any given situation. This is certainly the case in the law of torts, where negligence is defined as the failure to do what the reasonable person would do "under the same or similar circumstances." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 151 (4th ed. 1971). *See generally* James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951).

Thus, reasonable or unreasonable conduct can only be determined by examining the qualities of the actor himself; it can never be a purely objective test. There are several ramifications for applying an "objective good faith" test in the context of *Wood v. Strickland*. The most significant of these is determining exactly what the "reasonable school board member" is. Is it a person who has served in the capacity one year, five years or twenty-five years? Will a board member be more "reasonable" in validly assessing evidence against a teacher or a student in a disciplinary proceeding if he has more experience on the job? Will a school board member be held accountable for

As previous case law in the lower federal courts attests, a "good faith" test of qualified immunity under section 1983 is not altogether new.[30] In fact, it has long been acknowledged that official actions which are motivated by a sense of personal ill will cannot constitute "good faith," and are rarely defensible.[31] It is, rather, the "objective" aspect of the Court's announced standard of conduct which adds a new dimension to the doctrine of qualified immunity. It is this very aspect with which the dissenters in *Wood* take issue. Justice Powell argues with particular vigor that the Court's requirement that a broard member conform his conduct to what he *should realize* are the constitutional rights of the student that he is dealing with rests upon an overly optimistic and unwarranted appraisal of the educational background of the average school board member. Justice Powell charges that the objective criteria is unduly "harsh," and "leaves little substance to the doctrine of qualified immunity."[32]

This Comment will explore the effect of the *Wood* decision on the common law doctrine of qualified immunity, and will seek to define the present extent of immunity for school board members under section 1983. Particular emphasis will be placed on an analysis of the practical consequences of applying an objective standard of "knowledgeable conduct," which the dissent fears will dilute the defense of immunity to an unacceptable extent. The final section will focus upon administrative alternatives to invoking the section 1983 personal liability remedy against school board members.

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knowledge of his duties beyond the average person's knowledge of those duties? Will the board member be equated with other members of the community who are expected to possess a minimum of special knowledge and ability beyond the exercise of reasonable care in their jobs? *See, e.g.*, L.B. Laboratories v. Mitchell, 39 Cal. 2d 56, 244 P.2d 385 (1952) (accountant); Wintersteen v. Semler, 250 P.2d 420 (Ore. 1952), *reh. denied*, 255 P.2d 138 (Ore. 1953) (dentist); McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959). Or, rather, will the board member be considered merely a citizen holding a public office requiring no special skill or training, and thus be held only to a standard of the reasonable citizen? *See, e.g.*, CAL. EDUC. CODE § 1114 (West Supp. 1975); note 117 *infra* and accompanying text. These questions are of important significance in the context of the *Wood* decision, for the Court's explanation of what will constitute "good faith," while on its face a simple test consistent with the common law immunity doctrine, may go well beyond the perimeter of what the average "reasonable" person would be expected to know. *See* notes 110-23 *infra* and accompanying text.

30. *See* note 29 *supra*.

31. *See generally* Note, *The Evolution of the State of Mind Requirement of Section 1983*, 47 TUL. L. REV. 870, 881-85 (1973).

32. 420 U.S. at 329.

I. THE OFFICIAL IMMUNITY DOCTRINE

The official immunity doctrine, which "has in large part been of judicial making,"[33] grants immunity to certain governmental officers in order to allow them to conscientiously perform their duties without the fear of being forced to respond to costly lawsuits which would consume their time, energy, and resources.[34] The Supreme Court has expressed concern that such a fear would tend to inhibit the free and vigorous decision-making which characterizes the effective administration of government.[35]

The common law employed the doctrine of executive immunity long before the passage of section 1983.[36] Under the common law rationale, legislative, executive, judicial, and administrative officers were protected from personal liability for acts undertaken and decisions made within the realm of their granted authority.[37] The defense was utilized primarily in tort actions, where the official was held to answer to individuals claiming personal and financial injuries as a result of the official's conduct.[38] As more actions were filed pursuant to section 1983, common law immunity standards were further utilized, and at times expanded, to shield officers from personal liability.[39]

The immunity conferred, however, has not been identical for every official under similar circumstances. Those whom the courts considered to be performing a vital governmental function—legislators, judges and quasi judicial officers—were accorded an "absolute immunity," but only to the extent they did not act beyond the scope of their official

33. Barr v. Matteo, 360 U.S. 564, 569 (1959).

34. *See generally* Comment, *Subordinate State Officials, supra* note 1; Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285, 1295-99 (1953) [hereinafter cited as Note, *Scope of Civil Rights Acts*].

35. 420 U.S. at 319-20. This argument, and many similar to it, have been advanced in support of immunity for legislative, judicial and administrative officers who otherwise would be held liable under section 1983. *See, e.g.*, Doe v. McMillan, 412 U.S. 306 (1973); *see also* Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Tenney v. Brandhove, 341 U.S. 367 (1951).

36. Comment, *Smith v. Losee: Official Immunity of School Board Members Under Section 1983*, 1973 UTAH L. REV. 820, 821 [hereinafter cited as Comment, *Immunity of School Board Members*]; Note, *Scope of the Civil Rights Acts, supra* note 34, at 1295-99; Note, *Subordinate State Officials, supra* note 1 at 889-91.

37. Note, *Scope of the Civil Rights Acts, supra* note 34, at 1296-97.

38. Jennings, *supra* note 1, at 270-76.

39. Doe v. McMillan, 412 U.S. 306, 318-20 (1973); Pierson v. Ray, 386 U.S. 547, 553-54 (1967); Barr v. Matteo, 360 U.S. 564, 569-70 (1959); Tenney v. Brandhove, 341 U.S. 367, 376 (1951); Johnson v. Alldredge, 488 F.2d 820 (3d Cir. 1973) *cert. denied* 419 U.S. 882 (1974); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 287-96 (1965).

duties.[40] This absolute defense applied regardless of subjective bad faith or malicious intent on the part of the particular official.[41]

A more stringent standard was applied to individuals whose public offices were regarded as administrative or ministerial. They were cloaked with only a limited privilege, dependent upon the nature of their motive or state of mind at the time of their alleged impropriety.[42] The requirements for the defense of this "qualified immunity" varied from case to case.[43] The developing decisional law clearly indicated that such officials would be immune *only* if they acted within the ordinary exercise of delegated duties,[44] and *only* if they demonstrated that their actions were taken in "good faith."[45]

II. THE DISCRETIONARY ROLE OF THE SCHOOL BOARD MEMBER

Many of the governmental officers who are designated to receive protection under the immunity doctrine are charged with making a great number of discretionary decisions in the course of their duties.[46] For

40. Barr v. Matteo, 360 U.S. 564, 575 (1959); Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951); Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974) (per curiam); Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971).

41. Pierson v. Ray, 386 U.S. 547, 554 (1967) (dicta); Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

42. Pierson v. Ray, 386 U.S. 547, 555-57 (1967); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); Donahue v. Staunton, 471 F.2d 475, 482 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); McLaughlin v. Tilendis, 398 F.2d 287, 290-91 (7th Cir. 1968).

43. *See, e.g.*, Doe v. McMillan, 412 U.S. 306, 320 (1973). The majority opinion in *Wood* makes a thorough overview of the case law where conflicting standards for the defense of qualified immunity are utilized. The Court notes that "[t]here is general agreement on the existence of a 'good faith' immunity, but the courts have either emphasized different factors as elements of good faith or have not given specific content to the good-faith standard." 420 U.S. at 315 (footnote omitted).

44. Smith v. Losee, 485 F.2d 334, 342 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); McCormick v. Burt, 95 Ill. 263 (1880); Donahue v. Richards, 38 Me. 379 (1854); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 989 (4th ed. 1971); R. HAMILTON & Z. REUTTER, LEGAL ASPECTS OF SCHOOL BOARD OPERATION 190-91 (1958) [hereinafter cited as LEGAL ASPECTS]. *See generally* Comment, *Immunity of School Board Members, supra* note 36.

45. Wood v. Strickland, 420 U.S. at 315-16 n.7; Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974); Pierson v. Ray, 386 U.S. 547, 555 (1967); Smith v. Losee, 485 F.2d 334, 344 (10th Cir. 1973) *cert. denied*, 417 U.S. 908 (1974); McLaughlin v. Tilendis, 398 F.2d 287, 290-91 (7th Cir. 1968); Taliaferro v. State Council of Higher Educ., 372 F. Supp. 1378, 1382-83 (E.D. Va. 1974); Boyd v. Smith, 353 F. Supp. 844, 845-46 (N.D. Ind. 1973); Jones v. Jefferson County Bd. of Educ., 359 F. Supp. 1081, 1083-84 (E.D. Tenn. 1972).

46. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967); Monroe v. Pape, 365 U.S. 167

this reason, the most frequently employed rationale behind extending immunity for official actions is to shield the officer from potential liability for errors in judgment which will inevitably occur when discretion is exercised.[47] In recent years, several federal courts have noted that members of a school district policy-making board have

(1961). *Cf.* Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1971).

47. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Dewell v. Lawson, 489 F.2d 877, 883 (10th Cir. 1974); Klein v. New Castle County, 370 F. Supp. 85 (D. Del. 1974). *See generally* Note, *Doctrine of Official Immunity, supra* note 1.

This argument is commonly employed in civil cases against police officers for damages stemming from a false arrest or similar fourth amendment violations. The thrust of the argument is that a police officer is often called upon to make a snap judgment which ultimately may be determined to be a constitutional infraction, but which is necessitated by the urgency of the situation. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (federal agents, when charged with duties which require the exercise of discretion, are immune from liability when they act within the scope of their duties; 18 U.S.C. § 3056 (1970) requires that the instant exercise of judgment be protected); Hampton v. Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974) (the essential purpose of the doctrine of immunity is to give the officer freedom to exercise his discretion and to perform his official duties without fear that his conduct will be called into question); Valdez v. Black, 446 F.2d 1071, 1076-77 (10th Cir. 1971) (in cases constituting emergency circumstances, the test of probable cause plus good faith for police may be significantly reduced). *See generally* Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962).

With respect to prosecutors as well, courts have noted that the discretionary nature of their jobs will often shield them from liability. *See* Guerrero v. Barlow, 494 F.2d 1190 (5th Cir. 1974) (per curiam) (key to immunity as a prosecutor is whether the alleged wrongful acts were committed in the performance of an integral part of the judicial process); Lundblade v. Doyle, 376 F. Supp. 57, 60 (N.D. Ill. 1974) (prosecutors should be free to exercise their discretionary functions with independence and without fear of the consequences). This rationale has been most often utilized in cases where selective prosecution creates a claim of discrimination or malicious harassment. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962); People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (1967). *See generally* Cole, *Decision to Prosecute*, 4 L. & SOC. REV. 331 (1970).

Recognition of the need for broad judicial discretion has resulted in absolute immunity for all judges acting within their jurisdiction. *See* Adkins v. Underwood, 370 F. Supp. 510, 513-14 (N.D. Ill. 1974) *aff'd* 520 F.2d 890 (7th Cir.), *cert. denied*, 423 U.S. 1017 (1975) (doctrine of official immunity is for benefit of public so that judge is at liberty to exercise his discretionary functions with independence); Staud v. Stewart, 366 F. Supp. 1398, 1401 (E.D. Pa. 1973) (exercise of judicial function itself is highly discretionary and necessitates immunity from personal liability). *Cf.* United States v. Blackfeet Tribe, 369 F. Supp. 562, 565 (D. Mont. 1973) (judicial immunity does not apply in damage suit not arising out of performance of official duty).

Finally, legislators have been deemed to be immune when they exercise the discretion which is often inherent in their scope of authority. This is particularly applicable when individuals claim their constitutional rights have been violated by official legislative investigations, Tenney v. Brandhove, 341 U.S. 367 (1951); Freeman & Bass, P.A. v. State of N.J. Comm'n of Investigation, 486 F.2d 176 (3d Cir. 1973).

a wide latitude of discretion in passing upon important matters which affect the rights of employees[48] and students.[49] The myriad of complex problems which such officers face almost daily places them in a position of being required to make controversial decisions, the ultimate correctness of which cannot be conclusively established at the time.[50]

While board members are expected to conduct a thorough investigation before making an important decision, and are constitutionally required to conduct such investigations within the confines of due process of law,[51] the very nature of their job often mandates that highly discretionary judgments be made from conflicting findings in the course of their investigations.[52]

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48. Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *cf.* Gay v. Wheeler, 363 F. Supp. 764 (S.D. Tex. 1973).

49. Yench v. Stockmar, 483 F.2d 820 (10th Cir. 1973); Gay Students Organization v. Bonner, 367 F. Supp. 1088 (D.N.H.), *modified*, 509 F.2d 652 (1st Cir. 1974).

50. Wood v. Strickland, 420 U.S. 308 (1975), is a significant example. The school board was faced, at the February 12th meeting, with a fair amount of evidence leading to the conclusion that three students had violated the school regulation. Because school boards *do* possess discretion in promulgating rules which relate to maintaining the "orderly conduct" of the educational environment, Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966); Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966), their only consideration was whether the regulation had been violated. The majority opinion in *Wood* emphasizes that the court of appeals was unjustified in concluding that the board had violated the students' substantive due process rights by their finding that the girls had acted contrary to the school regulation:

> When the regulation is construed to prohibit the use and possession of beverages containing alcohol, there was no absence of evidence before the school board to prove the charge against the respondents. The girls had admitted that they intended to 'spike' the punch. . . .
>
> . . . It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. . . . The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.

420 U.S. at 325-26 (footnotes omitted).

Thus, at the February 18th meeting, the Mena school board was faced with making a decision with respect to evidence placed before it, and, absent a clear indication that constitutional rights were being violated, it would be justified in acting upon the evidence within the confines of its delegated discretionary function. *See also* Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

51. *See* notes 18 & 24 *supra* and accompanying text.

52. Examples of such decision-making duties are prevalent in the case law. For instance, school boards are constantly required to determine under what circumstances a teacher's employment may be terminated. Seaman v. Spring Lake Park Independent School Dist. No. 16, 363 F. Supp. 944 (D. Minn. 1973) (unalterable sex-related function of pregnancy not sufficient grounds for forced semester leave of absence); Gay v. Wheeler, 363 F. Supp. 764 (S.D. Tex. 1973) (due process does not require in every instance that a trial type hearing be given before discharge of employment).

In *Smith v. Losee*,[53] the Tenth Circuit Court of Appeals highlighted the nature of the school board member's discretionary role, and the consequent necessity for a judicially imposed standard of conduct by which to judge their actions in a case where immunity is asserted as a defense:

> The defendant members of the Board of Education are charged with broad duties and given extensive powers under the Utah Statutes. These duties and powers within their limited subject matter are not greatly dissimilar from those of a legislative body. They are required to formulate rules and regulations for the institutions, to establish and announce policies on fundamental matters . . . the decision not to renew or to discharge [the professor's contract] was board action representing an exercise of its discretion vested in it by state law, made in good faith and without malice, when the official facts before them showed a good and valid reason for the decision . . . .[54]

The average school board member is an individual elected by his respective community.[55] Once elected, the new official is expected to immediately assume both a legislative and an administrative role in the governing of the local schools.[56] As a *trustee*, he is charged with seeing

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In Wishart v. McDonald, 367 F. Supp. 530 (D. Mass. 1973), *aff'd*, 500 F.2d 111 (1974) the district court found that "[i]n order for the Court to grant the injunctive relief requested, it must find that the school committee's reasons for dismissing the plaintiff were arbitrary or capricious." *Id.* at 533. The court then cites *Drown v. Portsmouth School Dist.*, which outlined three ways in which board action could be held to be arbitrary or capricious: "[1] . . . a reason for discharge is unrelated to the educational process or working relationships within the educational institution; [2] . . . it [may be] trivial; [3] it [may be] wholly unsupported by a basis in uncontested fact either in the statement of reasons itself or in the teacher's file." *Id.* at 533, *citing* Drown v. Portsmouth School Dist., 451 F.2d 1106, 1108 (1st Cir. 1971).

Another area of discretionary judgment facing the school board is the delineation of the constitutionally permissible dimensions of a student disciplinary proceeding. *See* note 18 *supra* and accompanying text.

Still a third significant area calling for discretion involves the determination of those areas of student conduct which may be administratively controlled. This often involves an on-the-spot evaluation of the validity of certain types of activities, and requires a discretionary balancing of students' substantive constitutional rights, *see* note 24, *supra*, with the need for the board to regulate conduct and to maintain discipline for the effective maintenance of the school system. *See* Yench v. Stockmar, 483 F.2d 820 (10th Cir. 1973); Note, *Students Constitutional Rights, supra* note 24 at 108-110.

53. 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

54. *Id.* at 343-44.

55. *See, e.g.*, CAL. EDUC. CODE §§ 1111-1130 (West Supp. 1975), which mandates the manner in which school board members are to be elected. *Cf.* CAL. EDUC. CODE § 1162 (a) (West Supp. 1975).

56. The role of the board member in helping to carry on the daily functioning of the school district is extremely broad. The board, as a municipal corporation, is expected to prescribe and enforce rules for its own government, Montalvo v. Madera Unified

that the schools are well budgeted, and that tax dollars are allocated properly.[57] As an *employer*, he is obligated to assure fair and nondiscriminatory practices for all employees, and to honor their constitutional right to due process of law.[58] And finally, as an *educational policy*

School Dist. Bd. of Educ., 21 Cal. App. 3d 323, 98 Cal. Rptr. 593 (1971); CAL. EDUC. CODE § 925 (West 1969), as well as to execute any powers delegated to it by law. CAL. EDUC. CODE § 1001 (West 1969). It has the power to repair and insure school property, CAL. EDUC. CODE § 1004 (West 1969), to contract with other agencies, CAL. EDUC. CODE §§ 1061-66 (West Supp. 1975), to acquire sites for the construction of new school facilities, CAL. EDUC. CODE § 1041 (West Supp. 1975), and to prescribe rules for the government and discipline of the schools under the jurisdiction it serves. CAL. EDUC. CODE § 1052 (West Supp. 1975); *but see* Myers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969).

Although these examples are drawn entirely from the statutory powers accorded to California boards of education, the functions are common to most education code mandates in the United States. *See generally* LEGAL ASPECTS, *supra* note 44.

57. *See, e.g.*, CAL. EDUC. CODE § 1031(a)(c) (West Supp. 1975).

The state of Arkansas, where the *Wood* case originated, prescribes a similar requirement for its boards of education. ARK. STAT. ANN. § 80-509 (1967).

58. A teacher's right to due process of law is not significantly different from that of the student. *See generally* notes 18 & 24 *supra* and accompanying text. With respect to substantive due process, the right to employment has not often been found to be a compensable property right. Board of Regents v. Roth, 408 U.S. 564 (1972) (nontenured teacher has no property right to continued employment). *Cf.* Perry v. Sindermann, 408 U.S. 593 (1972) (teacher with actual or de facto tenure has legal proprietary interest in continued employment); Connell v. Higginbotham, 403 U.S. 207-08 (1971) (teacher recently hired without tenure but with clear promise of continued employment could not be dismissed without hearing).

However, courts have not been hesitant to find that teachers do possess a number of substantive constitutional rights, the violation of which will warrant a claim for injunctive or monetary relief. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968) (teachers may not be compelled to relinquish their constitutional right to free speech under the first amendment); McLaughlin v. Tilendis, 398 F.2d 237 (7th Cir. 1968) (teachers have right of free association to join a union of their choice); Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966) (teachers may not be discharged from employment on the basis of race).

As far as procedural due process is concerned, those teachers possessing tenure enjoy basically the same rights to notice and opportunity to be heard as do students. *See* Perry v. Sindermann, 408 U.S. 593 (1972). If, however, the teacher does not have either actual or de facto tenure, and no enforceable promise for continued employment, there can be no compensable claim for procedural due process violations in employment terminations. Board of Regents v. Roth, 408 U.S. 564 (1972). In *Roth*, the Supreme Court noted specifically that procedural due process rights depend upon an initial substantive protectable interest:

> The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.

Id. at 569-70.

maker, he has a legal commitment[59] to provide the most beneficial learning experiences practicably attainable for every student[60] in the district in which he is elected to serve.

Certainly with a role as varied as this, the doctrine of qualified immunity which evolved at common law[61] and which the Supreme Court has extended to these officials[62] serves a useful purpose, as commentators have repeatedly suggested in the years prior to the *Wood* decision.[63] There appear to be four distinct advantages to extending qualified immunity to such officials: (1) the need to free officials from vexatious suits; (2) the unfairness of asking a person to make a difficult decision and then holding him liable for the decision he makes; (3) the delay that accompanies these lawsuits; and (4) the fear that such suits will hamper the efficiency of the school board policy-making unit.[64]

On the other hand, it has been argued with equal persuasiveness[65]

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59. CAL. EDUC. CODE § 1071 (West Supp. 1975) gives a school board power to promote educational advancement.

60. Most education codes provide that the school board, so far as possible, devote equal energies and resources to every school within its jurisdiction. *See, e.g.*, CAL. EDUC. CODE § 1054 (West Supp. 1975).

61. *See* Wood v. Strickland, 420 U.S. 308, 318 n.9.

62. *Id.* at 319-20.

63. *See, e.g.*, Note, *Doctrine of Official Immunity, supra* note 1 at 1235-36; Note, *Damages Under § 1983, supra* note 7, at 529-30.

64. Note, *Damages Under § 1983, supra* note 7, at 522. The rationales advanced herein are not materially different from those used to cloak any governmental officers with immunity at common law. *See generally* Note, *Doctrine of Official Immunity, supra* note 1. At least one commentator has suggested that there should be a *uniform application* in the courts of an objective test of good faith.

> [A] uniform identifiable standard has not evolved in the application of the "good faith" doctrine of immunity in this area. The ambiguous character of the principle can no doubt be attributed to the application of common law immunity to § 1983 despite the specific policy consideration arising under that statute. Parochial definitions of common law immunity have made the legislative mandate [of section 1983] depend upon the forum in which the suit is brought.

Comment, *The Defense of Good Faith Under § 1983*, 1971 WASH. U.L.Q. 660, 671 [hereinafter cited as Comment, *Defense of Good Faith*].

Presumably the Supreme Court has provided just such a "uniform objective standard," to which lower courts must now adhere. It is unclear, however, whether the Court has sufficiently delineated a workable standard for determining precisely what actions will constitute "good faith" or "bad faith." *See* notes 70-106 *infra*, and accompanying text.

65. Goss v. Lopez, 419 U.S. 565 (1975); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Pred v. Board of Pub. Instruction, 415 F.2d 851 (5th Cir. 1969); Comment, *Immunity of School Board Members, supra* note 36, at 828-29. *Cf.* Tinker v. Des Moines Independent Comm. School Dist., 393 U.S. 503 (1969), where the Court noted that only if board members are able to anticipate "substantial disruption or material interference with school activities" may they restrict students' freedom of expression to wear black armbands. The Court emphasized that "[i]n order for the State

that school board members cannot simply invoke the excuse of "discretionary judgment" in order to violate the constitutional rights of others. One particularly strong argument was raised by the United States Supreme Court in *West Virginia State Board of Education v. Barnette*:[66]

> The Fourteenth Amendment as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, *but none that they may not perform within the limits of the Bill of Rights.*[67]

In order to insure that individual members of local boards of education do not abuse their inherently discretionary powers, the section 1983 remedy is available; its coercive sanction of damages provides a more powerful weapon against future violations by individual board members than does injunctive relief.[68] In each personal liability suit filed against a board member, the federal courts have faced the task of determining whether the existence of "good faith" warranted a defense of qualified immunity. In so doing, they have failed to agree on precisely what actions satisfy the nebulous requirement of "good faith."[69] The potentially powerful effect that the standard enunciated in *Wood v. Strickland* will have upon these determinations merits a closer examination of the *Wood* standard and its ramifications in light of the existing case law.

III. The Standard of Good Faith

The scope of the immunity test to be applied to school board members in an action brought pursuant to section 1983 "is not a question which the lower federal courts have answered with a single voice."[70] A survey of the case law indicates that a variety of different standards have been utilized at different times and under different circumstances.[71] The

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in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

66. 319 U.S. 624 (1943).

67. *Id.* at 637 (emphasis added).

68. For a broad overview of this rationale *see* Note, *Damages Under § 1983, supra* note 7, at 520-23, where it is noted that individual board members may be hesitant to risk their personal financial status and will therefore be more likely to investigate all possible constitutional ramifications before making an important decision. *Cf.* Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1971) (Burger, C.J., dissenting). *See also* Berch, *supra* note 6, at 50.

69. *See* note 64 *supra.*

70. Wood v. Strickland, 420 U.S. at 315.

71. *See* note 64 *supra*; notes 81-107 *infra* and accompanying text.

standard which the Supreme Court adopts in *Wood v. Strickland*, however, appears to go far beyond the perimeters of existing case law,[72]

72. In Scheuer v. Rhodes, 416 U.S. 232 (1974), for example, a less demanding immunity standard was fashioned by the Supreme Court for the Governor and Adjutant General of Ohio. The standard in *Scheuer* encompassed a purely "subjective" approach to analyzing the actions of the officials. The Court stated:

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48.

The Court said nothing about the Governor of Ohio accounting for his conduct on the basis of the "basic, unquestioned constitutional rights" of the students involved in the Kent State demonstrations. Rather, the Court allowed for a qualified immunity defense on the basis of a reasonable belief that the surrounding circumstances justified the decision—*whether or not it ultimately passed constitutional scrutiny*. Certainly, the constitutional rights which the Kent State students possessed were no *less* important than those of the students in the *Wood* case; in the former situation it was their very lives which hung in the balance, while in the latter it was merely the right to obtain their education without invalid and procedurally inadequate interruption.

In the school context, most federal courts have been reluctant to impose a standard of good faith that requires more than a *reasonable belief* that the action taken by the board member is warranted. *See* Simcox v. Board of Educ., 443 F.2d 40, 44-45 (7th Cir. 1971) where the court of appeals held that board members were immune from liability for dismissal of a teacher because they had *justifiable grounds* for believing that the teacher had refused to cooperate with school administrators. Once again, no mention is made of whether the board members were aware of either the substantive due process rights of the teacher to continued employment (the record indicates that he was tenured, *see* note 58 *supra*), or the requisites for complying with procedural due process mandates. Presumably, under the language of the Court in *Wood*, the board members in *Simcox* would have been held to conduct which conformed to the teacher's "clearly established constitutional rights." It is doubtful that the *Simcox* court intended the scope of the "good faith justifiable grounds" test to mandate such knowledge.

So too, in Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974), the Tenth Circuit Court of Appeals *acknowledged* that the teacher's first and fourteenth amendment rights had been violated, but concluded that the members of the Utah Board of Education were immune from liability because the dismissal had been effectuated on "justifiable grounds." If the constitutional infractions were so patently obvious to the court, why did they not impute that observation to the common knowledge of the board members involved? Apparently, the court did not intend to impose such a degree of constitutional awareness upon Utah's elected educational officials. Presumably, the Supreme Court of the United States now wishes to do so.

Some courts have even de-emphasized the requirement that the board members demonstrate that they acted on justifiable grounds by shifting the burden of proof to the *plaintiff* to demonstrate that the officials acted in bad faith. *See* Roberts v. Williams, 456 F.2d 819, 831 (5th Cir.), *cert. denied*, 404 U.S. 866 (1972); Briscoe v. Kusper, 435 F.2d 1046, 1058 (7th Cir. 1973). In these cases, the courts certainly mandated no more than that the board members not act in *bad faith* (which might be equated with the "malicious intent" aspect of the *Wood* standard, *see* note 27 *supra*, and accompanying text); requiring them to conform their conduct to the precise tenets of the Constitution (as ultimately defined by the judiciary) was not considered.

Thus, it appears that the *Wood* decision carries the requirement for establishing good

by mandating that the board member will now be accountable for conduct "based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges."[73] Although the majority opinion denies that the imposition of this partially objective standard[74] will force the school board member to predict "the future course of constitutional law,[75] the Court appears to be equating "good faith" in this context with a knowledge of "clearly established constitutional rights."[76] This standard is certainly no *less* demanding than prior judicial delineations of "good faith,"[77] and the majority opinion leaves room for speculation that courts *may indeed* require the average board member to remain abreast of emerging constitutional interpretations by the judiciary.[78]

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faith to an extent not before considered by many federal courts. The opinion leaves open to speculation, however, exactly what degree of knowledge of constitutional principles school board members will be held to in future cases.

73. 420 U.S. at 322.

74. *See* note 26 *supra* and accompanying text.

75. 420 U.S. at 322, *citing* Pierson v. Ray, 386 U.S. 547, 557 (1967).

76. *Id.* The majority opinion emphasizes that "[a] compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the students' clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." The Court fails to make it clear, however, whether the "clearly established" rights refer only to those specifically delineated in the Constitution, or whether varying judicial interpretations of the guarantees incorporated into the "liberty" and "property" concepts of the fourteenth amendment due process clause. It is one thing to hold a publicly elected official to a broad knowledge of the words of the Constitution, and quite another to hold him responsible for reading and grasping the fine distinctions between the broad constitutional concepts with which appellate courts grapple in their opinions. *See* notes 18, 24, & 58 *supra*, and accompanying text.

77. *See generally* Comment, *Defense of Good Faith, supra* note 64.

78. *See* notes 127-31 *infra* and accompanying text. In the area of "substantive due process" alone, case law expanding and constricting these rights conflicts to such an extent that a board member would constantly be forced to read appellate opinions for the most recent interpretations. The *Wood* opinion leaves this problem entirely open to speculation, by utilizing the vague terminology "basic, unquestioned constitutional rights." Unquestioned by whom? Does the Court mean principles which are unquestioned by judges? By lawyers? By laypersons? These will be the nagging questions facing the lower federal courts as they seek to apply the *Wood* standard to applicable factual situations.

While it is probably unlikely that the present Court intended to open up a flood of litigation against school board members, seeking to hold them to knowledge of many of the esoteric and minute nuances of constitutional law, it was incumbent upon the Court to express its intentions in more precise language. It is conceivable that lower courts will have difficulty in defining the extent of knowledge that board members will be expected to possess. This is particularly so because we *do* hold officials in other areas of the government to knowledge of emerging doctrines of law.

Police officers, for example, are held to a knowledge of the judicial interpretations

The difficulty in devising a uniform standard of good faith in the lower courts stems from the basic disagreement over whether the inquiry should concentrate on the particular official's subjective state of mind,[79] or whether a more demanding standard of objective reasonableness should be employed.[80]

Examples of differing situations where a "good faith" immunity defense was upheld demonstrate the extent to which lower courts have refused to agree on a definitive standard of conduct. Some courts, for instance, have simply concluded that if the board as a whole acted

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dealing with police conduct in the areas of fourth, fifth and sixth amendment rights. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (what facts constitute voluntary waiver of fourth amendment right to be free from unwarranted search must be known by police officer conducting the search); Chimel v. California, 395 U.S. 752 (1969) (police held to knowledge of permissible scope of search incident to lawful arrest); Terry v. Ohio, 392 U.S. 1 (1968) (what facts known to the police officer will justify a pat down search of a suspect); Miranda v. Arizona, 384 U.S. 436 (1966) (police required to inform criminal suspects of their fifth and sixth amendment rights before arrest or interrogation).

For further amplification concerning the potential problems with the Court's standard of good faith, *see* notes 105-28 *infra* and accompanying text.

79. Some courts, for example, have defined the standard to be simply a good faith exercise of discretion, depending upon the subjective state of mind of the *particular board member* at the time the alleged constitutional infraction occurred. *See* Briscoe v. Kusper, 435 F.2d 1046, 1057 (7th Cir. 1970); Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966). Under this rationale, it does not matter whether the "reasonable person" would have known that the action being taken would violate the Constitution, or whether the reasonable person acting in such a manner would have been presumed to have a malicious intention. Rather, the court must look only at the state of mind of the defendant board member—what did *he* know? What did *he* think? What did *he* do? *See* note 26 *supra.*

80. *See* McLaughlin v. Tilendis, 398 F.2d 287, 290-91 (7th Cir. 1968) where the court imposed a standard under which qualified immunity would only be accorded to a board member if he or she could demonstrate that the official action was supported by "justifiable grounds." *See also* Simcox v. Board of Educ., 443 F.2d 40 (7th Cir. 1971); Young v. Coder, 346 F. Supp. 165 (M.D. Pa. 1972); Kirstein v. Rector and Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970). Each of these cases calls for objective evaluation by the trier of fact of the reasonableness of the defendant board members' official activities. Thus, the court will determine what the "reasonably prudent person" would have done or believed when the action was taken, and will hold the board member to that standard of conduct. *See* note 26 *supra* and accompanying text.

The *Wood* doctrine appears to go beyond the "reasonable person" objective standard by mandating even a *basic* knowledge of constitutional principles; for surely courts would not seek to hold an elected official of the community—who possesses no qualifications beyond being of voting age in the district, *see* note 117 *infra*—to educational standards which would be impossible to meet. If this is so, the difficulty in determining whether the "reasonable school board member" is different from the "reasonable person" becomes readily apparent, as most board members are no more than civic-minded individuals. *See* notes 110-26 *infra* and accompanying text.

honestly and fairly in the exercise of its discretionary powers,[81] the individual member cannot be held liable for any official misconduct, regardless of his particular state of mind.[82] In seeking to balance students' and teachers' constitutional rights against the state's interest in maintaining the effectiveness of its educational process[83] some lower courts have been hesitant to find "bad faith" in even the most outrageous factual circumstances. One blatant example is *Byrd v. Gary*[84] in which several students sought an injunction under section 1983 to restrain the school board from expelling them for attempting to organize a boycott of the school cafeteria.[85] The court found no indication in the record that the board members had taken the action against these particular students with a discriminatory motive.[86] Concluding that such an act of discretion is not assailable under the Civil Rights Act, the court stated:

> The approach of granting immunity to government officials for discretionary acts done within the scope of their authority, seems a proper one. Without the presence of a particular discriminatory intent they have no liability in any event. This approach says we will not inquire . . . into their state of mind where they are exercising a discretionary function.[87]

It should be noted that the *Byrd* court was dealing only with a request for injunctive relief; it may well have applied a different standard had the plaintiffs been seeking damages from the individual board members. There have been situations, however, where courts have sought to tip the balance in favor of defendants sued for damages under section 1983,[88]

81. *See* notes 46-59 *supra* and accompanying text.

82. Brooks v. School Dist., 267 F.2d 733 (8th Cir.), *cert. denied*, 361 U.S. 894 (1959); Ward v. Board of Regents, 138 F. 372 (8th Cir. 1905); Brown v. Greer, 296 F. Supp. 595 (S.D. Miss. 1969).

83. Many courts have emphasized the need for striking such a balance. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

84. 184 F. Supp. 388 (E.D.S.C. 1960).

85. This would appear to be a clear violation of the constitutional right to freedom of expression, particularly because the case occurred before Tinker v. Des Moines School Dist., 393 U.S. 503, 514 (1969), in which the Court held that restrictions on freedom of expression were permissible, but *only* if the board could forecast substantial disruption of the school atmosphere.

86. 184 F. Supp. at 391.

87. *Id.* at 391-92, *citing* Hoffman v. Halden, 268 F.2d 280, 300 (9th Cir. 1959).

88. Most courts have been uniform in denying immunity in an injunctive relief setting. *See Ex parte* Young, 209 U.S. 123 (1908); Louisiana State Bd. of Educ. v. Baker, 339 F.2d 911 (5th Cir. 1964); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957), *cert. denied*, 356 U.S. 969 (1958); Schreiber v. Joint School Dist. No. 1, 335 F. Supp. 745 (E.D. Wis. 1972).

leaving room for speculation that the *Byrd* court might have devised an equally lax standard for assessing the board members' actions in a damage suit setting.[89]

Still other courts have applied a restrictive definition of activities constituting a defense of good faith. In *McLaughlin v. Tilendis*,[90] for example, two former probationary teachers brought a section 1983 action against both the Superintendent and the board alleging an infraction of their rights to associate with a union of their choice. The court of appeals held that a defense of qualified immunity on the part of the board members could be sustained only if they assumed the burden of proof that the teachers were discharged on justifiable grounds.[91] The court never specifically stated, however, exactly what subjective criteria were necessary to establish "justifiable grounds." In *Smith v. Losee*,[92] on the other hand, the Tenth Circuit Court of Appeals considered a situation in which an Associate Professor at a Junior College was dismissed because of his involvement in a local political campaign.[93] The court there, placed the burden of proof on the plaintiffs, requiring them to demonstrate that in light of all of the surrounding circumstances, the school board members could not reasonably have been

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At the same time, the tendency has been to give the individual board member every benefit of the doubt before assessing monetary damages. In McDonough v. Kelly, 329 F. Supp. 144 (D.N.H. 1971), for example, the court found that a board member who cast the deciding vote for dismissal of a teacher without having attended the hearing was nevertheless immune from damages. While the court clearly expressed the belief that such action violated both the due process clause, and the right to a full and fair hearing under an applicable New Hampshire statute, it nevertheless refused to apply the damage remedy against the board members as individuals. Although the court never stated precisely why it felt that damages were inappropriate—beyond the statement that the action did not evidence bad faith—it is probable that the court considered the remedy too harsh in light of the rationale behind the immunity doctrine. *See generally* Note, *Subordinate State Officials, supra* note 1, at 887-89; Note, *Doctrine of Official Immunity, supra* note 1, at 1231-33.

89. If the result in McDonough v. Kelly, 329 F. Supp. 144 (D.N.H. 1971) is any indication of the predilections of the lower courts, it is unlikely that the remedy of damages would be invoked more freely than that of injunctive relief. *See* note 85 *supra* and accompanying text.

90. 398 F.2d 287 (7th Cir. 1968).

91. *Id.* at 290-91.

92. 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

93. *Id.* at 336-37. The administration at the college charged among other things, that Professor Smith was acting in an unprofessional manner by using the name of the college Young Democrats organization to conduct a smear campaign against an incumbent state senator. Moreover, it was alleged that Smith held an "anti-administration" attitude, and attempted to persuade the student body to protest the misappropriation of student funds by the college administration. *See* Comment, *Immunity of School Board Members, supra* note 36, at 820 n.2.

acting in good faith.[94] The court, implying that the board members could rely totally on the recommendations of the President of the College—apparently without conducting an investigation into the truth behind the allegations—failed to specify exactly how far the board members could have gone before their actions would have constituted bad faith.[95]

Finally, a survey of the cases in which the courts have labeled the board members' actions as constituting "bad faith" demonstrates still greater disparity and confusion.[96] What is clear, however, is that none of the standards fashioned by lower courts—even those which seek to objectify the inquiry on a broader level of reasonableness—purport to go as far as does the Supreme Court in mandating a standard of knowledgeable conduct to which board members must conform.[97] A particularly blatant example of this problem arose in *McDonough v. Kelly*.[98] The action was brought by a teacher against the board members individually, alleging that her dismissal was conducted without due process of law. The district court held that the fact that one board member—who was not present at the initial dismissal hearing—eventually cast the deciding vote not to renew the teacher's contract constituted a denial of due process under the fourteenth amendment.[99] However, the court concluded that damages could not be assessed against the individ-

94. 485 F.2d at 352.

95. *Id.*

96. *See* Scoville v. Board of Educ., 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970) (court found that school authorities unjustifiably expelled two high school students for distributing at school a newspaper written off campus that was critical of school administration, because it denied freedom of speech with no evidence of imminent substantial disruption of school discipline); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) (court strikes down validity of administrative sanctions which the school board used to expel University of Wisconsin students, because the alleged "misconduct" had no basis in any clearly established pre-existing rules defining an acceptable standard of conduct); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966) (minor infractions allegedly committed by teacher with a spotless record spanning twelve years including failure to stand at door of her classroom between classes and failure to clean cabinets in her classroom did not justify board decision not to renew her teaching contract); Jones v. Jefferson County Bd. of Educ., 359 F. Supp. 1081 (E.D. Tenn. 1972) (board members acted in bad faith by making unwarranted defamatory charge against a teacher where their finding of guilt without adequate investigation made it impossible for the teacher to acquire another teaching position). *See also* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

97. *See* note 72 *supra* and accompanying text.

98. 329 F. Supp. 144 (D.N.H. 1971).

99. The findings of fact by the district court indicated that not only was there a constitutional infraction, but also a violation of a New Hampshire statute requiring a full and fair hearing. *See* N.H. REV. STAT. ANN. ch. 189:14 (1967).

ual board members because their action had been undertaken in "good faith."[100]

An application of the *Wood* standard could conceivably alter the outcome of the *McDonough* case. The trial court condemned what it labeled the "blatant" constitutional violation in unequivocal language:

> It does not require any extended citation of authority to rule that *it is a fundamental denial of one's constitutional right to due process of law* to allow one who has not been present at the hearing to cast the deciding vote on the very issue which was the subject matter of the hearing. To rule otherwise would make a hearing requirement meaningless.[101]

By utilizing the word "fundamental" to describe the right to have one who will eventually sit in judgment present at the hearing, the court is expressing the belief that such procedural due process constitutes basic, unquestioned constitutional law. This is precisely the mandate for knowledge on the part of the board member prescribed by *Wood v. Strickland*.[102] Nevertheless, the district court concludes that "[w]hile the very procedure of Dr. Lionos [the absent board member] . . . is shocking to one trained in the law, it does not constitute such bad faith as to render him . . . individually liable in damages . . . ."[103] Apparently, the court did not feel compelled to require that board members be "trained in the law." Whether the decision in *Wood v. Strickland* represents a radical departure from the district court's analysis is open to speculation.

Because the factual circumstances in *McDonough* portray such a flagrant picture of unfairness, it would probably be safe to assume that most "reasonable" individuals would find the procedure to be improper. It is unrealistic, however, to assume that they would be able to label it unconstitutional, or even to offer proposed alternatives to conform it to what is believed to be a proper or "fair" procedure.[104] To the extent that it is blatantly unfair, the *Wood* standard would justifiably allow for a finding of "bad faith" and a consequent denial of immunity. However, it is not entirely inconceivable to assume that other courts may find such action unjustified under the circumstances, and deny immunity on a standard less stringent than that proposed in *Wood*. The question that arises is whether in cases where the factual circumstances do not demon-

100. *See* note 88 *supra* and accompanying text.
101. 329 F. Supp. at 150 (emphasis added).
102. 420 U.S. at 322. *See also* notes 18 & 58 *supra* and accompanying text.
103. 329 F. Supp. at 150-51.
104. *See* notes 18 & 58 *supra* and accompanying text.

strate such an obvious abuse of discretion, the *Wood* standard would impose a requirement of knowledge of constitutional principles which are less well defined.[105] Basically, the issue is: if the reasonable person[106] would not be aware of any overt constitutional improprieties, is the Court saying that the *reasonable school board member* should be?[107]

IV. POTENTIAL DIFFICULTIES IN APPLYING THE WOOD STANDARD

The divergent definitions and applications of the "good faith" standard which are rampant in the lower federal court decisions indicate that no clearcut criteria have yet been articulated to judge the behavior of the individuals who control state and local schools.[108] To the extent that the *Wood* decision attempts to establish uniformity, it is a desirable development; one that has been long overdue.[109] However, the broad language of the majority opinion raises several areas of difficulty in applying the standard to potential factual situations.

A. What is the "Reasonable School Board Member?"

A careful reading of the majority opinion indicates that the Court wishes to draw a distinction between what the average person is expected to know about constitutional principles, and what the publicly elected school board member will be required to understand. The Court states:

> To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, *a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students*, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.[110]

The italicized language appears to indicate that the school board member, as one who undertakes a special role in the governmental

105. *See generally* notes 18, 24 & 58 *supra* and accompanying text.

106. *See* notes 26 & 80 *supra* and accompanying text.

107. *See* note 80 *supra* and accompanying text.

108. *See* notes 70-102 *supra* and accompanying text.

109. This is particularly so in light of the recent advances in defining the substantive and procedural rights which school children are to enjoy under the constitution. *See generally* notes 18 & 20 *supra* and accompanying text.

110. 420 U.S. at 322 (emphasis added).

structure, may be required to be aware of constitutional principles which are beyond the common understanding of the "reasonable person." Much of the difficulty in discerning exactly what the Court is requiring stems from uncertainty about *what are* basic unquestioned constitutional rights.[111] If they are "rights" which the average layperson is presumed to know, then the standard will have negligible effect, because a board member who purposefully evades principles of such pervasive common knowledge could not reasonably be found to be acting in good faith under existing case law definitions.[112] If, on the other hand, such "rights" involve knowledge of principles beyond those found within the realm of common knowledge, the Court may be devising a standard of "reasonable conduct" for school board members which diverges from the standard of reasonable conduct of the average layperson.[113] Indeed, it appears that the Court did mean to impose a standard of conduct for board members which requires a higher degree of knowledge than that possessed by the average layperson.[114]

While such a requirement is neither unprecedented,[115] nor unjustified,[116] a difficult problem stems from the fact that school board members are in reality ordinary laypersons; they need not possess any special qualifications before assuming office.[117] It hardly seems appropriate to

111. *See* notes 127-30 *infra* and accompanying text.

112. *See* notes 90-94 *supra* and accompanying text.

113. *See* notes 26 & 80 *supra* and accompanying text.

114. Board members are "entrusted with the supervision of students' daily lives . . . ." 420 U.S. at 321. They have "voluntarily undertaken the task of supervising the operation of the school and the activities of the students." *Id.* at 322. They are therefore required to meet a standard which "neither imposes an infair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system." *Id.*

115. *See* note 26 *supra* and accompanying text. The concept of the "reasonably prudent person" as it arose in the area of tort law was flexible enough to embody the attributes of the actor himself. Thus, one who possessed a special skill, or who had undergone preparatory education to assume a particular role was judged by the standard of conduct of the "reasonable person" possessing those special characteristics. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 161 (4th ed. 1971); note 28 *supra* and accompanying text.

116. Boards of education serve an extremely important function in our society; the job of directing the operation of effectively educating a large segment of the nation's population cannot be taken lightly. *See generally* CAMPBELL, CUNNINGHAM & MCPHEE, THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS (1965); H. LEVIN, COMMUNITY CONTROL OF SCHOOLS (1970) [hereinafter cited as LEVIN]; H. WHITE, LOCAL SCHOOL BOARDS: ORGANIZATION AND PRACTICES (1962) [hereinafter cited as WHITE].

117. Legal requirements for persons seeking to become board members are often simple to fulfill. In Arkansas, for instance, where the *Wood* case arose, the education code requires only that the prospective board member be eligible to vote. ARK. STAT. ANN.

require that average voters in a school district, who seek office because they are concerned about the quality of education in their community,[118] be assigned an added burden of becoming fully aware of every legal ramification of the many decisions which they must make.[119] It was for the very reason of encouraging interested and energetic individuals to assume the burdens of public office, that the defense of immunity was born.[120] To impose upon them a standard of knowledge beyond that of the "reasonable person of ordinary prudence" who pervades the law of torts, might unduly hamper the efficiency of school board operations, if not deter enthusiastic individuals from seeking office.[121]

While requiring from our elected officials a commitment to learn

§ 80-504 (1967). Likewise, in California, the average layperson can seek election without meeting a stringent set of requirements; no special education or experience is necessitated. *See* CAL. EDUC. CODE § 1112 (West 1976) (requires a candidate to be 18 years of age, a citizen of the state, a resident of the school district and a registered voter).

Moreover, because most school board members do not receive financial remuneration for their endeavors, their role on the policy making unit is characterized more as an "outside activity" than as a serious occupation. *See* SURVEY OF PUBLIC EDUCATION IN THE MEMBER CITIES OF THE COUNCIL OF BIG CITY BOARDS OF EDUCATION 3, 15-21 (1968); WHITE, *supra* note 116, at 67-69. Thus, it is questionable whether the average board member has the time, ability or inclination to read and grasp the nuances of constitutional law for which the dissent in *Wood* fears that they will now be held accountable. 420 U.S. at 427-29. This is particularly the case because the sources available to them for guidance when they assume their new roles are inadequate to help them deal with such complex issues. *See, e.g.*, CALIFORNIA SCHOOL BOARD ASSOCIATION, BOARDSMANSHIP: A GUIDE FOR THE SCHOOL BOARD MEMBER (1975).

118. It is safe to assume that a large number of prospective board members do possess such altruistic motives, as the workload is heavy and the remuneration often inadequate or non-existent. *See* WHITE, *supra* note 116, at 67-69; *cf.* LEVIN, *supra* note 116, at 154-59.

119. *See generally* LEGAL ASPECTS, *supra* note 44.

120. *See generally* Note, *Doctrine of Official Immunity*, *supra* note 1.

121. The majority opinion in *Wood* does recognize the problems inherent in holding board members fully responsible for errors in judgment which will inevitably occur, for it notes that "[t]he most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." 420 U.S. at 320.

The Court implies, however, that upon assuming office, board members should seek to develop a "quasi-expertise" in areas of the law which they would not be expected to encounter in their roles as voting citizens in the district. Certainly this in itself is not an unfair burden for one "entrusted with supervision of students' daily lives," (*id.* at 321) to assume. It is to be expected that those individuals who seek public office—whether it be executive, legislative or administrative—will attempt to develop a certain amount of competence in the exercise of their duties, simply to make the governmental entity itself function more effectively. Such an expectation is not unreasonable. However, requiring a standard of expertise for a "reasonable school board member," not required of a "reasonable citizen" will cause potential difficulties in enforcement of the standard. *See* text accompanying notes 110-20 *supra* and 122-31 *infra*.

from their experience the most effective and beneficial manner of executing their duties is in itself a reasonable expectation, there are potential difficulties in applying a standard of conduct for the "reasonable school board member." Will the courts require a greater amount of legal expertise from a school board member who happens also to be an attorney than they would from a board member who operates a business?[122] If this is so, it is conceivable that one board member (for instance, a lawyer) would be held liable for an unconstitutional action, while another board member with less exposure to constitutional principles and appellate court interpretations of the Constitution would not be. This would hardly fulfill the objective of the Court to adopt a uniform "good faith" standard, since the result of a section 1983 action could depend as much upon the personal educational characteristics of the defendant board member as upon the forum in which the suit is brought.[123]

Moreover, will the board member be deemed more "reasonable" as he gains more experience? If so, it would be possible to hold a board member with a twelve year tenure to a greater degree of knowledge than a board member who has served six months. Assuming that the term "basic, unquestioned constitutional rights" was meant by the Court to refer to the basic guarantees in the words of the Constitution itself (for example, freedom of speech, freedom of religion), a distinction based upon years of experience in office would not be unwarranted, as we would expect an individual who has faced the job of conducting board activities more often to have discovered what he is expected to know long before the more recently elected members. However, because constitutional principles of due process change frequently with varying judicial interpretations,[124] experience in office would be of little import if board members were expected to remain abreast of new appellate interpretations.[125]

Thus, while the *Wood* opinion is certainly justified in calling for a certain degree of expertise in assuming an office of such great responsibility, the Court fails to consider the practical difficulties of imposing an objectified standard of knowledge on school board members who have

122. Borrowing the concept of the "reasonable person" from the law of torts, it would appear that one who acquires special knowledge or skills does not shed them when they are to be utilized in a different capacity, for the characteristics of the actor are uniquely his, and all actions must be judged accordingly. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 151-52 (4th ed. 1971). *See also* notes 28, 78-80 *supra* and accompanying text.

123. *See* note 64 *supra* and accompanying text.

124. *See* notes 18, 24 & 58 *supra* and accompanying text.

125. *See* notes 127-30 *infra* and accompanying text.

differing amounts of expertise and knowledge. Perhaps because of the importance of assuring that public school students and teachers are accorded every procedural and substantive right to which they are entitled, the requirements for seeking office should be raised to a minimum level of educational or administrative experience. The responsibility for changing the candidacy requirements lies with the legislature rather than the courts. However, such a proposal would make a democratic community election difficult, particularly since no such requirements are imposed upon individuals who seek higher elective office.[126]

B. What constitutes "basic, unquestioned constitutional law?"

A second area of difficulty which the Court leaves unanswered is the standard that a reviewing court is to apply in determining what is the indisputable constitutional law of which the school board member is now to be held knowledgeable. The dissent argues that the concept is illusory, because even lawyers and judges cannot agree on the "settled indisputable law."[127] Should the school officials be charged with an

126. *See* LEVIN, *supra* note 116. Arguably, if requirements for seeking positions on school boards were suddenly raised, many interested, but less educated or experienced members of the community would be barred from representation. The United States Constitution does not mandate strict requirements of qualifications for either legislators or the President. *See* U.S. CONST. art. I, § 2, cl. 2 (a Congressman must be 25 years old, a citizen of the United States for seven years and an inhabitant of the state which he or she is elected to represent); U.S. CONST. art. II, § 1, cl. 5 (the President must be 35 years old, a natural born citizen and a resident of the United States for fourteen years). Surely, these offices require *no less* expertise and education than is necessary to effectively operate the schools; it would be inappropriate to require a greater degree of qualification for school board members.

127. 420 U.S. at 329. Referring to Goss v. Lopez, 419 U.S. 565, 584 (1975) (Powell, J., dissenting), the dissenting opinion calls attention to the fact that many vital constitutional issues are decided by a vote of five to four in the Supreme Court of the United States. One need look only to the numerous times that "landmark" constitutional interpretations are later overruled by the same tribunal. The evolving area of criminal procedure indicates that the concept of a "settled" doctrine of constitutional law is not a practical reality. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel is a fundamental right under the fourteenth amendment) which overruled Betts v. Brady, 316 U.S. 455 (1942) (due process clause of fourteenth amendment does not incorporate right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applies in state proceedings barring evidence seized unconstitutionally) which overruled Wolf v. Colorado, 338 U.S. 25 (1949) (exclusionary rule does not apply in state proceedings); Brown v. Board of Educ., 347 U.S. 483 (1954) (equal protection of fourteenth amendment mandates that separate facilities for different races is inherently unequal) which overruled Plessy v. Ferguson, 163 U.S. 537 (1896) (the Constitution does not prohibit use of "separate but equal" railway facilities for different races).

Emerging interpretations of the scope of constitutional guarantees are, therefore, as "settled" as the time that it takes to overrule a previous opinion. Thus, without keeping

understanding of the intricacies of the judicial structure so that they can give due weight to conflicting opinions from superior and inferior tribunals?[128] At what point in time will the board member be held accountable for awareness of new constitutional interpretations decided by the courts?[129] Will a sincere reliance upon improper advice of counsel constitute a valid defense?[130] It is interesting to note that the

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abreast of recurring judicial opinions, board members can never be totally aware of what the "law" is at any particular time. This has caused some commentators to critically assess the difficulties of requiring governmental officials—such as school board members—to conform their conduct to differing constitutional interpretations:

> If damages are to be permitted against school officials, the argument places great responsibility on the judiciary and on legislators to clearly articulate the guidelines which are to be followed. For example, the meaning of "due process hearing" should be well defined if administrators are to be held accountable for their failure to fully provide such a forum.

Note, *Damages Under § 1983, supra* note 7, at 522-23.

128. It has been pointed out by some commentators that school board members can turn only to statutes and court decisions in order to formulate standards and guidelines for their own official conduct:

> Where prior court determination of an issue is available, school board members are in the same position as the lower administrative officials who seek advice from the board. Where such advice is sought and given, immunity should exist, but where unilateral action is taken and a constitutional right is violated, the conduct should not be considered reasonable.

Comment, *Damages Under § 1983, supra* note 7, at 529-30.

What is the board member to do if, as is often the case, there are two differing interpretations of the same basic issue by different tribunals? Should the average board member be aware of which opinion is to be controlling? This problem has occurred before in another area where constitutional interpretation by the judiciary is of vital importance—fourth amendment violations. *Compare* Robinson v. United States, 414 U.S. 218 (1973) (the fact of a lawful custodial arrest alone justifies a full blown incidental search of the arrestee) *with* People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 19 Cal. Rptr. 315 (1975) (California Supreme Court holds that lawful custodial arrest alone will not make an incidental search valid). While logically it does not seem unreasonable to hold California police officers to a knowledge of the California Supreme Court's interpretation of its own constitution, so that they do not utilize the harsher federal standard of *Robinson*, does this mean that school board members (who, unlike police officers, do not hold a full time job where knowledge of such operating procedures is crucial) will be required by *Wood* to discern which appellate opinion they must follow if the California Supreme Court and the United States Supreme Court differ on a decision interpreting their respective due process clauses?

129. The *Wood* opinion is silent on the issue of whether or not a board member will be expected to keep constantly abreast of new decisions, so that knowledge of changing constitutional interpretations will be realized even before the opinion is published in the reporter system. For example, must the school board member read the advance sheets of the courts within the jurisdiction that he serves? When will basic constitutional principles be regarded as sufficiently "settled" that knowledge of them will be expected? While board members would probably not be called upon to read new appellate decisions every two weeks, or even every two months, the Court leaves the problem open to speculation—and open to the whims of the lower federal courts—by not specifying what is meant by the term "settled" constitutional law.

130. The criminal law has tended to allow reasonable mistakes of law to constitute

dissent raises this latter point specifically, warning that the majority is equating "actual malice" with an ignorance of the law, necessitating that a school official "will now act at the peril of some judge or jury subsequently finding that a good faith belief as to the applicable law was mistaken and hence actionable."[131]

These are all vital questions which remain unanswered by the majority opinion, and which must be resolved before the standard enunciated by the Court can become a workable framework within which to assess the actions of an individual school board member in a personal liability action brought pursuant to section 1983. It is still too early for the lower court case law to reflect the approach to the "good faith" standard enunciated in *Wood v. Strickland.*

There have been relatively few cases dealing with the express issue of what constitutes "good faith" for a defense of qualified immunity since the *Wood* case was decided. The cases which have considered the new qualified immunity standard generally do not present an optimistic outlook for school board members. In *Thonen v. Jenkins*[132] for example, two university students who were disciplined because of a letter published in a school newspaper brought a section 1983 action seeking correction of their academic records, readmission, monetary damages and attorneys fees. The Fourth Circuit Court of Appeals, citing the *Wood* case, remanded to the district court for a determination on the issue of the officials' qualified immunity from damages. The court noted that the appropriate test now involves inquiry into *objective* as well as subjective good faith, and that the district court had addressed only the issue of *subjective* good faith. What the district court will find is clearly open to speculation; however, it is apparent that the court of appeals was hesitant to affirm the trial court finding of immunity even though the record indicated that the university officials took their action in the sincere belief that they were acting correctly.[133]

A potentially very significant case is *Bright v. Los Angeles Unified School District*,[134] not so much for its position on the issue of immunity,

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a defense to actions which require a particular mental element. *See* Cox v. Louisiana, 379 U.S. 559 (1965). *Cf.* People v. McCalla, 63 Cal. App. 783, 220 P. 436 (1923). Once again the question is left unanswered: must a school board member seek advice of counsel before every important decision, and if so, will the board member be held accountable if that advice is erroneous?

131. 420 U.S. at 322.

132. 517 F.2d 3 (4th Cir. 1975).

133. *Id.* at 5-6.

134. 124 Cal. Rptr. 598 (Ct. App. 1975), *aff'd*, No. 30555 (Cal. Supreme Court, Dec. 6, 1976).

as for its apparent willingness to hold a school official (principal of high school) to knowledge of constitutional principles which are presumably beyond the realm of common knowledge. The action was brought by a high school student for an injunction to prevent school officials from interfering with her distribution of an underground newspaper prepared by students. The complaint also sought declaratory and monetary relief. The principal had banned the distribution of the newspaper on the ground that it contained material which was libelous against a particular school official. The California court of appeal held that the use of prior restraint on the ground that the proposed publication contained "facially libelous" material violated due process because the principal had determined that the article in question was libelous *solely on the basis of assurances by the school administrators that it was false.* The significance of the court's opinion lies in its determination that the principal was unjustified in not extending his inquiry into the truth or falsity of the article, as he did not determine before exercising his censorship of the publication whether the article was conditionally privileged. The court of appeal applied a stringent requirement of "legal knowledge" to which the principal was bound to conform by stating:

> Under the due process clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 7 of the California Constitution before the distribution of the summer 1974 issue of "The Red Tide" on the University High School campus could be constitutionally prevented by Principal Welch on the ground that it contained libelous material, he had to make a 'fundamentally fair' and reasonably complete (considering the stringent limitations of time) investigation to determine whether the facially libelous material was libelous "*according to legal standards.*"[135]

The court concluded that the principal did not comply with such standards because his factual inquiry into the truth or falsity of the article in dispute was too limited and because he made no independent investigation into whether the distribution of such material might be conditionally privileged.[136] Presumably, in order for him to determine whether the material was conditionally privileged, the principal would have been compelled to be aware of the standard enunciated in *New York Times v. Sullivan,*[137] (*i.e.* the students would have had to know of

135. *Id.* at 604 (emphasis added).
136. *Id.* at 604-05.
137. 376 U.S. 254 (1964).

the falsity of their statements or have acted with reckless disregard for the truth).

Although the court of appeal failed to refer to the *Wood* case (apparently because no immunity problems were directly at issue it is not unlikely that this same court would hold a school board member to a similar degree of knowledge of particular constitutional principles. The only distinguishing factor in the *Bright* situation was the existence of a statute which provided that public school students have a right to exercise free expression in printed materials, with the exception that expression which is libelous according to *current legal standards* is prohibited.[138] The existence of this statute, which apparently places a heavy burden upon school administrators to ascertain what is libelous and what is not (according to current legal standards) does not negate the distinct possibility that a school board member would also be held to a determination of the law of libel at the particular time if a suspension was being considered rather than a prior restraint.

In *Hutchison v. Lake Oswego School District*,[139] a pregnant teacher brought an action for damages because she had been excluded from sick leave coverage. Although the court found that the board members had not acted in bad faith under the *Wood* standard, it emphasized the fact that the board members had sought and relied upon the advice of the State Director of Legal and Executive Services. The court notes, also, that the board members were justified in concluding that they were not disregarding "settled, indisputable law" since "the courts themselves have been split as to whether or not pregnancy may permissibly be excluded from sick leave coverage."[140] Thus, while the Ninth Circuit Court of Appeals did not interpret the *Wood* standard to be so stringent that it barred a defense of immunity in this context, it implied that had the court opinions *not* been conflicting, and had the board *not* relied upon legal advice, the existence of good faith may well have been determined differently. The court never explicitly stated that the board members were free to exercise their own sincere judgment as to the good faith of their actions (as previous case law allows);[141] rather, they were apparently expected to seek legal advice on the state of the existing case law interpreting the extent of due process connected with pregnancy disabilities. Happily for the board, even though the advice of the State

138. CAL. EDUC. CODE § 10611 (West Supp. 1975); *see also* 124 Cal. Rptr. at 601-02.

139. 519 F.2d 961 (9th Cir. 1975).

140. *Id.* at 968.

141. *See, e.g.*, Brown v. Greer, 296 F. Supp. 595 (S.D. Miss. 1969).

Director of Legal and Executive Services was erroneous (as the board actions violated Title VII of the Civil Rights Act), their attempt to solicit such an opinion placed their action within the realm of "good faith."[142]

In *Sapp v. Renfroe*[143] the Fifth Circuit Court of Appeals was faced with an action for damages against school board members brought by a student who had been expelled because he refused to attend ROTC meetings. In concluding that the defendants could maintain a claim of qualified immunity, the court noted that

> [w]hile determining that a constitutional right is "clearly established," or is "basic" and "unquestioned" is likely to prove an onerous burden for the Board, . . . we believe that Sapp's freedom from attending ROTC was not a clearly established constitutional right.[144]

The basis upon which the court concluded that Sapp's conscientious objector status was not a constitutional right is unclear. However, its unwillingness to hold the defendants liable for damages indicates that at least one circuit is willing to read the *Wood* standard of "unquestioned constitutional law" rather loosely.

Finally, in *Samuel v. University of Pittsburgh*,[145] several plaintiffs, who had successfully challenged a state university rule under which the residency of married female students, for purposes of tuition, was determined by looking to the residency of their husbands, moved for attorneys fees. The court of appeals concluded that

> [f]rom the outset counsel has contended and this Court has found that the presumption of a married female student's domicile which this Court previously struck down was a rule of the Auditor General of the Commonwealth of Pennsylvania which the three defendant Universities, by virtue of their financial and administrative relationship with the Commonwealth, were obliged to have on their books if not follow. . . . The Universities will not be held to have acted in bad faith where their administration of the Auditor General's rule was nondiscretionary throughout the period in question.[146]

The factual circumstances in *Samuel* were clearly distinguishable from the discretionary role that the board members played in *Wood*. The court, by its explicit language referring to the University officials' ministerial duties, leaves open to speculation whether or not they would

142. *See* note 131 *supra*.
143. 511 F.2d 172 (5th Cir. 1975).
144. *Id.* at 176.
145. 395 F. Supp. 1275 (W.D. Pa. 1975).
146. *Id.* at 1284.

have been held to a more stringent standard had they been faced with a policy decision of their own making.

Whether or not the potential difficulties that have been raised in this Comment will pose a serious obstacle for school board members is open to speculation. However, the decision clears the way for the possibility of a large number of suits being filed against board members under section 1983.[147] This alone may create a potential problem for the efficient maintenance of school district operations. Board members—even if eventually able to prevail on a defense of qualified immunity—may be forced to spend an inordinate amount of time simply answering charges that are filed.[148]

If the courts are going to be more amenable to holding board members accountable for violating the rights of students and teachers,[149] there should be some vehicle available for insuring that only the most meritorious claims reach the point of litigation in the federal courts. The answer that has been devised by some courts to deal with both the interests of the party seeking redress and the official sued under section 1983 has been the requirement that the plaintiff exhaust all available administrative and judicial remedies before seeking relief under the Federal Civil Rights Act.[150]

It is unclear whether the students in the *Wood* case sought to exhaust their administrative remedies; the Court did not consider the issue. From the point of view of the board member, however, it appears to be an extremely important consideration. If board actions which are unjustified in light of the surrounding circumstances can be examined and ultimately corrected before the possibility of lengthy litigation arises, the party seeking redress can be satisfied, and the board member can avoid the possibility of monetarily compensating for the unwarranted invasion of constitutional rights.[151] On the other hand, if the action has

147. A greater accessibility to potentially successful compensatory awards may make the damage remedy a more attractive vehicle for students and teachers than it has been in the past. *See* note 6 *supra* and accompanying text.

148. The avoidance of just such a demand on the time, energy and resources of the public official was the motivating factor behind the immunity doctrine. *See* notes 34-36 *supra* and accompanying text.

149. *See* notes 7-10 *supra* and accompanying text. The rise in interest in student constitutional rights has led to a concomitant interest in seeing that those rights are enforced.

150. Case law clearly indicates that exhaustion of administrative remedies is a factor to be weighed in the section 1983 setting. *See* McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973).

151. The Supreme Court noted this particular advantage in Parisi v. Davidson, 405

created a severe hardship for the party seeking relief, he may wish to seek damages under section 1983 in any event, without undergoing the delay of exhausting his administrative remedies initially.[152] The reasonableness of both positions is not open to serious question, but the requirement of exhaustion of administrative remedies has posed a controversy in the federal courts,[153] and certainly is one that must be considered in the context of civil rights actions against members of boards of education.[154]

U.S. 34 (1972):

> The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence, to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.

Id. at 37.

152. Because no monetary compensation is ordinarily provided in an administrative proceeding, the plaintiff may wish to proceed in federal court even if ultimately satisfied by the administrative decree of reinstatement or expunction of records. For example, it does little good to reinstate a student who has missed an entire year of school and must undergo remedial measures, perhaps forfeiting the opportunity to graduate at the expected date. *See* Strickland v. Inlow, 485 F.2d at 188 n.1. Under these circumstances, compensatory and punitive damages may be in order, and it would be meaningless to require a lengthy procedure through the administrative maze which would facilitate nothing but an increase in the actual damages.

153. *See* notes 161-70 *infra* and accompanying text. *See also* C. WRIGHT, LAW OF FEDERAL COURTS 186-88 (2d ed. 1970); Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968) [hereinafter cited as Note, *Exhaustion of State Remedies*].

154. The educational context, in particular, provides a host of administrative remedies which students and teachers may pursue if their rights have been violated by either an executive or an administrative official of the school district. In the case of students, California provides a procedure whereby expulsions are appealed to the County Board of Education after a hearing by the local board. CAL. EDUC. CODE § 10608 (West 1973). The procedure at the hearing by such a governmental agency (the State Board of Education) is specified in CAL. GOV'T CODE § 11506 (West 1973).

The State of Washington provides a particularly enlightened example of a meticulously detailed procedure for students to follow, because the legislature recently enacted a statute dealing with the due process rights of students. WASH. AD. CODE, ch. 180-40 (1972). *See generally* Note, *Education—Due Process for Washington Public School Students*, 50 WASH. L. REV. 675 (1975).

Under the new Washington statute, formalized administrative procedures are required for hearings on expulsions or suspensions. WASH. AD. CODE § 180-40-140. The student is given advance notice of the initial hearing by an impartial decision maker, and the student's parents are invited to be present to be appraised of the charge against the student. *Id.* § 180-40-140(2). If an adverse judgment is rendered, the student has five days within which to appeal to the local school board. *Id.* § 180-40-140(5). If the student wishes to further appeal the local board's adverse finding, he may do so within thirty days to the superior court in the county in which the school district is located. *Id.* § 180-40-155.

In the area of teachers' employment hearings, the state of Arkansas provides a rather explicit set of administrative appeal procedures. ARK. STAT. ANN. § 80-1245 (1972). Any teacher who is dismissed or whose contract is not renewed for the following year

V. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The requirement of exhaustion of state administrative remedies has become a well settled doctrine of federal judicial administration.[155] The foremost rationale for the requirement of complete exhaustion is the protection and promotion of the state's interest in local regulation, by allowing the proper state agencies to "correct their own errors" before seeking redress in a federal forum.[156] This was noted with particular clarity in *Hayes v. Cape Henlopen School District.*[157]

> Having acknowledged and responded to the possibility of arbitrary or unreasonable administrative actions [such as those taken by boards of education] by establishing an administrative mechanism with procedures tailored to review and remedy, the state or state administrative agency has a legitimate interest in being afforded an opportunity to implement its apparatus and initiate appropriate corrective measures.[158]

At the same time, an exhaustion requirement facilitates the efficient allocation of judicial resources and promotes the exercise of judicial economy which is essential for the widest possible disposition of cases in the federal courts.[159] Moreover, a plaintiff who is required to exhaust all administrative remedies will not be disadvantaged if at a later time he or she wishes to invoke section 1983 in a federal forum, as the bar effect of

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may file a written request for a hearing by the board. The delineated procedure for the hearing is set forth in ARK. STAT. ANN. § 80-1246 (1970).

155. *See* Younger v. Harris, 401 U.S. 37 (1971); McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

156. This rationale was often cited in school segregation cases, to limit intervention by the federal courts. *See, e.g.*, Parham v. Dove, 271 F.2d 132, 137 (8th Cir. 1959); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95, 98 (4th Cir. 1959), *cert. denied*, 361 U.S. 818 (1960).

In Younger v. Harris, 401 U.S. 37 (1971), the interest of the states in local regulation was emphasized, as the Court called for federal deference to state procedures under the doctrine of comity. The Court emphasizes:

> The concept [of comity] does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44. *See generally* Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974). [hereinafter cited as Comment, *Exhaustion of State Administrative Remedies*].

157. 341 F. Supp. 823 (D. Del. 1972).

158. *Id.* at 832.

159. *See* Palmigiano v. Mullen, 491 F.2d 978 (1st Cir. 1974); Comment, *Exhaustion of State Administrative Remedies, supra* note 156, at 540-41.

res judicata does not attach to state administrative proceedings.[160]

The existence of an exhaustion requirement in suits brought pursuant to section 1983 has been the subject of considerable discussion and disagreement.[161] The raging conflict in the existing case law underscores the lack of consistency surrounding the issue of whether, and under what circumstances, exhaustion is a prerequisite to filing an action under the Civil Rights Act.[162] In particular, the circuit courts of

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160. The principle underlying the doctrine of res judicata is that every party should have his day in court, but once the decision of the tribunal is made final, and all available appeals have been utilized and finally determined, the same parties may not relitigate the issue. The objective is to prevent the courts from needless waste of time, and to effectuate repose in the determination of controversies. *See generally* 18 MOORE, FEDERAL PRACTICE (2d ed. 1974); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

Given the reason for the doctrine of res judicata, it would be inappropriate to impose the bar in subsequent judicial proceedings.

> The principle of res judicata is designed for adjudication, typified by a court proceeding, and many perplexities of res judicata in administrative law concern nonjudicial or unclassifiable functions. Courts normally apply law to past facts which remain static—where res judicata operates at its best—but agencies often work with fluid facts and shifting policies. The regularized procedure of courts conduces to application of the doctrine of res judicata; administrative procedures are often summary, parties are sometimes unrepresented by counsel, and permitting a second consideration of the same question may frequently be supported by other similar reasons which are inapplicable to judicial proceedings.

K. DAVIS, ADMINISTRATIVE LAW AND PROCEDURE 3 (1960).

Davis concludes that the sound view is to reject the doctrine of res judicata with respect to administrative hearings, when the reasons against it outweigh those in its favor. *Id.* at 345. Presumably, when the issue of possible violation of federally guaranteed rights is at stake, the courts would find a compelling reason to reject the doctrine. This has been noted by several courts which have refused to impose an exhaustion requirement when the plaintiff invokes the Civil Rights Act. *See, e.g.*, Allee v. Medrano, 416 U.S. 802 (1974); McNeese v. Board of Educ., 373 U.S. 668 (1963); Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973). The avoidance of imposing the res judicata doctrine on administrative proceedings where constitutional rights are in issue is a reasonable one, and serves the additional function of encouraging rather than discouraging a resort to administrative relief before invoking a federal cause of action. The exhaustion of administrative remedies postpones rather than precludes the assertion of federal jurisdiction. *See* Petroleum Exploration, Inc. v. Public Service Comm'n, 304 U.S. 209, 219 (1938); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-52 (1938).

161. *See generally* Note, *Exhaustion of State Remedies, supra* note 153; Comment, *Exhaustion of State Administrative Remedies, supra* note 156.

162. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (state appellate remedies must be exhausted in defense of nuisance allegation under applicable Ohio statute before resort to federal district court unless the party can show irreparable injury); Houghton v. Shafer, 392 U.S. 639 (1968) (exhaustion of administrative remedies not required in suit against prison authorities for confiscating materials gathered in preparation of appeal); Damico v. California, 389 U.S. 416 (1967) (relief under Civil Rights Act was not precluded by failure to seek relief under state administrative law available for challenging welfare laws); Monroe v. Pape, 365 U.S. 167 (1961) (exhaustion of state remedies was not necessary when such remedies were inadequate to produce relief from false

appeals are divided on the breadth of the Supreme Court's decisions concerning section 1983 and a litigant's rights to resort to a federal tribunal in lieu of prior appeal at each available administrative level.[163]

Much of the conflict appears to center upon whether the available administrative remedies are deemed to be "adequate" enough to require the plaintiff to pursue them before submitting the controversy to federal adjudication.[164] In the school context, this is particularly difficult to determine, as often there are problems of time and expense which will cause greater damage to the plaintiff than would the immediate filing of a complaint under the Civil Rights Act.[165] While some administrative

arrest and detention); Palmigiano v. Mullen, 491 F.2d 978 (1st Cir. 1974) (administrative process must be pursued until the case is "ripe" for judicial determination); Blanton v. State Univ. of N.Y., 489 F.2d 377 (2d Cir. 1973) (failure of disciplined students to follow administrative appeals procedure outlined in published student handbook is not absolute bar to federal relief but will be weighed as one of the factors in a determination if they were deprived of their constitutional rights to procedural due process); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973) (while there is no automatic requirement of exhaustion of administrative remedies, there must be some institutional determination of the issues before section 1983 is invoked).

163. The first, second and ninth circuits have all made exhaustion of administrative remedies a prerequisite to the filing of a section 1983 suit in certain situations. *See, e.g.*, Beattie v. Roberts, 436 F.2d 747 (1st Cir. 1971); Dunham v. Crosby, 435 F.2d 1177 (1st Cir. 1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969); Taney v. Reagan, 326 F. Supp. 1093 (N.D. Cal. 1971). The fifth circuit, on the other hand, has held that a plaintiff is *not* required to pursue either state judicial or administrative remedies prior to bringing suit under section 1983. *See, e.g.*, Chisley v. Richland Parish School Bd., 448 F.2d 1251 (5th Cir. 1971); Rainey v. Jackson State College, 435 F.2d 1031 (5th Cir. 1970).

164. The rationale behind such a consideration is to insure that a plaintiff is not needlessly frustrated by expending time and energy on appeals through the proper administrative channels, if those appeals will not adequately compensate for the injuries which have occurred. *See* McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973) (test to determine adequacy of state administrative remedy is the degree of due process that the prison inmate will receive, including the extent of prejudgment that takes place, whether the remedy is being administered in an even-handed manner, and the extent of the state's interest in the subject matter of the federal litigation); O'Brien v. Galloway, 362 F. Supp. 901 (D. Del. 1973) (because a discharged police officer could refer to no delineated procedure for reinstatement, the administrative remedies were inadequate, and he was not precluded from bringing suit in federal court).

It was for such reasons that the Civil Rights Act was adopted; section 1983 provides a remedy where the state remedy is, for all practical purposes, unavailable. *See* CONG. GLOBE, 42D CONG., 1ST SESS. 460 (1871). In Monroe v. Pape, 365 U.S. 167, the Supreme Court analyzed section 1983 extensively, concluding that it has three functions: (1) to overrule certain kinds of state laws; (2) to provide a federal remedy where the state remedy, though adequate in theory, is not available in practice; and (3) to provide a remedy where state law is inadequate.

165. For example, a student who has been expelled may have difficulties in obtaining an immediate injunction to restrain the board from depriving him or her of the opportunity of attending school. *See* Strickland v. Inlow, 485 F.2d 186, 188 n.1 (8th Cir. 1973).

procedures do not cause a deprivation of rights until the conclusion of the administrative process,[166] this is rarely the case when constitutional infractions against students and teachers are involved.[167] Whether it be a lack of procedural due process in an expulsion[168] or employment termination hearing,[169] or the censoring of protected constitutional rights to freedom of religion,[170] expression[171] or association,[172] a requirement that the plaintiff make futile appeals through several administrative panels before being allowed to seek judicial redress for constitutional infractions has been deemed by the Court to be contrary to the very purpose of the section 1983 remedy.[173] Thus, regardless of the existence of an exhausion requirement, the failure to resort to state administrative remedies will preclude a section 1983 action only when the available administrative remedies are adequate and effective. Although

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Because the appeals process on the administrative level is often slow and arduous, each day the student is forced to remain away from school increases the damages. *Cf.* Rackley v. School Dist. No. 5, 258 F. Supp. 676 (D.S.C. 1966), where the court held that a probationary teacher should not be denied the right to immediate resort to federal courts for an injunction restraining her removal from employment while she undertook to exhaust inadequate or ineffective administrative remedies.

166. *See* Comment, *Exhaustion of State Administrative Remedies, supra* note 156, at 549 n.61. For instance, in some states, the license revocation process allows an individual charged with abuse of a permissive license to practice until the completion of the administrative proceeding. Therefore, the individual is not deprived of anything until the administrative process has run its course. This is not the case in the school context, where expulsions and non-renewal of employment contracts are ordinarily effective immediately.

167. *See* notes 165-66 *supra* and accompanying text.

168. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Goss v. Lopez, 419 U.S. 565 (1975).

169. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

170. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

171. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

172. Holliman v. Martin, 330 F. Supp. 1 (W.D. Va. 1971).

173. Monroe v. Pape, 365 U.S. 167 (1961). In the landmark case of McNeese v. Board of Educ., 373 U.S. 668 (1963), the Supreme Court indicated that a constitutional claim is of such fundamental importance that immediate resort to the federal courts is not only justified, but in many situations is necessitated. Moreover, Justice Douglas noted in the majority opinion that "[i]t is immaterial whether the [board members'] conduct is legal or illegal as a matter of state law. Such constitutional claims are entitled to be adjudicated in the federal courts." *Id.* at 674.

Four years after the *McNeese* decision, however, the Court declared that a constitutional claim alone will not provide a plaintiff with an exemption from all requirements for seeking administrative relief. According to the Court, the primary inquiry in a determination of whether exhaustion is required is the adequacy of the administrative remedy rather than whether a constitutional right is being asserted. *See* W.E.B. Du Bois Clubs of America v. Clark, 389 U.S. 309 (1967).

the determination of what constitutes an "adequate" or "effective" administrative remedy is difficult of application,[174] the courts have been in general agreement that a plaintiff should not be obligated to pursue procedures which are inherently futile,[175] or which would be unproductive and could further damage his constitutionally protected rights.[176] The existence of a stringent exhaustion requirement would not, therefore, alleviate the potential threat of a flood of section 1983 actions against school board members when the administrative remedies are deemed unsatisfactory.

CONCLUSION

The purpose of this Comment has not been to condemn the attempt by the United States Supreme Court to enforce constitutional rights enjoyed by public school students and teachers. Few individuals would argue with the Court's statement in *Goss* that the due process guarantees in the Constitution do not cease to exist at the school house door. The questions which have been raised have been directed at an analysis of the Court's *method* more than at its *motive.* Admittedly, this analysis raises many more questions than it answers. The necessity for holding school board members accountable for their actions in order to meet the required constitutional standards is not at issue; the standards by which their accountability is to be determined is the critical problem. Holding average school board members to a standard of "knowledge" which may be interpreted to be beyond their capabilities is clearly not the way to impress upon them the need to conform their official activities to the tenets of the Constitution.

The reason that the Court's standard in *Wood v. Strickland* is difficult

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174. *See generally* Comment, *Exhaustion of State Administrative Remedies, supra* note 156.

175. *See, e.g.,* Haughton v. Shafer, 392 U.S. 639 (1968); McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). In addition, the procedures must be sufficiently delineated either through statute, regulation or practice to permit the individual and his attorney to accurately assess their responsibilities and opportunities within the administrative process and the probable efficacy of that process. Hayes v. Cape Henlopen School Dist., 341 F. Supp. 823, 831 (D. Del. 1972).

176. *See* Note, *Exhaustion of State Remedies, supra* note 153, at 1208, where it is noted:

> It has been suggested that, in some circumstances, the desirability of a prompt determination may be augmented by the fact that state statutes or regulations may "create pressures . . . analogous to the 'chilling effects' of strictures upon first amendment rights."

Id. at n.49, *citing* Note, *Federal Judicial Review of State Welfare Practices,* 67 COLUM. L. REV. 84, 101 (1967) (footnotes omitted). *See also* March v. School Bd., 305 F.2d 94, 98-99 (4th Cir. 1962); Farley v. Turner, 281 F.2d 131 (4th Cir. 1960).

of application is that it utilizes terms which it fails to decisively define: "basic," "settled," "indisputable." These terms are susceptible to a seemingly endless variety of meanings, varying with one's interpretation of the myriad sets of legal standards which are encompassed by "constitutional law."

It is impossible to accurately speculate on how the lower federal courts will interpret the *Wood* standard in future personal liability actions brought against school board members under section 1983. Given the underlying rationale for the doctrine of qualified immunity, and given the need to encourage rather than discourage the interest of qualified candidates to assume the role of directing the nation's schools, it is probably safe to assume that board members will not often be held to knowledge of fine points of law over which legal scholars fail to concur. It is the vast middle ground, however, which may cause difficulties with application of the standard. For example, where is the line to be drawn between what the average person would be expected to know about the implementation of procedurally fair and constitutionally adequate expulsion hearings, and what the judiciary has decreed are required procedures? Who is to determine what specific rights a student or teacher possesses under the "liberty" and "property" concepts of the fourteenth amendment, and when these rights have attained "settled" status?

It is with difficult problems such as these that lower courts must now grapple in an attempt to discern which principles of constitutional law are sufficiently established to have become "unquestioned." Unfortunately, until the Supreme Court speaks to the issue once more, the lower courts can look only to each other for guidance; *Wood v. Strickland* provides sorely inadequate assistance.

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