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Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size

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Comments

Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size

The historical development of the Civil Rights Act of 1871[1] has been a remarkable one. Until comparatively recent years, the statute was mired in obscurity and construed, when construed at all, more narrowly than the fourteenth amendment it was designed to implement.[2] By the twentieth century it was doubtful whether the statute was still in force.[3]

Due in large measure to the Supreme Court decisions in *Hague v. CIO*,[4] *Monroe v. Pape*,[5] and *Lynch v. Household Finance Corp.*,[6] private rights of action based on section 1983 began to flood federal tribunals.[7] This phenomenon, which one federal judge termed a "mad rush to the federal court,"[8] significantly altered the fabric of

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1. Section 1 of the Civil Rights Act of 1871 reads:

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

42 U.S.C. § 1983 (1970) [hereinafter referred to as the Civil Rights Act or 1983].

2. *See, e.g.*, Hague v. CIO, 307 U.S. 496, 507-12 (1939) (Roberts, J.) (jurisdiction available only to plaintiffs proving violation of privileges and immunities clause); *id.* at 531-32 (Stone, J., concurring) (§ 1343(3) unavailable for deprivation of property rights). *See also* Monroe v. Pape, 365 U.S. 167, 211-12 & n.16, 213-18, 224-39 (1961) (Frankfurter, J., dissenting) (arguing that "under color" of state law in § 1983 is narrower than "state action" in fourteenth amendment).

3. *See* Holt v. Indiana Mfg. Co., 176 U.S. 68, 72 (1900) ("[a]ssuming [§§ 1983 and 1343(3)] are still in force, it is sufficient to say that they refer to civil rights only and are inapplicable" to a claim seeking to enjoin state taxation of patent rights).

4. 307 U.S. 496 (1939).

5. 365 U.S. 167 (1961).

6. 405 U.S. 538 (1972).

7. As of September 1976, 772 pages of § 1983 cases were listed at 42 U.S.C.A. § 1983 (Cum. Supp. 1976). In fiscal year 1960, the year before *Monroe*, there were approximately 300 actions filed under the general heading of civil rights. *See* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 1 & n.2 (1974) [hereinafter cited as McCormack].

8. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. O. 557, 559 [hereinafter cited as Aldisert]. Judge Aldisert is a Circuit Judge on the United States Court of Appeals for the Third Circuit.

our federal system.[9] In addition to the burdensome amount of litigation entering the federal courts, federal scrutiny of conduct under color of state law to determine whether it complies with the dictates of the Constitution frequently exacerbates federal-state relations.

This past term the United States Supreme Court took giant strides to reduce these problems which had alarmed many.[10] Beginning with the landmark case of *Rizzo v. Goode,*[11] itself portending an entire new approach to federal-state relations as well as section 1983 litigation, the Burger Court has decided a number of cases which will result in either precluding litigants from bringing a section 1983 suit to federal court or persuading them to refer to state courts for adjudication of their claims. By balancing the prerogatives of the states and the roles of the federal courts as the primary guarantor of rights secured by the fourteenth amendment, the Supreme Court has attempted to avoid the strains resulting from federal intervention by reducing section 1983 litigation. It is a balance vastly dissimilar to that fashioned by the Warren Court, and one that civil libertarians fear represents an abnegation of the federal judiciary's role to vindicate constitutional rights when the state or its representatives are responsible for their deprivation.[12]

The Court did not accomplish this change in one broad sweep, but through a number of cases, each dealing with a different aspect of section 1983. It did not overrule *Monroe, Lynch,* or any of the other major section 1983 precedents which had opened the doors of the federal courts to a wide variety of suits. Each case was grounded in policy considerations, or distinguished from analogous cases which had upheld suits under the Civil Rights Act. Furthermore, each decision, when viewed individually, could be read to have little effect on the general tenor of 1983 litigation. But when the decisions are viewed from an overall perspective, what emerges is a Supreme Court view of section 1983 distinct from the Court's perspective less than a decade ago. The purpose of this comment is to examine these recent decisions and their effect on the 1983 litigant to determine whether the usefulness of section 1983 as a federal statute capable of redressing constitutional rights has been jeopardized. This com-

9. McCormack, *supra* note 7, at 1-2.

10. *See, e.g.,* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 HARV. L. REV. 1486 (1969).

11. 423 U.S. 362 (1976).

12. *See* New York Times, Apr. 7, 1976, at 11, col. 1.

ment concludes with a proposed alternative for a less drastic change in section 1983 rights than the Court's recent decisions suggest, one that seeks to preserve the vitality of the federal statute while reducing the present burden on the federal courts.

Introduction

A major reason section 1983 was historically ignored as a means of vindicating constitutionally protected rights was an early conclusion by the Supreme Court that an act not authorized by state law was neither "state action" nor action "under color of state law."[13] Although that holding was largely undermined[14] and eventually overruled[15] as it related to state action[16] for purposes of the fourteenth amendment, section 1983's "under color" language was still thought to encompass only action authorized by state law. In *Monroe v. Pape,*[17] however, the Supreme Court removed this restriction by holding that Congress intended to include within the ambit of section 1983 conduct by state officials who acted beyond their statutory authority.[18]

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13. Barney v. City of New York, 193 U.S. 430 (1904) (since complaint alleged that city's construction of tunnel was illegal and unauthorized, city's action was not state action within intent and meaning of the fourteenth amendment).

14. Snowden v. Hughes, 321 U.S. 1, 13 (1944) (noting that *Barney* has been severely restricted); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 286-89 (1913) (distinguishing *Barney* and noting that when a state officer misuses his authority, the fourteenth amendment can redress the wrong whether or not the state authorized the conduct).

15. United States v. Raines, 362 U.S. 17, 26 (1960).

16. The fourteenth amendment speaks only to actions by the state. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) ("that private action is immune from the restrictions of the Fourteenth Amendment is well established"). Although the "under color" language is peculiar to the Civil Rights Act, the term is synonymous with state action for purposes of § 1983. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966). *Accord,* Berrios v. Inter American Univ., 409 F. Supp. 769, 770-72 (D.P.R. 1975), *appeal dismissed,* 96 S. Ct. 2665 (1976) (holding that university's actions were not under color of state law but relying on Supreme Court cases on state action). When state action is found lacking, however, neither the fourteenth amendment nor § 1983 is available to redress allegedly unconstitutional conduct. *See, e.g.,* Ford v. Harris County Medical Soc., 535 F.2d 321, 322 (5th Cir. 1976) (dismissing suit against county medical society because 1983 cause of action requires "state involvement"); Acosta v. Tyrone Hosp., 410 F. Supp. 1275, 1277 (W.D. Pa. 1976) (for hospital to be liable under § 1983 plaintiff must show that hospital and state were, in effect, joint participants in the challenged activity). *Accord,* Lewis v. District of Columbia Dep't of Corr., 533 F.2d 710, 711 (D.C. Cir. 1976) (no cause of action under § 1983 can exist against District of Columbia officials). For further analysis of the "under color" language of § 1983 see Adickes v. S. H. Kress & Co., 398 U.S. 144, 210-21 (1970) (Brennan, J., concurring and dissenting).

17. 365 U.S. 167 (1961).

18. *Id.* at 172. The plaintiffs in *Monroe* alleged that the defendants, city police officers,

Other restrictions on the use of section 1983 derived from narrow constructions of the scope of protectible interests under that section[19] and its jurisdictional counterpart.[20] In a plurality opinion in *Hague v. CIO,*[21] however, Justice Stone sought to liberate the statutes from the view that they were unavailable in cases where only violations of the due process clause of the fourteenth amendment were alleged.[22] His view that the substantive rights protected by section 1983 were as broad as those protected by the fourteenth amendment itself ultimately prevailed in *Monroe.*[23] Finally, in

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broke into their home without a warrant, searched and ransacked the premises, and subjected them to various indignities. Borrowing language from United States v. Classic, 313 U.S. 299, 326 (1941), which had construed the criminal provisions of the Civil Rights Act, the Court characterized the conduct as a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." 365 U.S. at 184. The fact that the authorities allegedly transgressed their authority under state law made their conduct no less actionable under section 1983.

19. *See* Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 HARV. L. REV. 922, 949-51 (1976). *See generally* Gressman, *The Unhappy History of Civil Rights Legislation,* 50 MICH. L. REV. 1323, 1336-43 (1952).

20. Section 1343(3) gives the district court original jurisdiction to hear any civil action brought

> to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. § 1343(3) (1970). Section 1343(3) has no amount in controversy requirement as does § 1331. *See* note 22 *infra.* Hence, while a claim against a federal official for a constitutional deprivation must meet the statutory amount in controversy requirement, *see* District of Columbia v. Carter, 409 U.S. 418 (1973), the same conduct where the defendant is a state official is subject to no such requirement.

21. 307 U.S. 496 (1939).

22. *Id.* at 518-20, 524-27 (concurring opinion). Justice Stone also attempted to dispel the view that the general federal question statute enacted after § 1343(3), now codified as 28 U.S.C. § 1331 (1970), had superceded it so that an action alleging the deprivation of a fourteenth amendment right must satisfy § 1331's amount in controversy requirement. 307 U.S. at 527-32. However, he found it necessary to reconcile the two jurisdictional statutes by theorizing that § 1983 and § 1343(3) were not available to protect against deprivations of property rights; a plaintiff could avail himself of these statutes only in cases of alleged deprivations of personal liberty. *Id.* at 531-32. A number of circuits had followed *Hague*'s liberty/property dichotomy until its rejection in Lynch v. Household Fin. Corp., 405 U.S. 538, 542-46 (1972). *See* National Land & Invest. Co. v. Specter, 428 F.2d 91 (3d Cir. 1970); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969).

23. 365 U.S. at 171. This aspect of *Monroe,* combined with the Court's holding that action illegal under state law was actionable under § 1983, finally brought the "under color" coverage of § 1983 into line with the expanded sweep accorded the "state action" requirement of the fourteenth amendment nearly half a century earlier in Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 286-89 (1913). *See* note 14 *supra.*

Lynch v. Household Finance Corp.,[24] a unanimous Supreme Court repudiated Justice Stone's view in *Hague* that 1983 jurisdiction was limited to cases involving "personal liberty" rights,[25] and held it available to redress deprivations of property rights as well.[26]

In addition to this expansion of the scope of protectible interests encompassed within the Civil Rights Act, other factors contributed to increasing the number of 1983 suits entering the federal courts. First, incorporation[27] of the specific guarantees of the Bill of Rights into the due process clause of the fourteenth amendment secured these rights against action under color of state law. Thus, many wrongs of an individual nature previously actionable only in state tort actions against state officials were brought within the ambit of section 1983. Second, in *Monroe* Justice Douglas stated that when a complainant seeks redress under section 1983 in federal court, "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[28] Supreme Court cases after *Monroe* indicated that the adequacy of the state remedy did not bar federal relief.[29] Consequently, exhaustion of admittedly adequate state remedies was not a prerequisite to maintaining a 1983 suit in federal court.[30]

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24. 405 U.S. 538 (1972).

25. *See* note 22 *supra*.

26. 405 U.S. at 542-46. One federal judge expressed his view of the implications of the decision: "*Lynch*, unfortunately, has made the federal court a nickel and dime court. A litigant now has a passport to federal court if he has a 5-dollar property claim and can find some state action." Aldisert, *supra* note 8, at 569.

27. Since the first amendment was "selectively" incorporated into the due process clause of the fourteenth amendment in Gitlow v. New York, 268 U.S. 652 (1925), a variety of other provisions of the Bill of Rights have been incorporated into the fourteenth amendment. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (fifth amendment right against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to jury trial); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment proscription of cruel and unusual punishment).

28. 365 U.S. at 183. In *Monroe*, Justice Douglas identified three principal aims of § 1983: (1) to override certain kinds of state law; (2) to provide a remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy was adequate in theory but unavailable in practice. 365 U.S. at 173-74. Another purpose of § 1983 was recognized two years later in McNeese v. Board of Educ., 373 U.S. 668 (1963). *See* note 30 *infra*.

29. *See* Steffel v. Thompson, 415 U.S. 452, 472-73 (1974); Damico v. California, 389 U.S. 416, 417 (1967); McNeese v. Board of Educ., 373 U.S. 668, 671-72 (1963).

30. The no exhaustion rule was recognized as a purpose of § 1983 in McNeese v. Board of Educ., 373 U.S. 668 (1963): "We would defeat [the] purposes [of section 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." *Id.* at 672. *McNeese* involved a suit for injunctive relief under

In short, the Supreme Court broadened the scope of the "under color" language of 1983, expanded under the rubric of incorporation the interests protected by the fourteenth amendment, and refused to require litigants to first seek redress in state court regardless of the importance of the state interests involved. The deluge of section 1983 litigation entering the federal courts was, in a sense, invited. This term, however, the Supreme Court issued notice that its "unabashed love affair with the Civil Rights Act of 1871"[31] has ended.

I. *Rizzo v. Goode*: The Opening Volley

Rizzo v. Goode[32] involved a number of class actions brought under section 1983 by individuals and various organizations against the mayor of Philadelphia, the police commissioner and other public officials.[33] The suits alleged a pervasive pattern of unconstitutional police mistreatment of minority citizens in particular and Philadelphia residents in general. The defendants were charged with misconduct ranging from express authorization and encouragement of the mistreatment, to failure to take affirmative steps to avoid its recurrence. The individual patrolmen involved in the incidents were *not* named as defendants. The gravamen of the plaintiffs' complaint was that their only available administrative remedy, a disciplinary hearing after the fact, was inadequate to protect their constitutional rights and that the inadequacy was due to the defendants' failure to formulate and oversee effective disciplinary sanctions.

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section 1983. The lower courts refused the requested relief for failure to exhaust state administrative remedies. The Supreme Court reversed, holding that the remedy was inadequate because it would only result in a state court action which would not foreclose suit in federal court. 373 U.S. at 674-76. Thus, in an equitable action, the Court upheld the principle *Monroe* had established for damage suits under section 1983: state judicial relief need not be exhausted prior to initiating federal suit.

Besides its refusal to require a 1983 litigant to pursue state judicial remedies, the *McNeese* Court strongly intimated that exhaustion of state *administrative* remedies is also not required, at least when they are inadequate. 373 U.S. at 675-76. In Allee v. Medrano, 416 U.S. 802, 814 (1974), Justice Douglas apparently merged the two, simply stating there was no requirement that petitioners exhaust their "state remedies." *See also* notes 245 & 246 *infra*. One commentator has questioned whether a no exhaustion rule was a purpose of the Civil Rights Act as originally passed. Note, *supra* note 10, at 1491.

31. Aldisert, *supra* note 8, at 563.
32. 423 U.S. 362 (1976).
33. *Id.* at 364-65 n.1.

The Third Circuit affirmed the district court's choice of relief—a mandatory injunction[34]—based on its belief that the ordered revisions to the complaint processing procedures had the potential to prevent future police misconduct.[35] The Supreme Court reversed on several alternative grounds. First, the Court had "serious doubts" whether the requisite article III case or controversy existed between the plaintiffs and the individually named defendants.[36] Second, it felt that the plaintiffs had failed to demonstrate a pervasive pattern of intimidation by the defendants, or that through the defendants' own conduct the plaintiffs had been deprived of a constitutional right.[37] In addition, however, the Court held that notions of federalism and comity counselled against federal intervention in the functioning of state governmental agencies. The mandatory injunction was characterized as an "unwarranted intrusion by the federal judiciary into the police department's discretionary authority to perform their official functions."[38]

A. *Appropriateness of the Relief Granted*

Of primary concern to the Supreme Court was the district court's choice of an equitable remedy. Traditionally, injunctive relief to protect constitutional rights has not been viewed as an extraordi-

34. Council of Organizations on Phila. Police Acc. & Resp. v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd sub nom.* Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976). The district court found that although the evidence did not establish an actual departmental policy to deprive minority citizens of their constitutional rights, the filing of civilian complaints was discouraged and the department tended to minimize the consequences of police misconduct. The district court was convinced it was dealing with more than "rare, isolated instances" of deprivations of constitutional rights. 357 F. Supp. at 1319. Its choice of equitable relief was a mandatory injunction directed at the police administration, requiring it to submit a plan for comprehensive revision of complaint processing procedures. *Id.* at 1321.

35. 506 F.2d at 548.

36. 423 U.S. at 371-73. In O'Shea v. Littleton, 414 U.S. 488 (1974), the individual respondents alleged that the petitioners had engaged in discriminatory bond setting, sentencing, and assessment of jury fees in the administration of the state criminal justice system. No specific instances of wrongful conduct by the named defendants were set forth in the prayer for injunctive relief. The Court concluded that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* at 495-96. One reason posited by Justice Rehnquist for going on to reach the merits in *Rizzo* was that in contrast to *O'Shea*, *Rizzo* did not arise on the pleadings. 423 U.S. at 373.

37. 423 U.S. at 373-77. *See* note 47 and text accompanying notes 64-67 *infra*.

38. 423 U.S. at 366.

nary remedy,[39] and the Supreme Court has consistently adhered to the position that when federally protected rights are invaded, federal courts should adjust their remedies in order to grant the necessary relief.[40] Twice before *Rizzo,* in *Hague v. CIO,*[41] and, recently in *Allee v. Medrano,*[42] the Supreme Court approved injunctive relief against unconstitutional police practices. But while a federal court may marshall its enforcement powers to order a police department to *desist* from certain conduct found to violate the constitutional rights of citizens, it is another matter for the court to intervene when a lack of procedures is allegedly causing the denial of these rights and order a police department to *affirmatively act* in order to remedy a constitutional violation.

Although the Third Circuit was not alone in countenancing man-

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39. The Supreme Court has stated:

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do.

Bell v. Hood, 327 U.S. 678, 684 (1946) (search and seizure). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (school desegregation); Lawrence Univ. Bicen. Comm'n v. City of Appleton, 409 F. Supp. 1319 (E.D. Wis. 1976) (first amendment rights).

40. *See, e.g.,* Bell v. Hood, 327 U.S. 678, 684 (1946).

41. 307 U.S. 496 (1939). In *Hague,* police officers were charged with conspiring to intimidate the petitioners in the exercise of their first amendment rights. In a plurality opinion, Justice Stone stated that the Civil Rights Act of 1871 gave to every person the right to maintain a suit in equity to restrain state officials acting under color of state law from infringing rights guaranteed by the due process clause. *Id.* at 527.

42. 416 U.S. 802 (1974). In *Allee,* the Court considered whether enjoining police intimidation designed to crush a nascent labor union was a proper exercise of a federal court's equitable powers. The Court held that where there is a persistent pattern of police misconduct, injunctive relief is appropriate. *Id.* at 815. *Cf.* note 75 *infra.* The dissent by three members of the *Rizzo* majority termed this a "remarkable injunction." 416 U.S. at 846 (Burger, C.J., White & Rehnquist, JJ., concurring and dissenting). Expressing concern for the crowded federal docket and overburdened appellate judges, Justice Burger said explicitly what Justice Rehnquist intimated in *Rizzo*: "Federal district courts were not meant to be super-police chiefs, disciplining individual law enforcement officers for infractions of the rules for arrests and searches and seizures." *Id.* at 858. *Cf.* text accompanying note 63 *infra.*

Chief Justice Burger's expressed antipathy for federal court intervention in local law enforcement is troublesome in view of his prior recognition of the futility of other attempted means of combatting unconstitutional conduct by the police. In an article written during his tenure as circuit judge, he termed it "wishful thinking" to believe the suppression doctrine deters unconstitutional police misconduct and called for other means of deterrence to keep police conduct within the limits of the law. Burger, *Who Will Watch the Watchman?,* 14 AM. U.L. REV. 1, 11-13 (1964). *See also* Davis, *An Approach to Legal Control of the Police,* 52 TEX. L. REV. 703, 703-04 (1974), observing that much of police policy is illegal or of doubtful legality, yet police departments are largely exempt from judicial or administrative review.

datory injunctive relief to combat inadequate police supervision,[43] the Supreme Court had never considered the propriety of such relief before *Rizzo*. *Rizzo* could have been decided, then, by distinguishing a prohibitory injunction, deemed appropriate in *Hague* and *Allee*, from the imposition of an affirmative constitutional duty to eliminate the misconduct of others. In terms of a constitutional duty, the difference is a significant one.[44]

The Supreme Court, however, did not limit its decision to this distinction. Not only had three members of the *Rizzo* majority previously voiced displeasure with the prohibitory injunction in *Allee*,[45] but *Rizzo*'s references to notions of federalism and comity seemed intended to reduce the utility of section 1983 as a statute capable of redressing constitutional wrongs. *Rizzo*'s pronouncements on standing[46] and the requisite direct participation in the actual deprivation of a right[47] by themselves have the potential to reduce the

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43. In Calvin v. Conlisk, 520 F.2d 1 (7th Cir. 1975), *rev'g* 367 F. Supp. 476 (N.D. Ill. 1973), *vacated*, 424 U.S. 902, *aff'g district court on remand*, 534 F.2d 1257 (7th Cir. 1976), the petitioners alleged that supervisors have a duty to prevent police misconduct and to discipline individual officers who engage in it. Overlooking this misconduct condoned and in effect encouraged its continuation. Conceding that mandatory injunctions are extraordinary remedies that must be issued with circumspection, the Seventh Circuit nonetheless held that if the petitioners could prove their allegation, relief designed to force the administration to take affirmative steps to prevent future violations might be appropriate. 520 F.2d at 7. The Supreme Court vacated the judgment and on remand for further consideration in light of *Rizzo*, the suit was dismissed based on the standing requirements imposed by *Rizzo* and O'Shea v. Littleton, 414 U.S. 488 (1974). *See* note 36 *supra*.

Litigation seeking to enjoin allegedly unconstitutional conduct by police departments has proliferated in recent years, although most injunctive relief fashioned by the lower courts has been of a prohibitory nature. *See generally* Note, *Rethinking Federal Injunctive Relief Against Police Abuse: Picking Up the Pieces After Rizzo v. Goode*, 7 RUTGERS-CAMDEN L.J. 530, 531 nn.8 & 9 (1976).

44. *See* notes 66 & 67 and accompanying text *infra*.

45. *See* note 42 *supra*.

46. *See* note 36 *supra*.

47. Section 1983 provides a cause of action against any person who, under color of state law, "subjects, or causes to be subjected" any other person to the deprivation of rights secured by the Constitution or laws of the United States. 42 U.S.C. § 1983 (1970). The Act's legislative history manifests Congress' intent to create a remedy when representatives of a state were *unwilling* to enforce a state law, when to do so deprived persons of these rights. *See* Monroe v. Pape, 365 U.S. 167, 176 (1961). Despite this recognition in *Monroe*, the thrust of Part B of *Rizzo*, 423 U.S. at 373-77, is that, absent direct participation in the actual deprivation, there can be no relief under 1983 against supervisory personnel. *See* notes 64-67 and accompanying text *infra* for a fuller analysis of this portion of *Rizzo*.

Lower courts have disagreed about 1983 liability for perfunctory supervision which results in violations of individual rights. *Compare* Padover v. Gimbels Bros. Inc., 412 F. Supp. 920, 922-23 (E.D. Pa. 1976) (absent allegations of wrongful conduct or even acquiescence, com-

amount of 1983 litigation entering federal court. More importantly, *Rizzo* ostensibly expanded the scope of *Younger*-type abstention not only to all civil cases, but also to situations where an individual seeks relief from non-judicial state action.

B. *Extending Younger v. Harris to Section 1983*

An analysis of *Rizzo*'s potential impact on future section 1983 litigation and federal-state relations must begin with the Supreme Court decision in *Younger v. Harris.*[48] *Younger* is most often cited for the proposition that absent bad faith or harassment by state officials, a federal court must defer to a state criminal proceeding when a state statute or prosecution allegedly violates a constitutional right.[49] But in *Younger* the Court also identified an additional doctrine to be used by federal courts in order to minimize federal-

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plaint must be dismissed) *and* Beard v. Boren, 413 F. Supp. 41, 43 (W.D. Okla. 1976) (no liability unless defendant "directly and personally participates") *and* Wilkerson v. Mock, 403 F. Supp. 971, 973 (E.D. Pa. 1975) ("[i]t is well settled that police supervisory personnel are not liable in damages to a person injured by police misconduct absent direct personal participation"), *with* Shifrin v. Wilson, 412 F. Supp. 1282, 1297 (D.D.C. 1976) (failure to take preventive measures rendered police chief liable under § 1983) *and* Morris v. Danna, 411 F. Supp. 1300, 1302 n.5 (D. Minn. 1976) (failure to supervise may incur 1983 liability). *Cf.* Harris v. Chanclor, 537 F.2d 203, 206 (5th Cir. 1976) (upholding 1983 suit against warden since indifference to inmate's injuries is tantamount to cruel and unusual punishment).

There is also a marked conflict among the lower courts whether supervisors could be liable under the traditional tort doctrine of respondeat superior. *Compare* Sebastian v. United States, 531 F.2d 900 (8th Cir. 1976) (respondeat superior has no application in a 1983 context) *and* Westinghouse Broadcasting Co. v. Dukakis, 409 F. Supp. 895 (D. Mass. 1976) (no vicarious liability under this section) *and* Padover v. Gimbel Bros., *supra*, *with* Taylor v. Gibson, 529 F.2d 709, 716 (5th Cir. 1976) ("assertions of insulation from liability because section 1983 does not permit derivative, *respondeat superior*, liability are questionable, and, at best, overbroad") *and* Croy v. Skinner, 410 F. Supp. 117, 123 (N.D. Ga. 1976) (respondeat superior applicable in action brought under § 1983). *Cf.* Bracey v. Grenoble, 494 F.2d 566, 572 (3d Cir. 1974) (Seitz, C.J., concurring and dissenting) (advocating supervisor's liability not on theory of respondeat superior but due to acquiescence in unconstitutional conduct).

Rizzo seems to have settled this entire controversy. Its practical effect is that unless a plaintiff can show by specific pleadings that a member of a school board, or a warden, superintendent of corrections, or any other law enforcement official actively participated in the alleged deprivation, the complaint would fail to state a claim and summary judgment would lie. *But see* Sims v. Adams, 537 F.2d 829 (5th Cir. 1976) (distinguishing *Rizzo*, noting that § 1983 by its terms does not require "personal participation," and holding that the "proper question" is whether the complaint adequately alleges the requisite causal connection between the supervisors' actions and the deprivation of the complainant's constitutional rights).

48. 401 U.S. 37 (1971).

49. *See id.* at 49-53.

state conflict and promote federalism.[50] This doctrine, generally known as comity, is predicated on the belief that proper respect for the competence of state legislation and judicial proceedings compels a federal court to decline to adjudicate the federal rights of parties involved in ongoing state proceedings.[51]

One year after its decision in *Younger, Mitchum v. Foster*[52] presented the Supreme Court with an opportunity to apply *Younger*'s notions of federalism and comity to civil as well as criminal proceedings. *Mitchum* involved a challenge under section 1983 to a state nuisance statute which had been applied to allegedly obscene material sold by a bookstore. Rather than extend *Younger*, the Court held that 1983 civil rights actions were exceptions to the federal anti-injunction statute,[53] remanded the case for further consideration in that light, and avoided the question of *Younger*'s effect on civil proceedings.[54]

In *Huffman v. Pursue, Ltd.*,[55] the applicability of *Younger*-style comity to a 1983 claim in a civil suit, the question left unanswered in *Mitchum*, was faced by the Court for the first time.[56] A sheriff and prosecuting attorney initiated public proceedings against the management of a theater showing pornographic films and the theater was ordered closed by the state court. Instead of appealing through the state judicial system, the defendants appealed the offi-

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50. In *Younger*, Justice Black defined "Our Federalism" as

> a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left to perform their separate functions in their separate ways.

401 U.S. at 44.

51. The *Younger* Court used the terms comity and federalism synonymously. *See* note 50 *supra*.

52. 407 U.S. 225 (1972).

53. The anti-injunction statute states: A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1965). Section 2283 is not a doctrine of comity but an "absolute ban upon the issuance of a federal injunction against pending state court proceedings in the absence of one of the recognized exceptions." 407 U.S. at 228-29.

54. The Court in *Mitchum* was careful to point out, however, that its decision was not intended to emasculate the notions of comity and federalism enunciated in *Younger*. "[W]e do not question or qualify in any way the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding." 407 U.S. at 243.

55. 420 U.S. 592 (1975).

56. Prior to *Huffman* the holding and rationale of *Younger* were thought to apply only to criminal prosecutions. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452, 462 (1974).

cials' action to the federal district court, alleging a deprivation of constitutional rights under section 1983. In an opinion by Justice Rehnquist, the Court held that the non-intervention principles of *Younger* applied, notwithstanding the existence of the 1983 claim and the lack of a criminal proceeding.[57] Yet Justice Rehnquist's characterization of the state proceeding as "closely akin" to a criminal prosecution,[58] along with his express refusal to make a general pronouncement concerning the applicability of *Younger* to all civil litigation,[59] injected uncertainty into the scope of *Huffman.*[60] The Supreme Court's decision in *Rizzo* seems to have resolved this uncertainty. In referring to *Huffman* without using any language limiting its application to civil actions in the nature of criminal proceedings, the Court held that principles of federalism espoused there and in *O'Shea v. Littleton*[61] may prevent a federal court from enjoining any ongoing state civil proceeding.[62] But *Rizzo* went beyond applying notions of federalism to state *judicial* proceedings:

> We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents [*sic*] here.[63]

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57. 420 U.S. at 594.

58. *Id.* at 604.

59. *Id.* at 607.

60. A number of circuit courts had extended the *Younger-Huffman* principles to civil actions brought under § 1983. *See, e.g.*, Littleton v. Fisher, 530 F.2d 691, 693 (6th Cir. 1976) (citing *Huffman* and *Younger* in refusing to enjoin state award in custody case); Williams v. Williams, 532 F.2d 120 (8th Cir. 1976) (application for declaratory and injunctive relief barred by comity principles of *Huffman* and *Younger* when petitioner sought to enjoin adoption decree consummated without giving him notice). *But see* Sartin v. Commissioner of Pub. Safety, 535 F.2d 430, 433-34 (8th Cir. 1976) (doctrine of equitable restraint announced in *Huffman* applies to criminal and quasi-criminal proceedings). *See generally* Note, *The New Federal Comity: Pursuit of Younger Ideas in a Civil Context*, 61 IOWA L. REV. 784 (1976).

61. 414 U.S. 488 (1974). In *O'Shea*, the complainants alleged that the various defendants were engaging in discriminatory practices in the administration of the criminal justice system in Alexander County, Illinois. They filed suit in federal court under 1983 and sought injunctive relief. In addition to dismissing the suit because the complaint failed to allege a constitutional case or controversy, *see* note 36 *supra*, Justice White observed that

> such a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted.

414 U.S. at 502.

62. 423 U.S. at 379-80.

63. *Id.* at 380.

This language in *Rizzo* is susceptible of two interpretations. The Supreme Court may simply have seen the district court injunction as interfering with local government's ability to prevent misconduct by subordinate officials, particularly where the named defendants did not participate in the alleged wrong.[64] The Court's rejection of the plaintiffs' reliance on *Swann v. Charlotte-Mecklenburg Board of Education,*[65] which upheld federal intervention in the administration of public schools when the named defendants actually participated in denying the petitioners equal protection, supports this interpretation. If *Rizzo* is therefore limited to those instances where a defendant is charged with not *enforcing* the Constitution, it may not represent a major doctrinal change. The Constitution forbids the beating, harassment, or intimidation of citizens by state officials, but it may not compel police officials to create non-judicial procedures to punish police officers for constitutional violations, or to establish disciplinary schemes and implement them in good faith.[66] In terms of a constitutional duty, if this is the extent of the *Rizzo* holding, it is legally tenable and arguably not inconsistent with prior cases such as *Allee.*[67]

There is an alternative and more alarming interpretation of the Court's opinion, however. The Constitution may very well impose no duty to prevent others from participating in constitutional wrongs, but arguably *Rizzo*'s language does not stop there. It is possible that in one broad sweep *Younger*'s notions of federalism

64. *See* text accompanying note 37 *supra.*

65. 402 U.S. 1 (1971).

66. Arguably, however, this misstates the constitutional issue. Perhaps it should be stated: Do police officials have an absolute duty to prevent all constitutional wrongs by their subordinates acting in the scope of their employment, or alternatively, do police officials have a constitutional duty to use good faith efforts to halt known, repeated misconduct by officers? This latter alternative shades into the acknowledged duty not to participate directly in the alleged wrong, since indifference is in effect tacit encouragement and tacit encouragement is the functional equivalent of direct participation. *See, e.g.,* Delaney v. Dias, 415 F. Supp. 1351, 1354 (D. Mass. 1976) (cognizable 1983 claim must allege participation or acquiescence in the constitutional deprivation). These subtle nuances have left the lower courts in disarray. *See* note 47 *supra.*

67. In *Rizzo,* Justice Rehnquist did acknowledge the difference between enjoining active misconduct and imposing liability for a supervisor's failure to act:

> The theory of liability . . . urged upon us by the respondents, is that even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners' *failure* to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in *Hague* and *Medrano.*

423 U.S. at 375-76 (emphasis in original). He described the plaintiffs' view as an "amorphous proposition" which "blurs accepted usages and meanings in the English language." *Id.* at 376.

and comity may have been made applicable to virtually *any* section 1983 action where the alleged wrongdoer derives his authority from a non-judicial arm of the state. If the Supreme Court is saying that a federal court should be hesitant to entertain a 1983 suit whenever an individual alleges that a member of a school board, city planning commission, prison administration or law enforcement agency is acting in a way to deprive him of his constitutional rights, *Rizzo* represents a significant undermining of 1983's utility as a statute capable of vindicating those rights. Because of statutory interpretation, state agencies and commissions are already beyond the reach of a 1983 damage suit.[68] If notions of comity militate against entertaining any suit against individual members of those agencies, the Civil Rights Act has lost much of its vitality as an effective weapon against unconstitutional conduct consummated under color of state law.[69]

Assuming the Court is in fact expanding *Younger* and *Huffman* to reach civil rights suits against non-judicial state proceedings, it is troublesome that it did so without an adequate appraisal of the underlying purposes of those cases and section 1983. *Rizzo* failed to address the fact that the state interests which *Younger* and *Huffman* sought to protect are not present in a situation where there is no state litigation in progress and a party seeks relief from the actions of a non-judicial arm of the government. Since the state is not a party to any litigation, and no criminal or quasi-criminal statute which the state desires to have enforced is involved, a state's adjudicatory processes are not disturbed, nor is the integrity of the state judiciary impugned by federal suits when there is no state proceeding pending. In *Huffman,* the Court reiterated what had been declared in *Steffel v. Thompson*:[70] "the relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding."[71] By expanding the rationale of *Younger* and *Huffman* beyond the context of state judicial proceedings, in

68. *See* notes 184-96 and accompanying text *infra.*

69. Applying *Younger* principles to such suits would impose an additional burden on 1983 plaintiffs suing state officers; the Supreme Court has granted immunity in varying degree to nearly all state officials, thus placing them beyond the reach of a 1983 damage action. *See* notes 156-82 and accompanying text *infra.*

70. 415 U.S. 452 (1974).

71. 420 U.S. at 602-03, *citing* 415 U.S. at 462. In Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975), the Court held that the issuance of an injunction was not governed by *Younger* where no state proceedings was in progress.

less than one year federalism and comity have been elevated from insignificant considerations when no state proceeding is disrupted to precepts sufficiently compelling to preclude persons alleging uneven enforcement of the law[72] from having their claims litigated in a federal court. Consequently, civil libertarians fear the *Rizzo* decision represents decreased awareness by the Supreme Court of the purpose of section 1983 which less than a decade ago it had characterized as making federal courts the "*primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[73]

C. *The Impact of Rizzo*

Whether *Rizzo* is read narrowly or broadly by the lower courts will largely determine its impact on future section 1983 litigation in the federal courts. Beyond insulating supervisory personnel from liability under the Act for their failure to prevent others from violating constitutional rights, the scope of the decision is unclear. The decision is based on alternative grounds[74] which will undoubtedly provide flexibility to lower courts adjudicating future 1983 claims. Furthermore, one recurrent theme throughout *Rizzo* was the fact the Court discounted the gravity of the alleged violations and was not convinced they would recur in the absence of injunctive relief.[75] Under this analysis, despite *Rizzo,* a federal court may intervene when the gravity of an alleged constitutional violation requires extraordinary relief.

There are already indications of dissatisfaction with *Rizzo*'s holding that a petitioner must show direct participation by the named official to state a claim under section 1983,[76] and its pronounce-

72. The evils of this type of law enforcement were recognized in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), in the context of a vague statute. *See also* Olmstead v. United States, 277 U.S. 438, 469-85 (1928) (Holmes & Brandeis, JJ., dissenting) (uneven and illegal law enforcement breeds contempt for the law).

73. Zwickler v. Koota, 389 U.S. 241, 247 (1967) (emphasis in original). *Cf.* Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (stressing the "paramount role" Congress has assigned to the federal courts to protect constitutional rights).

74. *See* text accompanying notes 36-38 *supra.*

75. The Court was unconvinced the petitioner had established a *pattern* of unconstitutional police practices as in Allee v. Medrano, 416 U.S. 802, 812 (1974). 423 U.S. at 374-75. The fulcrum of Justice Blackmun's dissent was this conclusion of the majority. He noted the district court's finding of a "persistent deprival of federal constitutional rights" coupled with "official indifference." 423 U.S. at 382 (Blackmun, J., dissenting).

76. In Shifrin v. Wilson, 412 F. Supp. 1282 (D.D.C. 1976), the district court held that

ments on federal abstention under the principles of federalism and comity. Emphazing their constitutional and statutory duty to vindicate federal rights, and that abstention is a narrow exception to this obligation, especially in a civil rights context,[77] lower courts have refused to extend the principles of *Younger* and *Huffman* where there is no ongoing state proceeding and a petitioner challenges state action under section 1983.[78] Because of the inherent broadness of the concepts of comity and federalism, along with their discretionary nature, the effect of *Rizzo* must ultimately await determination on a case by case basis. Nonetheless, the Court has indicated to future litigants and the lower courts that section 1983 is no longer a carte blanche for federal review of allegedly wrongful conduct under color of state law.

II. *Paul v. Davis*: Limiting the Constitutional Tort

To establish a cause of action under section 1983, a plaintiff must

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failure to take preventive measures rendered a police chief liable under § 1983. The court relied on Bell v. Hood, 327 U.S. 678 (1946), and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), for its view that liability should attach because supervision of police officers is not discretionary. This position directly contravenes *Rizzo*. Supervisors in Philadelphia have a statutory duty to train, discipline, and supervise patrolmen. Philadelphia Home Rule Charter, ch. 2, at 5-200. *Accord,* Sims v. Adams, 537 F.2d 829, 831-32 (5th Cir. 1976) (distinguishing *Rizzo* and determining that when a supervisory defendant breaches a duty imposed by state law and this breach causes the plaintiff's "constitutional injury," the requisite § 1983 claim is established). *Cf.* notes 66 & 67 and accompanying text *supra*.

77. *See, e.g.*, McRedmond v. Wilson, 533 F.2d 757, 759-60 (2d Cir. 1976) (challenging state's failure to furnish treatment to those involuntarily confined to state institutions); Sartin v. Commissioner of Pub. Safety, 535 F.2d 430, 432 (8th Cir. 1976) (suit alleging state intimidation and discrimination due to interracial marriage); Coll v. Hyland, 411 F. Supp. 905, 907 (D.N.J. 1976) (challenging New Jersey's civil commitment procedures); Cicero v. Olgiati, 410 F. Supp. 1080, 1087 (S.D.N.Y. 1976) (challenging New York parole statute). *Cf.* McGill v. Parsons, 532 F.2d 484, 489 (5th Cir. 1976) (problem of recurring constitutional violations).

78. For example, in Cicero v. Olgiati, 410 F. Supp. 1080 (S.D.N.Y. 1976), the defendants, presumably relying on *Rizzo*, argued that the plaintiff's 1983 claim challenging the New York parole statute would "needlessly thrust the federal courts into a particularly sensitive and complex area of state regulation." *Id.* at 1087. The court flatly rejected the argument, emphasizing that absention is a narrow exception to the overriding principle that bona fide claims brought under the Civil Rights Act can be heard by a federal court. *Id. See also* Goldy v. Beal, Civil No. 75-791 (M.D. Pa. July 8, 1976) (1983 action to enjoin Pennsylvania's civil commitment statute not barred by equitable restraint principles of *Younger* when no state proceeding has begun). *Cf.* Sartin v. Commissioner of Pub. Safety, 535 F.2d 430, 433 (8th Cir. 1976) (doctrine of equitable restraint enunciated in *Huffman* inapplicable to 1983 action for damages since result would not annul state court proceeding).

allege the infringement of a constitutional right secured by the fourteenth amendment and that the right was deprived by a person acting under color of state law.[79] Violation of such a right gives rise to a "constitutional tort."[80] Congress created the first constitutional torts by enactment of a series of civil rights acts following ratification of the fourteenth amendment.[81] Section 1 of the Civil Rights Act of 1871, now section 1983, was enacted to implement the fourteenth amendment and provide an express federal remedy for its violation.[82]

Whereas the language of section 1983 dictates that a cause of action under the Civil Rights Act will lie only for deprivations of constitutional rights, state action which contravenes the due process clause does not automatically create a cause of action under section 1983. Neither is it clear whether conduct by a private citizen which would give rise to a state tort action is cognizable in federal court under section 1983 if a state official was involved. The Supreme Court addressed these uncertainties in *Paul v. Davis.*[83] As in *Rizzo,* the decision is at least arguably consistent with prior case law. Yet the Court resolved these questions in a manner which will potentially restrict the future usefulness of section 1983.

A. *State Tort Law vs. "General Federal Tort Law"*

When examining *Paul,* it is important to keep in mind prior judicial thought on the relationship between a constitutional tort and a private wrong actionable under standard tort principles.[84] In

79. *See* Rizzo v. Goode, 423 U.S. 362, 370-71 (1976).

80. Section 1983 has commonly been described as creating a "constitutional tort." *See* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965).

81. 42 U.S.C. §§ 1981-94 (1970).

82. No such express remedy exists for violations of other constitutional rights. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), however, the Supreme Court held that a violation of the fourth amendment prohibition of unreasonable searches and seizures by a federal officer gave rise to a tort claim cognizable in federal court. *See* Comment, *Remedies for Constitutional Torts: "Special Factors Counselling Hesitation,"* 9 IND. L. REV. 441 (1976), discussing the right to sue federal officers for tort damages under a *Bivens* theory along with the countervailing considerations.

83. 424 U.S. 693 (1976).

84. A private tort merely requires a plaintiff to have a legally protected right which, when invaded by the defendant, is compensable by money damages. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 4 (4th ed. 1971). *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.1 (1973). Neither *Monroe* nor subsequent Supreme Court cases have been instructive in delineating the differences, if any, between a "constitutional tort" and a private

Monroe v. Pape,[85] Justice Douglas stated that section 1983 was to be "read against the background of tort liability" in determining whether a constitutional right had been violated.[86] The impact of Justice Douglas' statement has been considerable.[87] While he may have been suggesting the development of a federal common law of torts for use in 1983 cases,[88] it seems clear that Justice Douglas was not suggesting that the same conduct actionable as a common law tort in state court was necessarily actionable in federal court under section 1983.[89] Yet some federal courts, interpreting this dictum literally, have made various tort concepts determinative of 1983 liability.[90] Others seemed to assume that if the prima facie elements of a state tort were established, a 1983 claim would arise if the conduct was under color of state law.[91] Another interpretation of Douglas' language, however, is that once it is determined a violation of a constitutional right has occurred, then the "background of tort liability" becomes a referent in fashioning the proper relief or proof of the deprivation.[92] It was this interpretation which was implicitly adopted in *Paul* when the Supreme Court declared that neither 1983

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tort. In Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972), the Third Circuit distinguished the two in terms of a public/private dichotomy. Judge Aldisert noted that whereas tort law protects private rights, the "rights protected by § 1983 are public ones, created or adopted by the Federal Constitution or by Congress." *Id.* at 279. *See* Dorak v. Shapp, 403 F. Supp. 863, 866 (M.D. Pa. 1975) (distinguishing the two torts on similar grounds).

85. 365 U.S. 167 (1961).

86. *Id.* at 187.

87. For a thorough discussion of the implications of this statement by Justice Douglas see Nahmod, *Section 1983 and the "Background" of Tort Liability,* 50 IND. L.J. 5 (1974) [hereinafter cited as Nahmod].

88. *See id.* at 9.

89. In a concurring opinion in *Monroe,* Justice Harlan noted that violation of a constitutional right is more serious than violation of a state right. 365 U.S. at 196 & n.5. In construing 1983's criminal counterpart, now 18 U.S.C. § 242 (1970), Justice Douglas has observed that "[v]iolation of local law does not necessarily mean that federal rights have been invaded." Screws v. United States, 325 U.S. 91, 108 (1945).

Only a few lower courts have addressed the issue. *See, e.g.,* Taylor v. Nichols, 409 F. Supp. 927, 933 (D. Kan. 1976) (although § 1983 confers a right of action "sounding in tort," not all violations of state law rise to the level of a constitutional tort). *See also* note 103 *infra.*

90. *See* Nahmod, *supra* note 87, at 23-28 & nn. 81-94 and cases cited therein.

91. *E.g.,* Weisman v. Lelandais, 532 F.2d 308, 311 (2d Cir. 1976) (since prima facie elements of false imprisonment appear when police officer makes arrest, 1983 cause of action made out); Rogers v. Fuller, 410 F. Supp. 187, 191 (M.D.N.C. 1976) (an alleged assault by law enforcement officers is a claim cognizable under § 1983).

92. *See* Howell v. Cataldi, 464 F.2d 272, 279 (3d Cir. 1972) (petitioner using § 1983 must first establish right, then use background of tort law to establish proof of the deprivation). *Cf.* United States v. Texas Educ. Agency, 532 F.2d 380, 389 (5th Cir. 1976) (school desegregation suit applying *Monroe's* mandate to read 1983 against the background of tort liability).

nor the fourteenth amendment creates a body of federal tort law to be vindicated in federal court.[93]

The plaintiff in *Paul* was arrested for shoplifting and pleaded not guilty at his arraignment. Before the charges were dropped, the defendants, two chiefs-of-police, circulated a flyer to nearly 800 merchants in the surrounding area, complete with photographs, which described the plaintiff as an "active shoplifter."[94] The plaintiff's claim for damages under section 1983, and his request for declaratory and injunctive relief, were predicated on a violation of the due process clause of the fourteenth amendment; he alleged a deprivation of liberty since the stigma imposed by the officials' action would, among other things, impair his future employment opportunities. Justice Rehnquist conceded that the plaintiff had made out a claim for defamation actionable in state court. But the due process clause was not a "font of tort law" to be superimposed on the entire body of tort law administered by the state courts; every violation by a state officer of one of the procedural guarantees of the fourteenth amendment does not give rise to a constitutional tort.[95]

In addition, the Court rejected any implication that the due process clause creates a cause of action under 1983 whenever the state can be characterized as the tort-feasor; conduct cognizable as a state tort was not a fortiori actionable in federal court when a state official was involved.[96] The Court in *Paul* has therefore refused to construe 1983 to include all tortious conduct committed by state officials merely because their acts might give rise to a state claim.[97]

Turning specifically to the plaintiff's claim, the Court reasoned

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93. 424 U.S. at 699-701.

94. *Id.* at 695.

95. *Id.* at 701.

96. Justice Rehnquist observed:

> Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result . . . .

Id. at 699.

97. In a stinging dissent, Justice Brennan emphasized that the existence of a state remedy is irrelevant in deciding whether a cause of action will lie under § 1983. He argued that the fourteenth amendment "clearly renders unconstitutional actions taken by state officials that would merely be tortious conduct if engaged in by those acting in their private capacities." *Id.* at 716. In his view, arbitrary and capricious government conduct which infringed on a person's dignity and sense of good worth was precisely the kind of evil the due process clause was intended to eradicate. *Id.* at 735.

that since the stigma to his reputation was the only injury alleged, and no specific guarantee in the fourteenth amendment protected that interest, to be actionable the right asserted must fall within the amendment's protection of the substantive aspects of liberty.[98] Because the right to one's reputation was deemed neither "fundamental" nor "implicit in the concept of ordered liberty," the right asserted by the plaintiff was not secured by the fourteenth amendment and therefore was not actionable under section 1983.[99] The defendants had not committed a constitutional tort.

In the wake of *Paul,* a civil rights claim against state officials alleging, for example, an unreasonable search and seizure, could be brought under section 1983, since the right to be free from such conduct is expressly granted by the fourth and fourteenth amendments.[100] Also, a state official who interferes with an individual's right to vote is still amenable to a 1983 suit since the right to vote has been deemed a fundamental right.[101] Beyond these circumstances, however, the Court's standard provides little guidance for determining what conduct renders a state official answerable to a civil rights suit.[102] In the future, courts must determine when conduct under color of state law goes beyond the pale of "ordered liberty," thus giving rise to a cause of action under section 1983.[103] The

98. *Cf.* Kelley v. Johnson, 425 U.S. 238, 244 (1976) (fourteenth amendment protects substantive aspects of liberty against unconstitutional restriction by the state).

99. 424 U.S. at 712-14.

100. The Court in *Paul* distinguished *Monroe* on precisely this basis. Justice Rehnquist declared that the complaint in *Monroe* stated a cause of action under the fourteenth amendment because it alleged an unreasonable search and seizure violative of the fourth amendment. *Id.* at 700-01.

101. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (invalidating poll tax as prerequisite to voting). *Cf.* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (right to interstate travel fundamental). In recent years the Court has shown a reluctance to expand the number of recognized fundamental rights. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Lindsey v. Normet, 405 U.S. 56 (1972) (decent housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare payments).

102. It has been recognized that one function of the Court, in addition to resolving the instant controversy for the litigants, is to articulate guiding principles to assist the lower courts in the adjudication of future cases. *See* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 HARV. L. REV. 1, 37 (1957), criticizing the Court's decision in *Lincoln Mills* for failing to outline the sources and guides to which federal judges will turn in fashioning a federal common law of labor as directed by the Court.

103. Until the Supreme Court articulates its position on this subject, Judge Friendly's oft-cited opinion in Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), may provide some guidance as to when conduct under color of state law gives rise to a cause of action under § 1983. In his view, Rochin v. California, 342 U.S. 165 (1952), which involved conduct which "shocked the conscience," points the way in determining whether the constitutional line has been

probable effect of *Paul* will be to limit 1983 suits to instances of outrageous conduct or actions which offend notions of common decency.[104] The Supreme Court seems to be saying that 1983 claims alleging only simple assault by a policeman, confiscation of personal property by a prison warden, or false arrest by a law enforcement official are no longer proper subjects for federal adjudication.[105] Apparently, the fear expressed by some lower courts, that bringing to the federal forum suits previously taken to state courts under standard tort and property principles would trivialize the Constitution,[106] has resulted in the Supreme Court's decision in *Paul*.

Concern over the debasement of the Federal Constitution may have been appropriate in certain circumstances. Certainly it can be argued that the Constitution is not the proper vehicle for providing redress each time a state officer places a private citizen in fear of bodily harm or offensively touches an individual while acting in the scope of his employment. When an individual claims that his good name, reputation, and personal integrity are being seriously damaged by irresponsible conduct of state officials, however, the argument for constitutional protection would seem to be a tenable one. To recognize reputation as a constitutionally protected right presented the Supreme Court with the difficult problem of reconciling well established principles of statutory construction and constitu-

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crossed. He would not require that an individual be able to point to a "specific" guarantee in the Bill of Rights before demonstrating a deprivation of liberty without due process of law; in *Johnson*, which involved police brutality, the application of undue force would suffice. 481 F.2d at 1032. In Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972), the Third Circuit observed that all torts do not rise to the level of constitutional violations, holding that where conduct goes beyond decency a 1983 cause of action will lie. *Id.* at 282. *Cf.* Meredith v. Arizona, 523 F.2d 481, 484 (9th Cir. 1975) (upholding 1983 suit where conduct was "offensive to human dignity").

104. *See* note 103 *supra*. *But see* McCormack, *supra* note 7, at 7-8, arguing that limiting 1983 causes of action to "outrageous abuses" would not adequately protect individual rights.

105. Lower court opinions which have upheld 1983 actions under similar circumstances are now of questionable vitality. *See, e.g.*, Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975) (1983 action will lie for conversion of prisoner's radio); Rogers v. Fuller, 410 F. Supp. 187 (M.D.N.C. 1976) (alleged assault is a cognizable claim under § 1983 where state officer involved); Bur v. Gilbert, 415 F. Supp. 335 (E.D. Wis. 1976) (post-*Paul* case holding that element of excessive or unnecessary force not a prerequisite to recovery under § 1983 in suit for unlawful arrest). *See also* Weisman v. Lelandais, 532 F.2d 308 (2d Cir. 1976) (simple false imprisonment); Watters v. Parrish, 402 F. Supp. 696 (W.D. Va. 1975) (upholding 1983 claim when towing plaintiff's car allegedly violated due process).

106. *E.g.*, Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600, 607 (3d Cir. 1975) (1983 suit filed when student was excluded from school soccer team for noncompliance with hair code).

tional adjudication, brought into conflict by the constitutional claim in *Paul v. Davis.*

B. *Reputation as a Constitutional "Liberty" Interest: Reconciling 1983 and Principles of Incorporation*

Some redress must be available for intentional or reckless falsehoods published by state officials which injure private citizens. The real question presented in *Paul* was whether state or federal courts should provide the redress. It is true, as Justice Brennan's dissent in *Paul* points out, that the existence of an adequate state remedy has heretofore been irrelevant in determining whether there is a cause of action under section 1983.[107] The problem involved in *Paul* was how to reconcile this principle with the equally well established principle that the fourteenth amendment's due process clause incorporated[108] only those fundamental rights in need of constitutional protection because of a state's failure to safeguard that right.[109]

One reason the Court rejected the plaintiff's constitutional claim was that no express guarantee in the Bill of Rights secured the right to one's good reputation.[110] Neither is there an express constitutional right to have illegally seized evidence excluded from an accused's trial. Yet, in *Mapp v. Ohio,*[111] the Supreme Court incorporated the exclusionary rule into the fourteenth amendment when it realized that other means were not deterring state law enforcement officials from disregarding the fourth amendment's prohibition of unreasonable searches and seizures.[112] Arguably, the right asserted by the

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107. *See* 424 U.S. at 715 (Brennan, J., dissenting) and cases cited therein.

108. *See* note 27 *supra.*

109. *See* Stone v. Powell, 96 S. Ct. 3037, 3046-47 (1976), describing the exclusionary rule as a judicially created means of effectuating the rights secured by the fourth amendment, and discussing its incorporation into the fourteenth amendment in Mapp v. Ohio, 367 U.S. 643 (1961), based on the belief it would deter unlawful police misconduct. In Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), the right to be free from arbitrary intrusions by police officers was recognized as implicit in the concept of ordered liberty and therefore a proper subject for incorporation. Despite this recognition, the Court refused to extend the exclusionary rule to the states since it was not "an essential ingredient of that right." 338 U.S. at 29. *But see* note 112 and accompanying text *infra.*

110. 424 U.S. at 701.

111. 367 U.S. 643 (1961).

112. *Id.* at 652-53, 656-58. The Supreme Court in *Mapp* found "not controlling" the factual considerations which prompted the Court to refuse to extend the exclusionary rule to the states in Wolf v. Colorado, 338 U.S. 25 (1949). *See* note 109 *supra.* One of the principle reasons for overruling *Wolf* was "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies." 367 U.S. at 652.

plaintiff in *Paul* could have been incorporated into the due process clause as a violation of the constitutionally protected right of privacy, despite the fact the Bill of Rights does not explicitly protect that right.[113] However, while the states did not vigorously or effectively protect citizens from unreasonable searches and seizures, they have not been lax in protecting the right to reputation. Indeed, federal courts have had to intervene when overzealous state courts, in an effort to redress violations of this right, have impermissibly cut into the protection afforded free speech by the first amendment.[114]

In view of the stringency with which the states have safeguarded reputation, the Court's reluctance to declare a new federal right and give reputation constitutional protection may be defensible, despite *Monroe*'s recognition that the adequacy of state remedies is irrelevant to section 1983 litigation. The Supreme Court in *Paul* did not address the relationship between state and federal enforcement of this right. Instead, the Court decided *Paul* by distinguishing past decisions which had seemed to give constitutional protection to reputation in the form of notice and an opportunity to clear one's name.

Wisconsin v. Constantineau[115] presented the Supreme Court with a formidable hurdle if it were to decide *Paul* without overruling any of its prior decisions. A chief of police, pursuant to a state statute, had posted a notice in area liquor stores forbidding all sales of liquor to the plaintiff for one year. In holding that due process is denied when a state attaches such a "badge of infamy" to an individual without prior notice or a hearing, Justice Douglas observed:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.[116]

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113. The plaintiff in *Paul* alleged a violation of his right of privacy guaranteed by the first, fourth, fifth, ninth, and fourteenth amendments. 424 U.S. at 712. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (recognizing that "zones of privacy" may be created by more specific constitutional guarantees). Justice Rehnquist found the plaintiff's claim "far afield" from Supreme Court decisions recognizing a constitutional right of privacy. 424 U.S. at 713.

114. The classic case delineating the conflict between the first amendment protection of free speech and a private cause of action for defamation is New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See generally* Warnock, *The New York Times Rule—The Awakening Giant of First Amendment Protections*, 62 KY. L.J. 824 (1974).

115. 400 U.S. 433 (1971).

116. *Id.* at 437. *See also* Cafeteria Workers v. McElroy, 367 U.S. 886, 898 (1961) (discharge of government contractor employee); Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (badge of infamy may arise if branded disloyal by government).

More recently, in *Goss v. Lopez,*[117] the Court held that the guarantees of the fourteenth amendment must accompany a suspension from school since charges of misconduct could seriously damage a student's reputation.[118] Distinguishing these cases, Justice Rehnquist framed the issue in *Paul* as whether due process guarantees were brought into play when a government official defames an individual without affecting any other right initially recognized and protected by state law. The Court held they were not, although language in *Constantineau* "could be taken to mean" that if a government official defames a person, without more, the procedural requirements of the due process clause come into play.[119] *Constantineau, Goss,* and earlier decisions dealing with government employment[120] may be distinguishable from *Paul.* In each case, as a result of state action, a right or status previously recognized or protected by state law was distinctly altered or extinguished.[121] This threshold element was missing in *Paul.* In the Court's view, this distinction was significant enough to deny the plaintiff in *Paul* the same procedural protections granted others whose reputation had been injured by defamatory publications of officials acting under state law.[122]

To dispose of the reputation question in *Paul,* the Court could have simply overruled *Monroe* and held that when a state remedy is adequate in both practice and theory—generally the case with defamation—a plaintiff must seek relief in state court. Instead of this drastic measure, the Court reached the same result through

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In Rosenblatt v. Baer, 383 U.S. 75 (1966), Justice Stewart, who joined the majority in *Paul,* called one's reputation interest "a concept of the essential dignity and worth of every human being." While noting that its protection is left largely to the states, he stated that the interest was entitled to no less protection in federal court. *Id.* at 92 (concurring opinion).

117. 419 U.S. 565 (1975), *noted in* 14 DUQ. L. REV. 295 (1976).

118. *Id.* at 574-75.

119. 424 U.S. at 708.

120. *See* note 116 *supra.*

121. An adult has a right under state law to purchase alcohol along with the rest of the citizenry, and state law confers upon every child the right to attend school. An employee also has a right to continued employment when he can establish the requisite entitlement. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 602-03 (1972). *See also* Bell v. Burson, 402 U.S. 535 (1971) (since individuals have right to operate motor vehicles on state highways, state must afford individual due process before revoking his driver's license).

122. 424 U.S. at 710-11. The thrust of *Paul* is that a person's status is "altered" when the state suspends him from school, terminates his employment with the state, or denies him the right to purchase alcohol, but it is not altered when the state labels an innocent person as an active shoplifter. *Compare* 424 U.S. at 710-14, *with id.* at 734-36. (Brennan, J., dissenting). *Cf.* note 123 *infra.*

strained reasoning[123] and created the impression that the Court is uninterested in cases where state officials recklessly denigrate private individuals. More importantly, *Paul* has made it clear that neither the Constitution nor section 1983 protects an individual's good name and reputation, even where they may have been seriously damaged by persons acting under color of state law. The decision also determined that conduct which would give rise to a state tort claim may not create a cause of action under section 1983 whenever the state can be characterized as the tort-feasor. While the first of these restrictions represents a more limited restraint on the use of section 1983, the Court's pronouncements on the scope of a constitutional tort, and its limiting interpretation of the breadth of the due process clause, may significantly reduce the vitality of the Civil Rights Act's original purpose: to deter wrongful state conduct and compensate injured parties in the process.

III. *Bishop v. Wood*: Determining Property Interests Solely by Reference to State Law

The fourteenth amendment and section 1983 protect not only liberty interests but also property interests from deprivation without due process of law. In *Paul,* the Supreme Court rejected the plaintiff's purported liberty interest as neither fundamental nor implicit in the concept of ordered liberty so as to fall within the scope of substantive due process. In the course of that decision the Court observed that the due process clause was not in itself a source of protectible liberty interests to be embodied in general federal tort law.[124] Three months after *Paul,* in *Bishop v. Wood,*[125] the Supreme Court turned its attention to the source and scope of property interests secured by the fourteenth amendment and section 1983. More specifically, the Court reconsidered the scope of the protection af-

123. What follows from the Court's interpretation of the fourteenth amendment is a number of curious results. First, an individual's privilege to purchase alcohol, at least in a context such as *Constantineau,* is accorded constitutional protection, while his right to his personal integrity and good name is not. Second, by distinguishing *Constantineau* and *Goss* on the ground that defamation implicates no right "recognized or protected" by state law, what follows is the proposition that state law does not "protect" this right even though it provides a forum for the legal redress of its infringement by means of a damage action. *See* 424 U.S. at 711-12.

124. 424 U.S. at 699-701.

125. 96 S. Ct. 2074 (1976).

forded public employment by the due process clause.[126]

Prior to *Bishop*, it was generally thought that state law was only one source of protectible interests contemplated within the due process clause.[127] In *Board of Regents v. Roth*,[128] the Court had observed that property interests are understandings that support claims of entitlement to certain benefits—understandings that emanate from an "independent source *such as state law.*"[129] That definition seemed to imply that property interests could also stem from other sources, presumably giving a federal dimension to a term appearing in the Constitution.[130] In a 5-4 decision, however, the Court in *Bishop* held that an individual's claim of entitlement to a property interest secured by the due process clause of the fourteenth amendment must be determined solely by reference to state law.[131] With the admonition that "the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,"[132] the Court ruled that a policeman

126. *See* Skehan v. Board of Trustees, 538 F.2d 53, 63 (3d Cir. 1976) (analyzing the import of *Bishop*).

127. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). *See also* notes 128-30 and accompanying text *infra*.

128. 408 U.S. 564 (1972).

129. *Id.* at 577 (emphasis added).

130. Bishop v. Wood, 96 S. Ct. 2074, 2082 (1976) (Marshall & Brennan, JJ., dissenting); *id.* at 2085 (White, J., dissenting) (adequacy of due process procedures should be determined by federal and not state law once state confers a property right). *Cf.* Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell & Blackmun, JJ., concurring) (adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms). In the area of federal taxation, it is well established that federal authorities are not bound by a state court determination of a property interest. *See, e.g.*, Commissioner v. Estate of Bosch, 387 U.S. 456, 463-64 (1967) (for purposes of federal estate tax liability, state determination of property interest entitled to "proper regard," not finality).

131. 96 S. Ct. at 2077-78 & n.7 (1976).

132. *Id.* at 2080. Whether this statement represents an extension of the concerns of federalism and comity articulated in Rizzo v. Goode, 423 U.S. 362 (1976) is unclear. *Compare* notes 32-73 and accompanying text *supra*, *with* text accompanying notes 148-51 *infra*. At least in the delicate area of personnel relationships, the Court is willing to leave control in the hands of the states. In Perry v. Sindermann, 408 U.S. 593 (1972), the companion case to *Roth*, the Supreme Court ruled that an understanding between faculty and teacher, so-called de facto tenure, could be sufficient to trigger the due process clause upon the teacher's discharge. *Id.* at 602-03. Chief Justice Burger advocated abstention where the question of whether an individual had a property right was unclear under state law. *Id.* at 603-04 (concurring opinion). *Bishop* may represent an extension of that view to all state personnel decisions involving anything less than a written employment contract, tenure, or similar guarantee of continued employment. As to *Sindermann*'s recognition that such an interest is cognizable in federal court, arguably, a plaintiff must now first go to state court for a determination of whether he has a property interest which could not be extinguished without some due process procedures.

fired without a hearing was not deprived of any constitutional right since his termination implicated neither "property" nor "liberty" interests[133] within the meaning of the due process clause.

Addressing the merits of the plaintiff's claim, the Court conceded that a constitutionally protected property interest can be created by ordinance or implied contract.[134] Yet, despite its observation that the plaintiff was a permanent employee, the Supreme Court deferred to the lower court's construction of the city ordinance in

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After *Bishop*, cases holding that a teacher with neither contractual nor implied tenure has no property interest protected by the fourteenth amendment are still authoritative. *See, e.g.*, Weathers v. West Yuma County School Dist. R-J-1, 530 F.2d 1335 (10th Cir. 1976) (nontenured school teacher has no property or liberty interest in renewal of his contract); Russell v. El Paso Indep. School Dist., 539 F.2d 563 (5th Cir. 1976) (finding that plaintiff had no reasonable expectation of reemployment and citing *Bishop* as foreclosing further inquiry into the merits of the claim).

133. In Part II of the *Bishop* opinion, the Court addressed the plaintiff's claim that he had been deprived of a constitutional liberty interest under Board of Regents v. Roth, 408 U.S. 564 (1972), because of the stigma which accompanied his discharge. 96 S. Ct. at 2079-80. The Court held that something more than a potential stigma must accompany the employee's termination.

When the Supreme Court declared in Paul v. Davis, 424 U.S. 693 (1976), that, standing alone, defamation of an individual by a state official is not sufficient to establish a claim under § 1983 and the fourteenth amendment, it preserved *Roth* and strongly intimated that where the defamation or stigma accompanied the termination of the individual's employment, a 1983 action would lie in federal court. *Id.* at 710. In *Bishop*, however, the Court qualified that position by adding that there must be public disclosure of the reasons for the discharge in order to constitute a deprivation of liberty protected by the fourteenth amendment. 96 S. Ct. at 2079. Apparently, an individual's interest in his reputation, honor and integrity is impaired only if the reasons for his dismissal become public knowledge.

This view is assailable as an overly restrictive view of the parameters of "liberty" contemplated in the fourteenth amendment. As Justice Brennan pointed out, common sense dictates that when a discharged employee seeks reemployment, the prospective employer will inquire why the individual was terminated from his former employer's service. 96 S. Ct. at 2081 n.2 (dissenting opinion). Therefore, if the petitioner seeks further employment the reasons for his dismissal will become widely known. It is the stigma to the individual, and the reduced sense of worth, that arguably is the liberty interest. Regardless of the number of persons who become aware of the reasons for the discharge, when a dismissal involves the imputation of reprehensible, illegal, or other opprobrious conduct which impugns an individual's integrity, due process should come into play. Lower court decisions both before and after *Paul* have focused on the individual injury rather than external factors. *E.g.*, Connealy v. Walsh, 412 F. Supp. 146, 159 (W.D. Mo. 1976) (charges creating the stigma must be graver than mere charges of improper or inadequate job performance); Osmer v. Moiles, 409 F. Supp. 675, 676-77 (E.D. Mich. 1975) (relying on Sixth Circuit's decision in *Paul* and declaring that charges which contain great potential for stigmatization trigger due process). *See also* Turano v. Board of Educ., 411 F. Supp. 205, 209 (E.D.N.Y. 1976) (discussing the liberty interest in being free from stigmatization).

134. *See* Perry v. Sindermann, 408 U.S. 593, 596 (1972) (lack of tenure alone does not negate fourteenth amendment claim). *See* note 132 *supra*.

question[135] giving the plaintiff no property interest in continued employment. Although the ordinance seemed to permit the discharge of city employees only for cause,[136] the Court acquiesced in the conclusion that the plaintiff held his position at the "will and pleasure of the city."[137] This interpretation was "tenable" and derived "some support" from a decision of the North Carolina Supreme Court;[138] the Court felt it was therefore foreclosed from an independent examination of the state law issue and dismissed the suit.[139]

Irrespective of the soundness of the view that only state law is dispositive of the sufficiency of a claim of entitlement to a property interest, *Bishop* represents a narrowing of *Roth*'s pronouncements on the scope of property interests secured by the fourteenth amendment. The Court ignored its observation in *Roth* that the purpose of the institution of property was to "protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."[140]

The plaintiff in *Bishop* was classified as a *permanent* employee and Justice Stevens conceded that on its face the ordinance in question "may fairly be read" as granting a guarantee of continued employment.[141] Despite the fact this ordinance had never been construed regarding the existence of such a guarantee, the Court decided the plaintiff had no property interest secured by the fourteenth amendment without considering whether he could have reasonably relied on continued employment if he adequately performed his duties. Under *Roth*, the relevant inquiry is whether it was objectively reasonable for the employee to believe he could rely on continued employment;[142] in *Bishop*, the petitioner's reclassification as a permanent employee after the requisite six month probationary period, along with a reasonable reading of the local ordinance, should have led to the conclusion that the petitioner could only be dis-

135. 377 F. Supp. 501, 503-05 (W.D.N.C. 1973).

136. See Justice White's dissenting opinion, 96 S. Ct. at 2083, for the relevant text of the ordinance.

137. *See* 96 S. Ct. at 2078 & n.9, *quoting* 377 F. Supp. at 504.

138. *See* Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971) (enforceable expectation of continued employment exists only if employer, by statute or contract, has actually granted some form of guarantee).

139. 96 S. Ct. at 2080.

140. 408 U.S. at 577.

141. 96 S. Ct. at 2078.

142. *See* 408 U.S. at 577; *cf.* 96 S. Ct. at 2082 (Brennan, J., dissenting).

charged for cause after a due process hearing. When Justice Brennan suggested a number of criteria[143] to determine whether an employee's reliance on continued employment was objectively reasonable and therefore protectible as a property interest, Justice Stevens termed his view a "remarkably innovative suggestion that we develop a federal common law of property rights."[144] Thus, the definition of property for the purposes of the fourteenth amendment is simply what the states decide is property.[145] Carried to its logical extreme, this proposition means that any state statute which seemed to confer an entitlement to a property right can be construed by a state court as not conferring such a right; if that construction is "tenable,"[146] then no constitutional right is implicated, no suit under section 1983 will lie in federal court, and any challenge to the discharge must be pursued in state court. [147]

There was more at stake in *Bishop* than determining whether North Carolina's classification of the petitioner as a permanent employee afforded him a constitutional property right. Nothing in the Constitution requires a state to reclassify its employees depending on the duration of their employment. Whatever North Carolina's reason for this classification, it is doubtful its purpose was to extend constitutional protection to the petitioner's interest in continued employment; its reasons were probably peculiar to the administration of its own law enforcement. What actually concerned the Court was briefly referred to by Justice Stevens in

143. 96 S. Ct. at 2082 & n.5 (dissenting opinion).

144. *Id.* at 2080 n.14.

145. *See* McCormack, *supra* note 7, at 3 & n.12.

146. Compare this standard of review with Kelley v. Johnson, 425 U.S. 238 (1976), a suit brought under § 1983, where the Court held a police force's hair-length regulation did not infringe on any rights guaranteed by the fourteenth amendment. Justice Rehnquist stated that in positing a constitutional challenge to a regulation which arguably infringes on an individual's liberty interest in matters of personal appearance, the question is not whether the state can establish a "genuine public need" for the regulation, but whether the complainant can demonstrate there is "no rational connection between the regulation . . . and the promotion of safety of persons and property." *Id.* at 247. Thus, in both *Bishop* and *Kelley*, the Supreme Court has elected to narrow its scope of review in cases involving state public employees despite the nature of the interest allegedly affected by the state action. *See* Ahearn v. DiGrazia, 412 F. Supp. 638 (D. Mass. 1976) (dismissing 1983 suit after applying *Kelley*'s rational basis standard in an equal protection case which involved statutorily imposed punishment duty); *But cf.* Syrek v. Pennsylvania Air Nat'l Guard, 537 F.2d 66 (3d Cir. 1976) (post-*Kelley* case upholding 1983 suit because state regulation of hair length could constitute an invasion of constitutionally protected "liberty").

147. *See* 96 S. Ct. at 2080 n.13.

Bishop,[148] but fully articulated in *National League of Cities v. Usery.*[149] In the concluding segment of a plurality opinion Justice Rehnquist observed that Congress may not exercise its power under the commerce clause to force upon the states its methods of regulating integral government functions.[150] Providing police protection, the function involved in *Bishop,* is a government service traditionally left to the states and their subdivisions. Whereas notions of federalism and comity counsel against federal court interference with state judicial processes, concern for "the essentials of state sovereignty"[151] militate against federal interference into the administration of non-judicial government functions.

The import of *Bishop* then, like *Rizzo* and *Paul,* is that the Supreme Court is willing to allow the states to adjudicate at least some allegedly wrongful conduct by certain individuals acting under the color of state law. By declaring in *Bishop* that the validity of the petitioner's potential state law claim was unaffected by its analysis of the constitutional question,[152] the Supreme Court implicitly acknowledged that although action under color of state law should give rise to a private cause of action for damages, section 1983 may not always be the appropriate vehicle for redress.

Perhaps a federal court is not the appropriate forum to scrutinize the entire spectrum of personnel decisions that are made daily by public agencies. As the Supreme Court recently recognized in *Elrod v. Burns,*[153] however, a person entering public employment is not divested of all constitutional protection. Federal rights may be lost

148. *See* text accompanying note 132 *supra.*

149. 96 S. Ct. 2465 (1976). In *Usery,* the Supreme Court held that Congress exceeded its powers under the commerce clause in amending the Fair Labor Standards Act to extend the Act's coverage to nearly all employees of the states and their subdivisions. In declaring the amendments unconstitutional, the Court expressly overruled Maryland v. Wirtz, 392 U.S. 183 (1968), which had sustained the validity of earlier amendments to the Fair Labor Standards Act extending its coverage to employees of state hospitals, institutions, and schools.

150. 96 S. Ct. at 2474-76.

151. *Id.* at 2476, *citing* Maryland v. Wirtz, 392 U.S. 183, 205 (Douglas, J., dissenting).

152. 96 S. Ct. at 2080 n.13.

153. 96 S. Ct. 2673 (1976). In *Elrod,* non-civil-service employees of Cook County, Illinois were discharged or threatened with discharge for not being affiliated with the Democratic Party. They sought declaratory and injunctive relief under § 1983 for violation of rights secured by the first and fourteenth amendments. In a plurality opinion, Justice Brennan held that patronage dismissals severely restrict freedom of association and political belief, and a government may not force a public employee to relinquish his right to political association as a price for holding a public job without impermissibly inhibiting his first amendment rights. *Id.* at 2681-83.

in the absence of expeditious federal adjudication,[154] and federal courts *are* the appropriate forums to ensure that individuals are accorded procedural safeguards when government action deprives them of important property or liberty interests. In holding that the petitioner's termination did not trigger the strictures of due process, *Bishop* seems to represent the curtailment of constitutional safeguards which perhaps "marks too many recent decisions of the Court."[155]

IV. *Imbler v. Pachtman*: Prosecutorial Immunity—Adding to the List of Those Beyond the Reach of Section 1983

The Supreme Court has consistently held that public officials are entitled to some measure of immunity from damage actions[156] brought under section 1983.[157] To promote effective public administration, the Court has engrafted common law immunities onto the Act, despite the fact the statute creates a species of tort liability which on its face admits of no immunities.[158] The granting of absolute and qualified immunities represents an accommodation of interests: public officials who labor under the onus of potential damage actions may become hesitant in carrying out their responsibili-

154. *See* Coll v. Hyland, 411 F. Supp. 905, 908 (D.N.J. 1976) (challenging New Jersey's civil commitment procedures).

155. 96 S. Ct. at 2082 (Brennan & Marshall, JJ., dissenting).

156. Official immunity from damages under § 1983 does not necessarily mean a plaintiff is left without relief. Although the Supreme Court has never directly confronted the issue, it has indicated that official immunity will not bar equitable relief. *See* Wood v. Strickland, 420 U.S. 308, 314-15 n.6 (1975). A number of lower court opinions support this view. *See, e.g.*, Boyd v. Adams, 513 F.2d 83, 86-87 (7th Cir. 1975) (policy considerations supporting official immunity inapposite in the context of equitable relief); Taliaferro v. Willett, 411 F. Supp. 595 (E.D. Va. 1976) (individuals may be sued in their official capacity where declaratory relief is sought); Demkowicz v. Endry, 411 F. Supp. 1184 (S.D. Ohio 1975) (1983 defense of good faith and reasonable belief not available to school officials in suit for back pay which sounds in equity).

157. Wood v. Strickland, 420 U.S. 308 (1975) (qualified, good faith immunity for school officials); Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified immunity for executive and administrative officials); Pierson v. Ray, 386 U.S. 547 (1967) (absolute immunity for judges; qualified, good faith immunity for policemen); Tenney v. Brandhove, 341 U.S. 367 (1951) (absolute immunity for legislators). *See generally The Supreme Court, 1974 Term*, 89 Harv. L. Rev. 1, 219-25 (1975) [hereinafter cited as *The Supreme Court, 1974 Term*]; McCormack, *supra* note 7, at 10-17.

158. Justice Douglas has argued that the statute should be applied as stringently as it reads; hence, he would confer no immunities under § 1983. Pierson v. Ray, 386 U.S. 547, 559 (1967) (dissenting opinion).

ties and others will be deterred from entering public service.[159] Also, it would seem unjust for officials to be amenable to damage awards as a consequence of honest, good faith mistakes. Yet a grant of absolute immunity arguably conflicts with the policies underlying section 1983—compensation for the deprivation of constitutional rights and deterrence of future violations.[160]

In *Scheuer v. Rhodes,*[161] the Supreme Court attempted to reconcile these conflicting interests by applying what was essentially a "reasonable man" test of standard tort law for determinations of immunity under section 1983. *Scheuer* held that state executive and administrative officials were not entitled to immunity if, in light of all the circumstances, their conduct was unreasonable.[162] The Court continued the trend in *Wood v. Strickland,*[163] holding that school officials cannot claim immunity if they knew or reasonably should have known their actions would violate a student's clearly established constitutional rights.[164] *Wood* acknowledged that a greater than average awareness of the law can be imputed to a person who holds a public office demanding a high degree of intelligence and judgment.[165]

In light of these developments, it was somewhat surprising that in *Imbler v. Pachtman*[166] the Court held that a prosecuting attorney, acting within the scope of his duties in initiating and pursuing a criminal prosecution, is absolutely immune from a civil suit for damages under section 1983 for alleged deprivations of the accused's constitutional rights.[167] Examining the immunity historically ac-

159. *See The Supreme Court, 1974 Term, supra* note 157, at 220.

160. *See id.*; Nahmod, *supra* note 87, at 10-11.

161. 416 U.S. 232 (1974).

162. *Id.* at 247-48.

163. 420 U.S. 308 (1975).

164. *Id.* at 321-22. *See* Picha v. Wielgos, 410 F. Supp. 1214, 1220 (N.D. Ill. 1976) (school officials cannot claim § 1983 immunity when they violate well settled rights of students).

165. 420 U.S. at 322.

166. 424 U.S. 409 (1976), *aff'g* 500 F.2d 1301 (9th Cir. 1974). The Ninth Circuit had adhered to the doctrine of prosecutorial immunity for a number of years. *See* 500 F.2d at 1302 and cases cited therein. The court distinguished *Scheuer* on the basis that prosecutorial immunity was a form of judicial immunity rather than executive immunity. *Id.* at 1304 n.4.

167. 424 U.S. at 430-31. The Court expressly deferred answering the question whether an absolute immunity extends to a prosecutor carrying out his administrative or investigatory functions. *Id. See* Morris v. Danna, 411 F. Supp. 1300, 1302-03 n.5 (D. Minn. 1976) (post-*Imbler* case suggesting issue of extending prosecutor's immunity be pursued in state court); Gockley v. VanHoove, 409 F. Supp. 645, 650 (E.D. Pa. 1976) (immunity extends to acts within prosecutor's jurisdiction, but not to acts clearly outside that jurisdicction); Tomko v. Lees,

corded prosecutors at common law, which Justice Powell found to be absolute,[168] the Court concluded that the same policy considerations determinative of prosecutorial immunity at common law applied under section 1983.[169]

Whereas the lower court decisions before *Imbler* struggled with both the scope of prosecutorial immunity[170] and its derivation,[171] *Imbler* resolved the question and its rationale is now being applied in other contexts. Absolute immunity from 1983 damage suits has since been granted to parole and probation officers,[172] election officials,[173] common pleas chief probation officers,[174] court-appointed lawyers,[175] and possibly to public defenders;[176] federal prosecutors have similarly been accorded immunity based on the policy considerations underlying *Imbler*.[177]

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416 F. Supp. 1137, 1139 (W.D. Pa. 1976) (refusing to extend immunity to prosecutor's actions connected with recruiting and cultivating informants); Sprague v. Fitzpatrick, 412 F. Supp. 910, 913-14 (E.D. Pa. 1976) (prosecutor, in his status as employer, not immune from 1983 suit). *Cf.* Wiggins v. Hess, 531 F.2d 920 (8th Cir. 1976) (discussing instances when judge can lose his shield of immunity).

168. 424 U.S. at 421-24.

169. *Id.* at 427. *See also* Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 956 n.171 (1976), noting that *Imbler* was bottomed on broad policy considerations rather than any notions that state immunity was applicable to its agents.

170. For a series of opinions evincing judicial struggle with the problem of prosecutorial immunity see Martin v. Merola, 532 F.2d 191 (2d Cir. 1976), including Judge Lumbard's concurrence with the Second Circuit's per curiam opinion, where he notes that while *Wood v. Strickland* did not control the instant case, it signalled an extension of 1983's reach to officials who infringed individual rights. He would hold the shield of absolute immunity unavailable to a prosecutor who goes beyond the scope of his official duties and knows or should have known that his actions would deprive a defendant of constitutionally protected liberties. *Id.* at 197. *See also* Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), *vacated*, 424 U.S. 961 (1976) (refusing to grant absolute immunity where prosecutor withheld exculpatory evidence, since such action not within the scope of his prosecutorial duties).

For an excellent discussion of immunities and defenses under § 1983 see Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976) (before a panel of 15 judges en banc) (good faith and reasonableness are defenses to a 1983 false imprisonment action). *See also* Hazo v. Geltz, 537 F.2d 747 (3d Cir. 1976) (sheriff and his deputies not necessarily immune from 1983 suit).

171. *E.g.*, Grow v. Fisher, 523 F.2d 875, 877 (7th Cir. 1975) (prosecutor has quasi-judicial immunity when acting within scope of prosecutorial discretion because prosecutors are more analogous to judges than policemen).

172. Pate v. Alabama Bd. of Pardons & Paroles, 409 F. Supp. 478 (M.D. Ala. 1976).

173. Oakley v. City of Pasadena, 535 F.2d 503 (9th Cir. 1976) (alternative holding).

174. Timson v. Wright, 532 F.2d 552 (6th Cir. 1976).

175. Minns v. Paul, 542 F.2d 899 (4th Cir. 1976).

176. Gilbert v. Corcoran, 530 F.2d 820 (8th Cir. 1976).

177. Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976). The federal prosecutors were not sued under section 1983, but rather on a cause of action first identified in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

This expansion of absolute immunity represents a deviation from the balancing approach undertaken by the Court in *Wood* and *Scheuer*.[178] While those cases are distinguishable based on the nature of the official function involved, they nevertheless epitomized a trend to hold public officials accountable for the infringement of basic constitutional rights.[179] To hold that state officials as a class are absolutely immune from damage suits under section 1983 would negate the very remedy section 1983 was intended to provide.[180] Immunity from 1983 suits should be read against the background of tort law. If tort law's "reasonable man" has traditionally been viewed as possessing a pool of knowledge that includes an elementary awareness of the law, certainly a state prosecutor should be held to a higher standard in view of the nature of his responsibilities. When a prosecutor purposefully solicits and knowingly uses perjured testimony,[181] withholds exculpatory evidence, or otherwise misuses his office, to shield him from a damage remedy under section 1983 can lead to unpalatable results.[182] A qualified, good faith immunity, which would protect prosecutors from honest mistakes or overzealousness, would adequately protect the office and would not completely eviscerate the purpose of section 1983.

Imbler represents yet another restriction of section 1983, consistent with *Rizzo, Paul,* and *Bishop*. The decision is bottomed, however, on a rationale wholly different from those cases. Each of those decisions took cognizance of wrongful conduct under color of state law, but held that injuries resulting from that conduct were not sufficiently compelling to warrant constitutional protection. In a case such as *Imbler,* where the wrongdoer enjoys absolute immunity, the alleged deprivation may have reached the level of a constitutional tort; had the tort-feasor not been clothed with immunity, 1983 would have been available to the injured party. Yet in *Imbler,*

178. *See* text accompanying notes 161-65 *supra.*

179. Martin v. Merola, 532 F.2d 191, 198 (2d Cir. 1976) (Lumbard, J., concurring).

180. *See* 424 U.S. at 433-34 (White, J., concurring).

181. *See* Tate v. Grose, 412 F. Supp. 487 (E.D. Pa. 1976) (*Imbler* controlling even though perjured testimony not only used, but solicited as well).

182. In Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), *cert. denied,* 424 U.S. 975 (1976), a city attorney, justice of the peace, and police chief were sued for damages under § 1983 when the plaintiff was detained in the local jail while the defendants sold his entire stock of hogs, worth thousands of dollars, on the pretense of satisfying a $55 misdemeanor fine. All three defendants were granted immunity for purposes of the 1983 suit; although the action was "in excess" of their jurisdiction, it was not in the "absence" of that jurisdiction and was within their general powers under state law. *Id.* at 592. *See also* note 181 *supra.*

the Court was unwilling to implement section 1983 based on a different consideration: the perceived need for a steady flow of fearless individuals to prosecute criminal activity. As a result, section 1983 is simply unavailable to vindicate important constitutional rights which may have been lost in the process.

V. *Aldinger v. Howard*: Pendent Jurisdiction and the Move Towards State Adjudication of Section 1983 Claims

Like other Supreme Court decisions which have delimited the scope of section 1983 based on their perception of Congress' intent in enacting the Civil Rights Act, statutory interpretation is the starting point for an analysis of *Aldinger v. Howard.*[183] In *Monroe v. Pape,*[184] the Supreme Court held that municipal corporations are not amenable to damage suits under 1983 since they are not "persons" within the meaning of the statute,[185] and in *City of Kenosha v. Bruno,*[186] it rebuffed efforts to use 1983 to obtain equitable relief against similar defendants.[187] Although the Court has held only that municipal corporations and counties are not suable under section 1983,[188] lower courts have determined that a wide variety of local governments and their subdivisions are beyond the reach of the statute,[189] including boroughs,[190] school boards,[191] city police depart-

183. 96 S. Ct. 2413 (1976).

184. 365 U.S. 167 (1961).

185. *Id.* at 187-91. *See* note 187 *infra.*

186. 412 U.S. 507 (1973). Section 1331 jurisdiction may be available to a person seeking to hold a municipality liable for damages. *Compare* 412 U.S. at 514 *with id.* at 516 (Brennan & Marshall, JJ., concurring). *See generally* Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 Harv. L. Rev. 922 (1976).

187. The Court observed:

> We find nothing in the legislative history discussed in *Monroe,* or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them.

412 U.S. at 513.

188. *See* Bishop v. Wood, 96 S. Ct. 2074, 2077 n.1 (1976); Moor v. County of Alameda, 411 U.S. 693, 698-710 (1973), discussed at note 201 *infra.*

189. Premised on the realization that 1983 damage actions against individual municipal officials sued in their official capacity are in effect suits against the municipalities themselves, lower courts have held that an action cannot be brought for damages under § 1983 against municipal officials in their *official* capacities. *E.g.,* Monell v. Department of Soc. Servs., 532 F.2d 259 (2d Cir. 1976) (attempt to sue various officials who promulgated agency rules concerning mandatory leave for pregnant women). *Contra,* Muzguiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) (en banc) (individual members of pension fund board

ments and planning commissions,[192] state boards of probation and parole,[193] federal agencies,[194] and city transit commissions.[195] Therefore, no independent basis of federal jurisdiction exists over these subdivisions under section 1983 and its jurisdictional counterpart.[196]

Federal courts are courts of limited jurisdiction;[197] unless a plaintiff can show federal jurisdiction over his claim by virtue of a congressional grant of judicial power,[198] he cannot litigate his claim in federal court. In certain circumstances, however, the doctrine of pendent jurisdiction[199] may enable a party to obtain a federal forum for a claim that, standing alone, is not within the statutory jurisdiction of the federal courts. A claim is said to be within the pendent jurisdiction of the federal courts when it is joined with a substantial claim that independently meets the statutory requirements for federal jurisdiction, and the claim arises from the same "nucleus of operative fact" as that of the federal claim.[200]

The Supreme Court squarely faced in *Aldinger* the "subtle and complex" question it had twice alluded to,[201] but had left

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could be sued for monetary damages in their official capacity despite fact money would come from city pension funds). *Cf.* Thurston v. Dekle, 531 F.2d 1264, 1269 (5th Cir. 1976) (allowing suit against members of municipal agencies acting in their official capacities, but limiting award to back pay since restitution damages would in effect establish a conduit to the city treasury).

190. Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976); Olson v. Borough of Homestead, 417 F. Supp. 784 (W.D. Pa. 1976).

191. Campbell v. Gadsden County Dist. School Bd., 534 F.2d 650 (5th Cir. 1976).

192. Amen v. City of Dearborn, 532 F.2d 554 (6th Cir. 1976).

193. Reiff v. Pennsylvania, 397 F. Supp. 345 (E.D. Pa. 1975).

194. Hoffman v. United States Dep't of Housing & Urban Dev., 519 F.2d 1160 (5th Cir. 1975). *But see* Monell v. Department of Soc. Servs., 532 F.2d 259, 263 (2d Cir. 1976) (intimating that some agencies may be "persons" for purposes of § 1983).

195. United Handicapped Fed'n v. Andre, 409 F. Supp. 1297 (D. Minn. 1976).

196. *See* note 20 *supra.*

197. *See generally* C. WRIGHT, FEDERAL COURTS § 7 (2d ed. 1970) [hereinafter cited as WRIGHT].

198. *See* Hagans v. Lavine, 415 U.S. 528, 538 (1974) (dictum) ("[j]urisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other").

199. *See generally* WRIGHT, *supra* note 197, § 19; Sullivan, *Pendent Jurisdiction: The Impact of Hagans and Moor*, 7 IND. L. REV. 925 (1974); Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 VA. L. REV. 194 (1976) [hereinafter cited as *Pendent Party Jurisdiction*].

200. *See* UMW v. Gibbs, 383 U.S. 715, 725 (1966). *See* notes 209 & 210 *infra.*

201. Philbrook v. Glodgett, 421 U.S. 707, 720 (1975); Moor v. County of Alameda, 411 U.S. 693, 715 (1973).

The issue in *Moor* was very similar to the question presented in *Aldinger.* In *Moor*, the petitioners sought damages for injuries suffered as a result of the wrongful discharge of a shotgun by a county sheriff attempting to quell a civil rights disturbance. The petitioners filed

unanswered: whether pendent jurisdiction can be exercised over a party such as a municipality for whom no independent basis of jurisdiction exists.[202] In other words, *Aldinger* confronted the issue whether pendent party jurisdiction is within the judicial powers of the federal courts. As in *Rizzo, Paul,* and other recent civil rights cases, section 1983 provided the vehicle for resolution of an important federal question.

In *Aldinger,* the plaintiff was dismissed from her employment with the county despite her admittedly excellent job performance because she was allegedly living with a male companion. She filed a federal suit against both the county and the individuals involved in her discharge,[203] and sought injunctive relief and damages under section 1983. The plaintiff asserted jurisdiction over her federal claims under section 1343(3), and pendent jurisdiction was alleged to lie over the state law claims against the parties.[204] Her 1983 suit against the individual defendants was properly in federal court, but since a similar claim under the Civil Rights Act against the county

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a § 1983 damage action against the sheriff and other local officials, and sought damages against the county, claiming it was vicariously liable for the officer's acts under the California Tort Claims Act. The petitioners asked the lower court to assume pendent party jurisdiction over the state claim involving the county, since both claims arose from a common nucleus of operative fact.

The Supreme Court found that the 1983 claim against the individual defendants was substantial, and that all the claims arose out of a common nucleus of operative fact. However, Justice Marshall, speaking for the Court, noted that the exercise of jurisdiction over the county would require "the addition of a party which is implicated in the litigation only with respect to the pendent state law claim and not also with respect to any claim as to which there is an independent basis of federal jurisdiction." 411 U.S. at 713. Although the issue was thus squarely approached, the Court evaded a decision on the existence of pendent party jurisdictional power and upheld the district court's dismissal of the pendent party claim on the basis of the discretionary criteria set forth in *Gibbs. Id.* at 716. *See* UMW v. Gibbs, 383 U.S. 715, 726-27 (1966), for the criteria referred to by Justice Marshall in *Moor. Moor,* therefore, failed to resolve the question of a federal court's *power* to exercise pendent party jurisdiction.

202. 96 S. Ct. at 2415. Lower courts have split over this issue. *Compare* Aldinger v. Howard, 513 F.2d 1257, 1261 (9th Cir. 1975) (refusing to exercise pendent party jurisdiction while acknowledging "widespread rejection" of its view), *with* Haber v. County of Nassau, 411 F. Supp. 93, 96-97 (E.D.N.Y. 1976) (exercising jurisdiction and noting that under the circumstances, not to exercise such jurisdiction may have constituted an abuse of discretion). *See Pendent Party Jurisdiction, supra* note 199, at 206-08 & nn.69-74, collecting the lower court cases which represent a "model of disarray" since *Gibbs.*

203. The individual defendants were the county treasurer, his wife and certain named county officials. 96 S. Ct. at 2415.

204. *Id.* at 2415-16. The state law claim against the county was said to rest on state statutes waiving the county's sovereign immunity and rendering the county vicariously liable for the tortious conduct of its officials. *See* 513 F.2d at 1358.

was foreclosed by *Kenosha,*[205] the plaintiff's only available means of having all her claims litigated in one judicial proceeding was to have the federal court exercise "pendent party jurisdiction"[206] over the state law claim against the county. Distinguishing *UMW v. Gibbs,*[207] where the defendant was already properly in federal court, the Supreme Court held that a federal district court, in an action brought against a county official under section 1983, has no statutory jurisdiction to join the defendant county; a nonfederal claim cannot *in turn* be the basis for impleading a party over whom no independent federal jurisdiction exists.[208] The plaintiff's state and federal claims derived from a "common nucleus of operative fact,"[209]

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205. *See* notes 186 & 87 and accompanying text *supra.*

206. This term, used by Justice Rehnquist in *Aldinger,* represents a hybrid between the traditional doctrines of ancillary jurisdiction, which is predicated on the joining of pendent parties, and pendent jurisdiction, which generally contemplates the exercise of jurisdiction over additional claims. *Compare* WRIGHT, *supra* note 197, § 9, *with id.* § 19. *See also Pendent Party Jurisdiction, supra* note 199, at 194 n.2. In *Aldinger,* Justice Rehnquist found it unnecessary to decide whether there exists any principled differences between the two types of jurisdiction. He simply characterized the type of jurisdiction asserted by the plaintiff as "pendent party jurisdiction"; it is the language in UMW v. Gibbs, 383 U.S. 715, 725-26 (1966), a pendent jurisdiction case, on which the lower courts have relied in extending the type of pendent jurisdiction urged by the plaintiff. 96 S. Ct. at 2419-20. *See, e.g.,* Haber v. County of Nassau, 411 F. Supp. 93, 96-97 (E.D.N.Y. 1976) (upholding such jurisdiction relying solely on *Gibbs*).

207. 383 U.S. 715 (1966).

208. 96 S. Ct. at 2418 (emphasis in original). *See generally* Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. PITT. L. REV. 1 (1972); *Pendent Party Jurisdiction, supra* note 199, at 196. Both commentators conclude that the exercise of pendent party jurisdiction is proper in limited circumstances.

209. The crucial language in *Gibbs* redefining the scope of pendent jurisdiction reads:

> Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties" . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. . . . [A]ssuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

383 U.S. at 725 (footnotes and citations omitted). In Hurn v. Oursler, 289 U.S. 238 (1933), cited in *Gibbs* as representing an "unnecessarily grudging" approach to pendent jurisdiction, the Court held that where two separate causes of action were alleged, only one of which was federal, federal juducial power did not lie over the state law claim. If two distinct grounds, one state and one federal, supported a single cause of action, a federal court could dispose of the case on the nonfederal ground. 289 U.S. at 246. Whereas *Gibbs* interred this approach to pendent jurisdiction in favor of a common nucleus test, Justice Rehnquist's "in turn" treatment in *Aldinger* may represent somewhat of a retrenchment since the plaintiff in *Aldinger* was in essence alleging two distinct causes of action: a federal claim against the individuals

and her claims were such that she would ordinarily be expected to try them all in one proceeding.[210] Although exercising pendent jurisdiction under these circumstances would be desirable in other contexts, in *Aldinger* this interest was outweighed by the Court's recognition of the limited jurisdiction of the federal courts along with the perceived congressional intent to negate municipal liability under section 1983.[211] In holding that the petitioner must litigate her state law claim against the county in state court, the Court seems to have decided sub silentio a previously unresolved question by implying that section 1983 claims are not cognizable exclusively in federal court but may also be entertained by state courts.[212]

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and a state claim against the defendant county. Although *Gibbs* did not expressly overrule *Hurn*, it is clear that *Hurn's* basic approach to pendent jurisdiction was repudiated. 383 U.S. at 724-25.

210. *See* UMW v. Gibbs, 383 U.S. 724, 725 (1966). Although there is some uncertainty from the language of *Gibbs*, the weight of authority has been that its "common nucleus" and "ordinarily in one proceeding" requirements must both be met for pendent jurisdiction to exist. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567, at 445 (1975), and authorities cited therein.

211. 96 S. Ct. at 2421-22. Justice Brennan dissented, joined by Justices Marshall and Blackmun, and found the majority's result "demonstrably untenable." In his view, the majority wholly disregarded the congressional intent and policy in enacting the various civil rights statutes including the present § 1983: The Act's focal point was the provision that claims brought under § 1983 should be entertained in federal judicial forums. 96 S. Ct. at 2427-28.

212. *See* 96 S. Ct. at 2421-22; *id.* at 2430 n.17 (dissenting opinion).

As of 1969, no state court had ever heard a 1983 claim. *See* Note, *supra* note 10, at 1497 n.62. As late as 1976 there was still doubt whether *Monroe* or its descendents, in holding a 1983 suit supplementary to any state remedies, had precluded state courts from entertaining suits under that section. Backus v. Chilivis, 363 Ga. 500, 224 S.E.2d 370 (1976) (refusing to decide whether 1983 suits are cognizable in state court but noting that neither *Monroe* nor *McNeese* construed the statute as confining 1983 subject matter jurisdiction to the federal courts). *But cf.* Robinson v. Brown, 328 So. 2d 291, 292 (Ala. 1976) (upholding dismissal of 1983 claim which had already been litigated in federal court because the issue had been determined by a court of "concurrent jurisdiction"); Stephens v. Dixon, 30 Md. App. 56, 351 A.2d 187, 190 (1976) (remanding plaintiff's suit against mayor, alleging infringement of first amendment rights, because "appellant's proper method of recovery would be via 42 U.S.C. § 1983").

Other state courts have considered 1983 claims without reference to jurisdictional impediments. *See, e.g.*, Evans v. Copins, 26 Ariz. App. 96, 546 P.2d 365 (1976) (suit against city magistrate for false imprisonment and deprivation of other constitutional rights dismissed based on judicial immunity); Zisk v. City of Roseville, 56 Cal. App. 3d 41, 127 Cal. Rptr. 896 (1976) (action against city, city planning commission, and individual councilmen); Knight v. Board of Educ., 38 Ill. App. 603, 348 N.E.2d 299 (1976) (student suing school board over grade reductions); Price v. Sheppard, 239 N.W.2d 905 (Minn. 1976) (suit against director of state mental hospital controlled by immunity doctrines enunciated by Supreme Court); Moore v. City of Pacific, 534 S.W.2d 486 (Mo. App. 1976) (suit to invalidate ordinance establishing allegedly discriminatory ward lines); MacNeil v. Klein, 141 N.J. Super. 394, 358

The Court's contentment with this result represents a major philosophical change from relatively recent cases which recognized federal courts as the appropriate forum for the adjudication of these claims.[213] Pendent jurisdiction has consistently been recognized as a doctrine of judicial discretion.[214] Although *Gibbs* and other pendent jurisdiction cases[215] are distinguishable on the ground identified by Justice Rehnquist,[216] *Aldinger* could have fit within *Gibbs'* requirements for pendent jurisdiction[217] to ensure that the plaintiff's 1983 claim against these individuals for her arbitrary discharge would be heard in a federal forum with the benefit of federal fact-finding. Arguably, it is insignificant that Congress intended to insulate municipalities from section 1983 liability. The plaintiff sought to have her state claims against the county adjudicated by the district court, and under the doctrine of pendent jurisdiction federal courts surely have the *power* to adjudicate a state law claim in the course of disposing of an article III case.[218]

The policies of economy which underlie the doctrine of pendent

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A.2d 488 (1976) (action by county inmates); Schroeck v. Pennsylvania State Police, 362 A.2d 486 (Pa. Commw. 1976) (suit against various state police personnel).

It is not at all certain that state courts will adequately protect rights presumably secured by § 1983. In Jones v. Hilderbrant, 550 P.2d 339 (Colo. 1976), the defendant police officer intentionally shot and killed the plaintiff's 15 year-old son. Citing Paul v. Davis, 424 U.S. 693 (1976), which involved distributing a shoplifting flyer, as an "analogous § 1983 case," the Supreme Court of Colorado affirmed the lower court's damage award of $1500, and dismissed the 1983 claim, declaring that it had merged with the Colorado wrongful death statute. 550 P.2d at 344. Colorado's wrongful death statute included a "net pecuniary loss rule," restricting damages to those actually sustained as a result of the death of the appellant's son. *Id.* at 341. *See also* text accompanying note 225 *infra*. *But cf.* Human Rights Comm'n v. Assad, 349 N.E.2d 341, 344 (Mass. 1976) (dictum) ("excessive use of force by a police officer acting under color of law is a violation of the 'civil rights' of any victim of that police action").

213. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 238-39 (1972); Zwickler v. Koota, 389 U.S. 241, 247-48 (1967). See also Justice Brennan's strong dissent in Francis v. Henderson, 96 S. Ct. 1708, 1716 (1976), a habeas corpus case, where he observes that recent decisions of the Court are stripping the federal judiciary of its responsibility to safeguard and preserve precious constitutional rights.

214. *See* UMW v. Gibbs, 383 U.S. 715, 726 (1966).

215. For a discussion of the major Supreme Court precedents in this area see Aldinger v. Howard, 96 S. Ct. 2413, 2416-21 (1976).

216. In *Gibbs*, the defendant was already properly in federal court and was called upon to answer nonfederal claims. *See id.* at 2420. Under § 1983, a county, the entity sued by the plaintiff in *Aldinger*, was not properly in federal court since a federal court has no jurisdiction over suits against counties under §§ 1983 and 1343(3). *See* 96 S. Ct. at 2421 & n.11.

217. *See* note 209 *supra* for the *Gibbs* formulation. Justice Brennan forcefully argued that exercising pendent jurisdiction was proper in *Aldinger*. 96 S. Ct. at 2422-30 (dissenting opinion).

218. 383 U.S. at 725. *See* note 209 *supra*.

jurisdiction are self-apparent. Trying all claims simultaneously enables the federal court to provide complete justice and achieve an efficient disposition of the case by avoiding piecemeal litigation. Convenience and fairness to the litigants invariably result since all claims are tried in one proceeding. The possibility of inconsistent results as well as the costs of litigation are decreased. *Aldinger*'s effect on the average litigant's choice of a forum is painfully clear. Faced with choosing between litigating all of his claims in one suit in state court, or suing an individual state official under section 1983 in federal court and then relitigating the identical issues in a state court suit against the municipality, the typical litigant will probably forego the latter course and present his 1983 suit for resolution by a state court. The Court's decision in *Aldinger* has the potential to significantly alleviate the federal caseload of section 1983 suits, but in a wholly different manner than other cases examined in this comment. In *Paul, Rizzo, Bishop,* and *Imbler,* no cause of action under section 1983 was made out; therefore there was no case to adjudicate. By refusing to exercise pendent jurisdiction in *Aldinger*, the Court has made it economically and practically infeasible to bring an otherwise appropriate suit to a federal tribunal.

When federal claims under section 1983 are adjudicated in state courts, the potential is clear that constitutional rights may be lost in the process. These courts lack experience in dealing with the statute.[219] Additionally, 42 U.S.C. § 1988[220] directs that federal law shall govern 1983 suits where necessary to achieve the purposes of the Act.[221] Although federal courts often use state laws interstitially in areas to which section 1983 does not refer,[222] federal common law

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219. *See* note 212 *supra.*

220. The section states in relevant part:

> The jurisdiction . . . conferred on the district courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . [state laws] shall be extended to and govern the said courts . . . .

42 U.S.C. § 1988 (1970).

221. *See generally* Comment, *Choice of Law Under Section 1983*, 37 U. CHI. L. REV. 494 (1970).

222. *Compare* Meyer v. Frank, 409 F. Supp. 1240, 1241 (E.D.N.Y. 1976) (in determining timeliness of 1983 suit, federal court should "borrow" most analogous state statute of limitation), *with* Brown v. Blake & Bane, Inc., 409 F. Supp. 1246, 1248 (E.D. Va. 1976) (one-year statute of limitation impermissible burden upon, and discrimination against, assertion of federal rights).

should be the referent in matters such as the proper measure of damages, affirmative defenses, and the various bases of liability under the Act.[223] Once a court has decided as a matter of federal law that a damage remedy is appropriate to vindicate constitutional rights, the supremacy clause requires rejection of state defenses that embody a contrary substantive policy.[224] Yet, at least one state court decision after *Aldinger,* in dismissing a 1983 suit, held various police personnel absolutely immune based on common law notions of sovereign immunity without mentioning the 1983 claim or Supreme Court cases dealing with immunity granted to police supervisors and their subordinates.[225]

The Supreme Court may have been correct in *Paul* in observing that every tortious act cognizable as a state tort does not rise to a constitutional violation. But drawing the line will be no less difficult in a state court than in a federal one. At least the federal courts have had occasion to consider this troublesome question in the past. There is no indication in *Aldinger* that the Court has paused to weigh these considerations which may have a debasing effect on important constitutional rights once selfishly guarded by our federal courts.[226]

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223. *See* Manfredonia v. Barry, 401 F. Supp. 762, 770 (E.D.N.Y. 1975) (because constitutional tort is more serious than state law tort, determination of damages is guided by federal common law of damages); Zisk v. City of Roseville, 56 Cal. App. 3d 41, 127 Cal. Rptr. 896 (1976) (applying federal immunity standards to § 1983 action in state court). *But cf.* note 225 and accompanying text *infra. See generally* Comment, *Choice of Law Under Section 1983,* 37 U. CHI. L. REV. 494, 502-12 (1970).

224. *See* Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974) (Stevens, J.) (when construing a federal statute, to give state immunity defense controlling effect would violate supremacy clause). *But see* note 225 and accompanying text *infra.*

Furthermore, deterrence may be a more compelling function of a constitutional tort under § 1983 than state tort law, where compensation is of primary concern. *See* Nahmod, *supra* note 87, at 10-11.

225. Schroeck v. Pennsylvania State Police, 362 A.2d 486, 488 (Pa. Commw. 1976). In dismissing the plaintiff's claim against three district attorneys, the court did cite Imbler v. Pachtman, 424 U.S. 409 (1976). *See* notes 156-82 and accompanying text *supra.*

226. There are indications that the lower courts are not so willing to relinquish their statutory duty to vindicate federal rights. *See, e.g.,* McRedmond v. Wilson, 533 F.2d 757, 759-60 & n.1 (2d Cir. 1976); Sartin v. Commissioner of Pub. Safety, 535 F.2d 430, 434 (8th Cir. 1976); Coll v. Hyland, 411 F. Supp. 905, 908 (D.N.J. 1976).

VI. The Present Status of Section 1983: Some Suggested Alternatives

While leaving undisturbed *Monroe, Lynch, Roth*, and other landmark cases which contributed to the proliferation of section 1983 litigation in federal court, the Supreme Court seems to have succeeded in emasculating section 1983, unquestionably once an effective vehicle for combatting constitutional wrongs and compensating persons for the resulting injuries. Two primary reasons for its decisions were reducing the federal caseload and increasing respect for our federal system. Another was respect for the Constitution; perhaps the Court felt the Constitution was being abused when it was invoked every time a conceivable "liberty" or "property" interest was allegedly deprived by a representative of a state.

These are unquestionably legitimate concerns for the Court. It is probably true that every slight deviation from the requirements of procedural due process, offensive touching of an individual being searched by a police officer, or wrongful confiscation of a prisoner's personal property, should not rise to the level of a constitutional tort. Section 1983 was never intended to reach those concerns and to extend the Act to such actions may indeed tend to trivialize the Constitution.[227] Established principles of state contract, property, and tort law are better suited to redress those wrongs, especially where it appears the state remedy is adequate in both theory and practice. Although the Court still recognizes that certain conduct by state officials should render them amenable to damage suits to compensate persons for any injuries which result, it is not willing to concede that the Constitution is always the proper vehicle for providing that redress. In every case discussed in this comment, the Court observed that the conduct complained of was a predicate, or at least might be a predicate, for a suit for damages under state law.

This position of the Court is defensible when the rights asserted are not substantial in constitutional terms. However, cases such as *Rizzo, Paul,* and *Aldinger* were hardly of a trivial nature. On the contrary, the factual settings presented were precisely the evils which 1983 was intended to eradicate: class deprivations of constitutional rights as in *Rizzo,* unfettered and capricious action under pretense of state law as in *Paul,* and arbitrary deprivation of impor-

227. *See* Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600, 607 (3d Cir. 1975) (expressing such a concern).

tant property rights at the whim of a state official permitted by a state statute as in *Aldinger*.[228] Even those who have most forcefully argued for the imposition of judicial limitations on 1983 suits in federal court concede that federal jurisdiction is proper in these circumstances.[229] The very essence of the complaint in *Rizzo* was the inadequacy of the state administrative remedy;[230] to abstain from exercising jurisdiction under those circumstances is especially repugnant in a civil rights context and ignores one of the express purposes for the enactment of section 1983.[231]

Reflecting on these recent Supreme Court cases, it becomes difficult to construct a case where section 1983 is still viable. Nearly every state official now enjoys a degree of immunity from 1983 suits—some qualified, others absolute.[232] Although policemen and other law enforcement officials do not enjoy a shield of immunity when their actions are not taken in good faith, their conduct may not be sufficiently egregious to attain the status of a constitutional tort.[233] Even when an official acts beyond the scope of his immunity, comity and federalism militate against federal interference with those responsible for administering local law through an executive branch of a state or local government.[234] Supervisory officials are for practical purposes free from suit under 1983, since rarely, if ever, can the requisite direct participation be shown. These obstacles to maintaining a suit under section 1983 are in addition to the practical difficulties which have always existed in obtaining redress when constitutional rights have been disregarded.[235]

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228. *See* 96 S. Ct. at 2415.

229. *See* Note, supra note 10, at 1495-96, 1502.

230. *See* notes 32-34 and accompanying text *supra*.

231. *See* note 28 *supra*.

232. *See* notes 156-82 and accompanying text *supra*.

233. See the discussion of Paul v. Davis, 424 U.S. 693 (1976), notes 79-123 and accompanying text *supra*.

234. Rizzo v. Goode, 423 U.S. 362, 380 (1976). *See* text accompanying note 75 *supra*.

235. It may be difficult to identify the individual officials responsible for a constitutional violation. *See, e.g.*, Burton v. Waller, 502 F.2d 1261, 1265, 1271 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975) (upholding jury verdict for all 69 defendant police officers due to impossibility of determining which of them had fired the fatal and wounding shots): Howell v. Cataldi, 464 F.2d 272, 279-84 (3d Cir. 1972) (affirming directed verdict for two police officers alleged to have brutally beaten plaintiff, on ground plaintiff had failed to prove which defendants were the policemen who actually administered the beating). Furthermore, many officials lack the financial means to pay substantial judgments, thereby negating the utility of a 1983 suit. *See, e.g.*, Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966) ("[n]either the personal assets of policemen nor the nominal bonds they furnish afford genuine hope of redress").

In sum, a prospective litigant seeking to utilize section 1983 now is in a much more difficult position than a former 1983 plaintiff. Although the present state of the law may not be satisfactory from the standpoint of protecting individual rights, the Supreme Court's former stance on 1983 and its relation to the federal system had its own deleterious effects. In addition to overburdening federal courts, the bypassing of state remedies ignored the state interest in policing itself and destroyed the important incentive for states to improve their own remedies.[236]

The optimum solution is to construe section 1983 in terms of its original purpose, yet maintaining the statute's usefulness to safeguard substantial constitutional rights. Critics of the Supreme Court's former position on 1983 point out that the statute was not originally intended to protect rights guaranteed by the Bill of Rights—before incorporation those rights were not secured by the fourteenth amendment.[237] Yet section 1983 is well suited to safeguard those interests when a state official is responsible for their deprivation. The answer, then, is not to limit 1983, as some have suggested, to the purposes for which it was enacted in 1871.[238] The Supreme Court recently rejected a similar course in *McDonald v. Santa Fe Trail Transportation Co.*[239] It concluded that section 1981 of the Civil Rights Act of 1866,[240] enacted to protect blacks exercising the freedoms conferred upon them by the fourteenth amendment,[241] also prohibited racial discrimination aimed at white citizens. Section 1983 should be a readily accessible statute to an individual alleging a deprivation of important constitutional rights; the Act should not be a means for allowing federal courts to ignore the countervailing state interests,[242] nor should it be a means for liti-

236. *See* Note, *supra* note 10, at 1492-94.

237. *See* Aldisert, *supra* note 8, at 572-73.

238. One federal judge has suggested that the Act's appellation, the Ku Klux Klan Act, itself implies a limited application of § 1983. *Id.* at 580.

239. 96 S. Ct. 2574 (1976).

240. The Act reads in relevant part: "All persons within the jurisdiction of the United States shall have the same right in every State . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (1970).

241. *See* Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90, 94 (D. Conn. 1975) (Congress enacted § 1981 to protect blacks, but whites facing racial discrimination often need the same protection).

242. *See* note 236 and accompanying text *supra*.

gants to circumvent adequate state remedies in the belief they will receive more favorable treatment in federal court by alleging a constitutional wrong.

One possible accommodation of the conflicting interests involved would be to impose an exhaustion rule where the constitutional right involved is not compelling. The Supreme Court hinted in *King v. Smith*[243] that it was prepared to impose such a requirement where the constitutional challenge was not "sufficiently substantial."[244] The Second Circuit now requires exhaustion of state *administrative* remedies when they appear to be adequate.[245] Imposing an exhaustion requirement, limited to situations where the federal right was not substantial, would ensure that important constitutional claims would be litigated in a federal court; but exhaustion contemplates only a postponement of federal jurisdiction. The burden on federal courts may not be significantly lessened.

One commentator has advocated a "deferral approach,"[246] similar to an exhaustion requirement, with the important distinction that in refusing to adjudicate a 1983 claim due to its insignificant status, the deferral approach contemplates an absence of subject matter jurisdiction.[247] The difficulty with this alternative is that it may not provide a workable standard for courts to determine when conduct is sufficiently flagrant or rights are sufficiently important to warrant constitutional protection.

The solution which might best accomodate all the competing interests involved is to place some statutory limitation on section 1983. Those who have proposed such a solution concede a lack of certainty in delimiting the restrictions.[248] One possibility is to repeal section 1343(3), section 1983's jurisdictional counterpart which has no minimum amount provision,[249] and engraft an amount in contro-

243. 392 U.S. 309 (1968).

244. *Id.* at 312 n.4. *But see* Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (unqualifiedly observing that the Court has not required exhaustion of state judicial or administrative remedies).

245. Gonzalez v. Shanker, 533 F.2d 832 (2d Cir. 1976). *Contra,* Hochman v. Board of Educ., 534 F.2d 1094 (3d Cir. 1976) (exhaustion of state remedies, whether judicial or administrative, not required prior to commencing 1983 suit); Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1976) (exhaustion generally not required because advantages of exhaustion outweighed by importance of federal forum for adjudication of federal constitutional rights).

246. Note, *supra* note 10, at 1498-504.

247. *Id.*

248. Aldisert, *supra* note 8, at 577.

249. The text of § 1343(3) appears at note 20 *supra.*

versy requirement on claims brought under section 1983. A federal court would be without subject matter jurisdiction if the claim did not meet the statutory minimum, thus reducing its caseload by eliminating trivial claims. Substantial constitutional claims would still be litigated in federal court and the state executive and judicial branches would not be denigrated by having federal courts adjudicating tort claims better suited to state disposition. Through this alternative the delicacy of federal-state relations is respected and the state's interest in providing its own remedies is left untouched. Although imposing a minimum dollar amount presents its own difficulties in determining which claims are suitable for federal court,[250] it is a far more predictable standard than presently exists for determining when the constitutional line has been crossed.

One problem left unresolved by this proposal, which may also require legislative attention, is the granting of judicially created immunities to certain defendants in 1983 suits. The policy considerations underlying a grant of immunity are clear. Yet as more and more state officials are accorded absolute immunity from damages, the Act becomes decreasingly efficacious. A qualified, good faith immunity for state officials would provide adequate protection for honest mistakes and preserve 1983's usefulness as an effective means of redressing constitutional wrongs committed under color of state law.

Conclusion

In reviewing the history of section 1983 it is important to remember that it was the Supreme Court, not Congress, that expanded the scope of the fourteenth amendment through incorporation and broadened the "under color of state law" language of section 1983 to comport with the expanded scope of state action under that amendment. It was judicially determined that exhaustion of state remedies is not a prerequisite to a 1983 suit in federal court, and that action illegal under state law is no less actionable under the Civil Rights Act. The cases examined in this comment demonstrate that the days of expanding the scope of section 1983 have, at the very least, come to a temporary halt. And, in addition to its deci-

250. *See generally* P. BATOR & P. MISHKIN, FEDERAL COURTS & THE FEDERAL SYSTEM 1141-62 (2d ed. 1973).

sions this term, the Court has granted certiorari in a case[251] which presents an opportunity to reevaluate the "under color of" language of section 1983 that has been substantially unaffected since *Monroe*.[252] Whether the Court will seize the opportunity to further erode section 1983 remains to be seen. It seems clear, however, that the Court has already cut deeply into the utility of the Civil Rights Act as a means of bringing to federal court claims against persons acting under color of state law who allegedly have violated citizens' constitutional rights.

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251. Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975), *cert. granted,* 425 U.S. 910 (1976). In *Belcher,* an off-duty and out-of-uniform police officer, required by police regulation to carry a weapon at all times, entered a bar and became involved in an altercation with other patrons. Without identifying himself as a policeman, he shot and killed two young men and paralyzed a third. The Sixth Circuit held that the officer was acting under color of state law within the meaning of § 1983.

252. *See generally* note 16 *supra.*