July 2015

Off Duty, Off the Wall, But Not Off the Hook: Section 1983 Liability for the Private Misconduct of Public Officials

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by

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CONTENTS

I. INTRODUCTION 326

II. CURRENT MODELS AND THEIR DISCONTENTS 328

A. Inconsistent Outcomes in the Lower Courts 328
B. Broad Theoretical Models and the Supreme Court. 329
C. The Causation Submodel (and Its Variants) 336
D. The Nexus Submodel. 346
E. The Agency Submodel. 351
F. The "Pretense" Submodel. 354

III. INTERPLAY BETWEEN SUBSTANTIVE CONSTITUTIONAL LAW AND THE LAW ON CONSTITUTIONAL CONSTRAINTS. 367

A. Fourth Amendment. 367
B. Eighth Amendment. 370
C. Procedural Due Process. 371
D. Substantive Due Process. 376
E. Equal Protection. 383

IV. TOWARD A MORE WORKABLE STANDARD. 390

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1. Barna v. City of Perth Amboy, 42 F.3d 809, 813 (3d Cir. 1994). The court ultimately

Police Officers . . . Otterbine . . . and Echevarria . . .were outside [a] bar in Echevarria's truck. . . . Although the officers were off-duty and not in uniform, they were armed with their service revolvers and with their police-issue . . . nightsticks.

Officer Otterbine . . . began yelling at Mr. Barna and accused him of hitting his sister, . . . Mary [Otterbine]. Mr. Barna argued with Officers Otterbine and Echevarria, telling them: "Look, you guys are out of your jurisdiction. Just get out of here, go home, this is none of your concern." . . . Echevarria then responded: "Jurisdiction? I'll show you jurisdiction." . . . Echevarria and Otterbine then attacked Mr. Barna and beat him up.[1]

I. INTRODUCTION

The past thirty-five years have seen a tremendous expansion in the use of Section 1983 to redress abuses of power.[2] The expansion has been well documented, and most federal judges could probably recite Section 1983 verbatim immediately upon waking from a deep sleep.[3] Yet the statute remains a minefield of unresolved issues for the unwary litigant or jurist. One mine that continues to confound the bomb squad is the problem of how to draw the line between purely private conduct and conduct that is "under color of" some law, within the meaning of Section 1983.

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concluded that the officers had not acted under color of law, stating that "the unauthorized use of a police-issue nightstick is simply not enough to color this clearly personal family dispute with the imprimatur of state authority." *Id.* at 818 (footnote omitted). *See* discussion, *infra* at text accompanying notes 85-92.

2. 42 U.S.C. § 1983 (1994) provides:

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

3. During the fiscal year ending September 30, 1995, about 34% of all appeals commenced in the United States Courts of Appeals were classified as "civil rights" cases. Administrative Office of the United States Courts, 1996 Annual Report 91-93. In the district courts, "civil rights" cases made up about 31% of all filings during the same period. *Id.* at 138-40. ("Civil rights" is not precisely defined in the report. However, it is clear that "civil rights" does not include prisoner habeus corpus petitions. *Id.* at 91-93, 138-40.) Even more significantly, perhaps, the United States Courts of Appeals were required to give serious attention to at least one substantive § 1983 issue in an estimated 6%, or 192, of the 3231 full published opinions reported in volumes 17-35 of the *Federal Reporter, Third Series*, covering opinions issued from roughly January to October, 1994. The estimated rate for the United States District Court published opinions reported in volumes 844-861 of the *Federal Supplement*, covering the same time period, is also about 6% (176 of 2946). 42 U.S.C.A. § 1983 (Supp. 1995). This is a significant proportion, when it is considered that criminal cases, with no § 1983 issues, now make up a large part of the federal docket.

The Supreme Court has often explained that not every act of a state employee is conduct "under color of" state law within the meaning of Section 1983: only the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" rises to that level.[4] The question of whether there is state action for purposes of the Fourteenth Amendment is closely related to the "under color" inquiry, and conduct that gives rise to one will usually support the other.[5]

The language quoted in the previous paragraph, employing as it does the metaphor of causation, represents one model for determining when a person has acted under color of law. Other models have also been used. In Part II of this Article, I note briefly the inconsistency of outcome that has marked this area, and identify the various models used, relying in part on the efforts of other commentators to describe the models that might be available from a theoretical standpoint.[6] In the course of identifying these models, I note that many, if not all, lack authority either in the history of Section 1983 or the Fourteenth Amendment, and appear to have developed from similar but quite distinct areas of common law and federal statutory jurisprudence; I note also that many of the models lack the specific standards necessary for consistent application. In Part III of this Article I undertake a brief examination of what model most closely matches the Supreme Court's "state action" jurisprudence with respect to each of five selected kinds of Constitutional deprivation.[7] In this section, I make particular reference to the costs that are incurred when the Court tries to adhere to an inadequate model, both in terms of its effect on Section 1983 jurisprudence and its effect on substantive constitutional law. Finally, in Part IV of this Article, I propose a model that is in some ways narrower than most of those currently being used, while being, in other ways, broader than most of those currently being used. In any event, I believe that, when compared to the other

4. Lugar v. Edmondson Oil. Co., 457 U.S. 922, 929 (1982) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

5. *Id.* at 935; Hafer v. Melo, 502 U.S. 21 (1991). There may well be sound reasons for "unbundling" these two concepts. *See* discussion, *infra* at text accompanying notes 142-48. The actual statement in *Lugar* was that conduct constituting state action will necessarily be under color of law, not the converse (that conduct under color of law will necessarily be state action). Certainly, the focus of most of the theoretical debate on this issue is on the "state action" test. *See, e.g.*, Glenn Abernathy, *Expansion of the State Action Concept under the Fourteenth Amendment*, 42 CORNELL L. Q. 375 (1958); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Ronald J. Krotoszynski, *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995); William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action"*, 80 NW. U. L. REV. 558 (1985); Barbara R. Snyder, *Private Motivation, State Action and Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053 (1990).

6. *See infra* notes 9-149 and accompanying text.

7. *See infra* notes 150-219 and accompanying text.

models currently employed, the proposed model is more closely tied to the history and purposes of Section 1983, more likely to yield consistent results, and less likely to skew constitutional doctrine.[8]

II. CURRENT MODELS AND THEIR DISCONTENTS

A. Inconsistent Outcomes in the Lower Courts

That the lower federal courts are having trouble drawing the line between public and private conduct can hardly be denied. Consider the following cases, in which the Courts of Appeals found conduct under color of law. In *United States v. Tarpley*,[9] the Fifth Circuit concluded that a deputy sheriff who assaulted his wife's former lover was acting under color of law because he used his service weapon, made several references to the fact that he was a law enforcement officer, and summoned another officer to help him run the victim out of town in a squad car. In *Revene v. Charles County Comm'rs*,[10] the Fourth Circuit concluded that an off-duty, out-of-uniform deputy sheriff who stopped while driving his own vehicle and ended up shooting and killing a man with whom he was apparently not previously acquainted was still acting under color of law, because under local law he was authorized to take appropriate police action any time of day or night. Similarly, in *Stengel v. Belcher*,[11] the Sixth Circuit upheld a verdict against an officer who, while off duty and out of uniform, was involved in a bar room fight, and ended up shooting three men, never having identified himself as a police officer. In *Cassady v. Tackett*,[12] the Sixth Circuit held that a jailor's assault on a fellow public employee was under color of law, because the authority to carry the gun used in the assault arose from the defendant's status as a jailor. In *Lusby v. T.G. & Y. Stores, Inc.*,[13] the Tenth Circuit held that an off-duty officer who purported to make an arrest while working as a private security guard was acting under color of law, even though the arrest was not legal because the alleged misdemeanor was not committed in his presence. Finally, in *Pickrell v. City of Springfield*,[14] the Seventh Circuit held that an off-duty officer may have been a state actor when he made an "arrest," despite the fact that he was working as private security guard at a restaurant at the time, in light of fact that he was wearing his uniform and badge, and carrying his service revolver.

8. *See infra* notes 220-221 and accompanying text.
9. 945 F.2d 806, 809 (5th Cir. 1991).
10. 882 F.2d 870 (4th Cir. 1989).
11. 522 F.2d 438, 441 (6th Cir. 1975).
12 938 F.2d 693 (6th Cir. 1991).
13. 749 F.2d 1423 (10th Cir. 1984).
14. 45 F.3d 1115, 1118 (7th Cir. 1995).
15. 54 F.3d 980 (1st Cir. 1995).

Contrast the cases in the previous paragraph with the following, seemingly indistinguishable cases, in which the courts reached the opposite conclusion. In *Martinez v. Colon*,[15] the Fourth Circuit concluded that there was no state action when an on-duty police officer shot a fellow officer with a service revolver, in the course of harassing or hazing the other officer. In *Gibson v. City of Chicago*,[16] the Seventh Circuit held that a police officer who identified himself as an officer, purported to make an arrest, and shot the "arrestee" was not acting under color of law because the officer was on medical leave and had been officially instructed not to exercise any police powers. In *Morgan v. Tice*,[17] the Eleventh Circuit concluded that a town manager and police officer were not acting under color of law when they defamed a political opponent during the course of an "investigation" in the opponent's home town, even though they identified themselves by their official titles and stated their goal to be "to get enough information on him to put his ass in jail."[18]

The district courts have been equally puzzled. In *Hudson v. Maxey*,[19] the court held that an off-duty sheriff was not acting under color of law in defending his girlfriend from her ex-boyfriend, who had climbed in through a window in her home, even though the ex-boyfriend knew that he was confronting a sheriff, and demanded to be arrested, and despite the fact that the sheriff used his departmental firearm. In *Johnson v. Hackett*,[20] the court held that police officers shouting racial epithets and challenging blacks to fight were not necessarily acting under color of law, even though they were on duty and in uniform.[21]

B. Broad Theoretical Models and the Supreme Court

The lower court confusion is hardly surprising, given the lack of clarity in some of the Supreme Court pronouncements. Larry Alexander and Paul Horton, in explaining why they found it necessary to take a step back and examine the question from a purely theoretical viewpoint, put the matter this way:

> Whom does the Constitution command? Failure of our U.S. Supreme Court to answer this question with cogency and clarity has spawned a multiplicity of seemingly inconsistent and often incomprehensible decisions that,

16. 910 F.2d 1510 (7th Cir. 1990).

17. 862 F.2d 1495 (11th Cir. 1989).

18. *Id.* at 1501; *see also* Delcambre v. Delcambre, 635 F.2d 407 (5th Cir. 1981) (per curiam) (chief of police not acting under color of law when he assaulted his sister-in-law, even though the assault occurred at the police station).

19. 856 F. Supp 1223, 1227-28 (E.D. Mich. 1994).

20. 284 F. Supp. 933, 937 (E.D. Pa. 1968).

21. *See also* Rambo v. Daley, 68 F.3d 203, 206 & n.1 (7th Cir. 1995) (officers who were outside their jurisdiction were probably acting under color of law, although court in criminal prosecution for same conduct had concluded that they were acting only as private citizens).

22. LARRY ALEXANDER & PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND?

taken together at least, have lacked even the minimal coherence of consistent pigeonholing.[22]

Alexander and Horton posit three possible models for determining the set of actors commanded by the Constitution. Under a model they call "Legalist," the Constitution commands only those who are acting in the role of lawmakers.[23] Under a model they call "Naturalist," the Constitution commands each person within the jurisdiction of American law.[24] Finally, under a model they call "Governmental," an intermediary approach, the Constitution commands "not only those persons who are acting in the role of lawmakers, but also a broader audience composed of persons who perform other governmental roles, impos-

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5 (1988). *See also* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632, (1994) (O'Connor, J., dissenting) ("our cases deciding when private action might be deemed that of the state have not been a model of consistency"); Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1172 n.10 (1195) ("The state action doctrine has long been criticized for its lack of clarity and indefinitive scope.").

23. ALEXANDER & HORTON, *supra* note 22, at 6.

24. *Id.* A full explanation of why this might be a model for determining whom the Constitution commands is beyond the scope of this Article, but the position has attracted many adherents. *See, e.g.*, Chemerinsky, *supra* note 5. Sometimes the debate between Naturalists and non-Naturalists is couched in terms of whether to maintain the "public/private distinction." *See* Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMM. 361 (1993). According to Alexander, a pure Naturalist might argue as follows:

> All private actions take place against a background of laws and have a legal status under those laws. Thus, private actions may be legally forbidden, legally required or legally permitted. If they are legally permitted, moreover, that permission can be cashed out in terms of legal prohibitions and legal immunities. If we couple this fact about private actions . . . with another fact — that these various background legal duties and immunities are paradigmatic "state action" — we come to the conclusion that all private action implicates state action. Therefore, no case involving a constitutional challenge can be lacking in state action.

Id. at 362-63. Alexander would argue that merely acknowledging what he calls the "interpenetration" of the public and the private in our society does not lead inexorably to adoption of the Naturalist model.

> Private power is subject to constitutional scrutiny. That is so, not because there is no public/private distinction, but because private power is a product of public laws and has effects on interests of constitutional significance. Some fear recognition of this rather banal point will lead to a nightmare of courts constitutionalizing all private decisionmaking. They would rather, instead, have the courts tell the noble lie that the choices of private actors are beyond constitutional scrutiny by omitting to acknowledge that those choices are permitted and enforced by the state itself and thus circumscribed by laws that represent the state's choices.
>
> What these people fear is indeed nightmarish, but it does not follow from a recognition of what is nothing more than a conceptual truth.

Id. at 377-78.

25. ALEXANDER & HORTON, *supra* note 22, at 6.

ing limitations upon them that are linked to their association with government."[25]

Alexander and Horton are quick to point out that, because different Constitutional provisions are phrased differently with respect to whom they command, it is unlikely that a single model will work for all provisions.[26] They make a preliminary observation that the Governmental model

> is an unprincipled model, with nothing to recommend its acceptance other than (1) the possibility that particular, narrow provisions in the Constitution seem comfortably to prescribe it, or (2) more generally, the possibility that it furnishes a compromise of sorts between the more extreme and principled "Legalist" and "Naturalist" models we have identified.[27]

In other words, the "Legalist model and the Naturalist model are theoretically more coherent and more defensible than is the Governmental model."[28]

Nevertheless, in the majority of cases in which the Supreme Court has been called upon to choose between the Legalist model and the Governmental model over the past fifty years, it is the Governmental model that has carried the day. In other words, the Court has been willing to find state action[29] when there has pretty clearly been no "lawmaking," yet there has been some governmental involvement. In leading cases like *Monroe v. Pape*[30] and *Screws v. United*

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26 *Id.*

27. *Id.* at 8. At least one commentator has taken fairly violent issue with the book's condemnation of the Governmental model, and seen the book as essentially an attempt to further one of the other approaches. Thomas P. Lewis, *Whom Does The Constitution Command? A Conceptual Analysis With Practical Implications.* 8 CONST. COMM. 486, 490-96 (1991) (book review). This commentator had difficulty deciding whether the authors "favored" the Legalist or the Naturalist model:

> It is evident in the book that the Legalist model is favored. There is a good deal to be said for a model of this sort, and I first suspected that their exegesis of the Naturalist model was their way of emphasizing the unacceptability of the Governmental model. This suspicion was overcome, however, by their assertion that *either* the Legalist or the Naturalist model ought to be accepted as presumptively correct . . . . For my money that put their indictment of the Governmental model in the strongest possible terms, until I realized that it rested on the same building block that led them to characterize the Naturalist model as principled.

Id. at 493. This statement is puzzling, in light of Alexander and Horton's frequent (and apparently sincere) protestations to the effect that they were not attempting to provide an ultimate "answer" to the book's central question. ALEXANDER & HORTON, *supra* note 22, at 6-7.

28. ALEXANDER & HORTON, *supra* note 22, at 12.

29. Again, some of the cases involved whether the conduct occurred "under color of" some law, but because the Court has indicated a close connection between the two, the cases can be taken as state action cases for determining the dominance of a particular model. *See supra* text accompanying note 4-5.

30. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Servs., 436 U.S. 658 (1978). In *Monroe*, police officers conducted an arrest and a search that were

States,[31] according to Alexander and Horton,

> governmental officials did not "enact" unconstitutional laws, at least not in any sense a Legalist would find comfortable. Instead, they violated state laws that were constitutionally adequate. Yet the Supreme Court declared that constitutional rights were violated in both cases and offered a federal forum that otherwise would have been unavailable . . . .[32]

Because the Governmental model extends the scope of state action, it requires a distinction that the Legalist model has no need for: the distinction between "government officials" and "private citizens."[33] But here is one of the drawbacks of the model: the distinction is devilishly difficult.

> This point deserves elaboration. The Governmental model includes the Legalist model. The Legalist model imposes a constitutional obligation on government officials to enact and enforce the laws that are required by the

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outrageous and in violation of the Fourth Amendment, as applied to local actors by the Fourteenth Amendment, but also illegal under state law, and thus presumptively remediable under state law. The Court accepted the municipality's argument that it was not a "person" within the meaning of § 1983, but rejected the argument of the individual officers that they were not acting "under color of . . . law" simply because their conduct violated state law. It was the holding with regard to municipalities that was overruled in *Monell*.

31. 325 U.S. 91 (1945). This case involved a prosecution under § 1983's criminal analog, 18 U.S.C. §242, against a sheriff, deputy sheriff, and police officer who arrested a man pursuant to a warrant, then severely beat him in front of the court house:

> As Hall alighted from the car at the courthouse square, the three petitioners began beating him with their fists and with a solid-bar blackjack .... [A]fter Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the courthouse yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness.

Id. at 92. The Court found the conduct to be action under color of law, despite the fact that it violated state law, because the defendants were still, broadly speaking, undertaking to perform their official duties. *Id.* at 111.

32. ALEXANDER & HORTON, *supra* note 22, at 21. Alexander and Horton include an appendix in which they summarize 54 post-Civil War Supreme Court decisions. *Id.* at 91-119. While many of the cases are described as falling comfortably within the Legalist model, the majority of them did not require the court to consider the Governmental model, so it is misleading to suggest that they stand for the rejection of the Governmental model. Another leading case that supports the Governmental model is Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), in which the Court stated that "the theory of the [Fourteenth] Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant . . . ." *Id.* at 287.

33. "The Legalist model needs a definition for 'lawmaker.' The Governmental model needs, as well, a definition for 'government official.'" ALEXANDER & HORTON, *supra* note 22, at 30.

34. *Id.* at 32.

> Constitution, which is something only government officials *qua* government officials can do. The Governmental model imposes the same constitutional obligation on government officials, but it goes further. The Governmental model also imposes a constitutional obligation on governmental officials to abide by those laws — and to ignore unconstitutional laws — which is something that private citizens, as well as government officials *qua* government officials, can do. . . .
>
> Assume, for the benefit of the Governmental model, that we can stipulate who is, and who is not, a "governmental official." Most governmental officials are government officials only part of the time; the rest of the time they are spouses, parents, taxpayers, automobile drivers, Presbyterians, club and union members — in short, most of the time they are indistinguishable from "private citizens" even according to the Governmental model. According to [this] model, government officials may violate constitutional duties only while they are acting in their capacities as government officials; otherwise, they are ordinary folks who can only behave illegally, not unconstitutionally.
>
> It follows that the Governmental model needs a good test by which to distinguish, not only between "government official" and "private citizen," but also between "government official acting in official capacity" and "government official not acting in official capacity."[34]

Steven Winter offers the term "amphibians" for these governmental officials, in consideration of their dual roles.[35] Winter's view arises from his careful consideration of the history of Section 1983 as well as the uses of language in society. His 1992 article amounts to a brilliant refutation of the purely Legalist model, as embodied in the dissenting opinions of Justice Frankfurter in *Monroe* and *Screws* and the work of a few commentators.[36] According to this essentially Legalist position taken by Justice Frankfurter, "under color of" law means "by authority of law," and Section 1983 creates liability only for acts done with state authority. Justice Frankfurter's view was that, in this statute, the Reconstruction Congress was seeking to extend federal jurisdiction only to "the class of cases in which, constitutional violation [having been] sanctioned by

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35. "[T]he people who act for [the state] are 'amphibians,' for they are capable of acting in either of two roles at any given moment"; "[i]n other words, the issue concerns the inherent ambiguity of a social role like that of a public official. The *color of office* metaphor signifies the amphibious character of the officer who is the provisional embodiment of 'the State'." Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 338, 401 (1992) (footnote omitted).

36. *Id.* at 324 and *passim*. The chief commentator identified by Winter is Eric Zagrans. *See* Eric H. Zagrans, *"Under Color of"* What *Law?: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985). Other commentators who appear to be more closely aligned with a Legalist model include Thomas P. Lewis. *See* Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

The fact that I take issue in this Article with some of Professor Winter's suggestions about

state law, state judges would be less likely than federal judges to be sympathetic to a plaintiff's claim."[37] Moreover, Frankfurter found it necessary to

> reject the suggestion that state-sanctioned constitutional violations are no more offensive than violations not sanctioned by the majesty of state authority. Degrees of offensiveness, perhaps, lie largely in the eye of the person offended, but is it implausible to conclude that there is something more reprehensible, something more dangerous, in the action of the custodian of a public building who turns out a Negro pursuant to a local ordinance than in the action of the same custodian who turns out the same Negro, in violation of state law, to vent a personal bias? Or something more reprehensible about the public officer who beats a criminal suspect under orders from the Captain of Detectives, pursuant to a systematic and accepted custom of third-degree practice, than about the same officer who, losing his temper, breaks all local regulations and beats the same suspect?[38]

In my view, Winter has driven a stake through the heart of the pure Legalist model for "color of law," by showing the flaws in Justice Frankfurter's representations about the origins and meaning of Section 1983. But Winter goes further, acknowledging that there remains the question of how to give content to the correct and more expansive view, and argues that the cognitive structure and historical meaning of metaphor should not be cast aside at this later stage:

> The only plausible issue concerning the intent of the drafters concerns which of the variously nuanced technical definitions of the phrase might have been intended. For, as we have seen, the exact definition of the phrase varied somewhat between cases and across doctrinal categories despite an overwhelming consensus that it connoted some kind of official action without authority. Here the historical and cognitive material cannot preclude all choice. But it does afford a meaningful framework for analysis and interpretation of the statute. Certain choices make little sense within the frame of the legislative history, the historical usage, and the range of meanings expressed by the phrase *under color of law*.[39]

In this Article, I am not seeking to enter fully into the debate between the pure Legalists and the pure Naturalists, although some of the discussion may

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the specific meaning that should be attached to § 1983 should not be taken as denigration of his 1992 article: I think it stands as one of the more important pieces of § 1983 scholarship ever produced.

37. Monroe v. Pape, 365 U.S. 167, 254 (1961) (Frankfurter, J., dissenting).

38. *Id.*

39. Winter, *supra* note 35, at 405. *See also* Harry A. Blackmun, *Section 1983 and the Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 39 (1985):

> I am relying in part on the symbolic importance of § 1983. The symbolism I have in mind, and the symbolism that § 1983 has come to possess for those whose rights depend on it, is not the symbolism the statute bore when it was enacted in 1871. Then

well reflect on that debate. Nor am I seeking to reopen the main argument between, essentially, Frankfurter and Winter: I will assume that Winter has won the argument, even as others may wish to continue it. The primary goal of this Article is simply to elaborate on Winter's theme that, within the range of submodels thus far identified for distinguishing (under the main Governmental model) between official conduct and private conduct, some submodels are better than others.[40]

As indicated earlier in this Article, Supreme Court pronouncements tend to suggest a Governmental model, and a causation submodel, for determining whether an action is taken under color of law, but the phrasing is surprisingly varied. Consider these formulations (emphasis added in each):

> Whoever, *by virtue of public position* under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.[41]

> His power *by virtue of his office* sufficiently connected him with the duty of enforcement . . . .[42]

> [O]ne who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids . . . if *the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer.*[43]

> [T]he subject must be tested by assuming that the officer possessed power if the act be one which *there would not be opportunity to perform but for the possession of some state authority.*[44]

> [A]cts done "*by virtue of a public position* under a State government " are not to be treated as if they were the acts of private individuals.[45]

> [This case involves the m]isuse of power, possessed *by virtue of state law*

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§ 1983 was part and parcel of the Radical Republican assault on the ashes of the Old South. Today, § 1983 properly stands for something different — for the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful.

40. A particular submodel is proposed in Part IV of this article.

41. *Ex parte* Virginia, 100 U.S. 339, 347 (1880).

42. *Ex parte* Young, 209 U.S. 123, 161 (1908).

43. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913).

44. *Id.* at 288-89.

45. Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 246 (1931) (quoting ex parte

> *and made possible only because the wrongdoer is clothed with the authority of state law.*[46]
>
> The evidence has nullified any pretense that petitioners acted as individuals, about their personal though nefarious business. They *used the power of official place* in all that was done.[47]
>
> [Some government actors are] *clothed with an appearance of official authority* which is itself a factor of significance in dealings between individuals.[48]
>
> Congress had no intention of taking over the whole field of ordinary state torts [but it nevertheless] regarded actions by an official, *made possible by his position*, as far more serious than an ordinary state tort, and therefore as a matter of federal concern.[49]
>
> [We interpret] "color of office" [as used in the federal officer removal statute] to require a showing of a "causal connection" between the charged conduct and the *asserted official authority*.[50]

C. The Causation Submodel (and Its Variants)

Steven Winter sees the "abuse of authority" test as essentially one of causation, and he takes on the causation submodel directly:

> The traditional doctrinal approach has been to treat all these cases together as instances of action "under color of" state law pursuant to a test that understands the statutory phrase in the broad sense of state action and simple "but for" causation. Here again, we see that the conventional legal tools prove either too much or too little. For this would indeed mean that sheriffs who drive their patrol cars negligently are acting in a manner potentially subject to constitutional scrutiny under section 1983. That prospect pressures the Court to adopt sharply limiting constitutional analyses . . . which exclude far too many cases. On the other hand, the more complex metaphorical understanding expressed by the *color of office* conception provides an alternative way to think about these cases, an approach that avoids the rigid, overinclusive categorical method in which every action causally associated with the actor's governmental status is necessarily covered by the statute.[51]

Winter's condemnation of the "but for" submodel is understandable, albeit

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Virginia, 100 U.S. at 347).

46. United States v. Classic, 313 U.S. 299, 326 (1941).
47. Screws v. United States, 325 U.S. 91, 115 (1945) (Rutledge, J., concurring).
48. Monroe v. Pape, 365 U.S. 167, 238 (1961) (Frankfurter, J., dissenting).
49. *Id.* at 193 (Harlan, J., concurring).
50. Willingham v. Morgan, 395 U.S. 402, 409 (1969).
51. Winter, *supra* note 35, at 415.

imperfectly expressed. The Court's bundling of "state action" and "color of law" has meant that, necessarily, there is interplay between the test used for "color of law" and the test used to determine whether the state has "acted," for purposes of particular constitutional provisions, not to mention the interplay between "color of law" and the *substance* of these constitutional provisions. That latter interplay is the subject of Part III of this Article. And it is true, as Winter suggests, that the Court has already embraced the possibility that sheriffs who drive their patrol cars negligently are subject to constitutional scrutiny.[52] But, ironically, application of a "but for" test might place this conduct outside, rather than inside, the sphere of constitutional scrutiny. Consider an officer who drives her patrol car in a negligent fashion, striking a pedestrian. The "but for" test might operate as follows: the status caused the harm only if the harm would *not* have occurred but for the status. In the example, the same harm arguably *would* still have occurred even if the officer had been a plumber driving her van, or a housewife driving her Volvo station wagon, or even if she had been a private citizen driving a patrol car (stolen, perhaps, during a moment of police unwariness). In this sense, the status is irrelevant.

Of course, Winter's analysis of the above example might be as follows: if the officer had not been an officer, she would not have been on patrol, and therefore she would not have been at the intersection at the time the pedestrian was crossing the street, and her patrol car would not have struck the pedestrian. But this ignores a traditional component of "but for" analysis, which asks whether the harm would have occurred if the defendant had not acted tortiously, but *all circumstances not affected by the defendant's conduct had been exactly the same*.[53] Thus, a more perfect application of the principle to our "color of law" inquiry would be to ask whether the same harm would have occurred if the actor

52. In Paul v. Davis, 424 U.S. 693 (1976), the Court held that a police leaflet misidentifying the plaintiff as a shoplifter did not violate any liberty or property interest. To hold otherwise, according to the Court, would be to risk making the Fourteenth Amendment "a font of tort law to be superimposed upon . . . the States." *Id.* at 701. If the Fourteenth Amendment extended so far, according to the opinion by Justice Rehnquist, "it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle . . . would not have claims equally cognizable under § 1983." *Id.* at 698. *See also* Monroe v. Pape, 365 U.S. 165, 242 (1961) (Frankfurter, J., dissenting) (expansive view of state action "makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country"). Note that Justice Rehnquist was explaining the logic of a narrow view of "liberty" and "property," while Justice Frankfurter was complaining about what he saw as the illogic of the majority's expansive view of "color of law." Thus, Justice Rehnquist appeared to be conceding that, under *Monroe*, there was no way to exclude simple torts committed in the course of duty using the "color of law" or "state action" doctrines alone. For further discussion, *see infra* text accompanying note 164-74.

53. For example, the authors of the Restatement ask whether "the harm would have been sustained even if the actor had not been negligent." RESTATEMENT (SECOND) OF TORTS §

had been a private citizen but all other circumstances had been the same. In the aforementioned hypothetical, if all circumstances other than the occupation of the driver had been the same, the plumber's van (or the Volvo station wagon, or, of course, the stolen patrol car) would still have struck the pedestrian.

Even if the application I suggest is not more appropriate, it must be accepted that there is a problem with using the causation submodel. Causation, as a common law tort concept, is designed to clarify the link between harm and *conduct*.[54] In the "color of law" inquiry, we are trying to clarify the link between harm and *status*. It may be that the traditional tests for determining whether *conduct* caused harm do not work in determining whether *status* caused harm, and it may be this difficulty that Winter is grappling with.

Perhaps we can still agree that Winter is correct in saying that the "but for" test is too broad in its pure form to be the primary test for determining when conduct is "under color of law." To expand Winter's example a bit, consider the officer who, on the way home after an exhausting shift that included three hours of overtime, falls asleep at the wheel of her private vehicle and thereby injures another. In a sense, she would not have caused the injury "but for" the fact that she is a police officer, because if she had not been a police officer she would not have been at that place at that time, and she would not have been exhausted and fallen asleep. Thus, under the view of "but for" causation I have ascribed to Winter, this conduct of falling asleep at the wheel and causing injury would have to be considered conduct "under color of law." Yet no one, perhaps not even a Naturalist, would really agree with that conclusion, so the test that produced it cannot be part of the Governmental model.[55]

But the conclusion that a pure "but for" test is too broad would hardly be unique to Section 1983 jurisprudence. Courts and scholars long ago concluded that, in its pure form, the test is also too broad for determining causation for purposes of common law torts. As explained in the *Restatement (Second) of Torts*, the tort regime would deem conduct to be the cause of harm only where

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432 (1965). The illustrations make it clear that the question is to be answered under the assumption that all *unrelated* events would still occur in the same way that they actually did occur. *See id.*, illust. 1 (where a storm was so severe that a sailor would not have been able to survive in a lifeboat even if his employer had supplied one, the employer's failure to supply a lifeboat would not be a cause in fact of the sailor's death).

54. *See id.*

55. Some courts do appear to take a "but for" approach, at least where the significant on-the-job event is a more affirmative act than simply working overtime. *See* Layne v. Sampley, 627 F.2d 12, 13 (6th Cir. 1980) (relying on fact that the "genesis" of the argument that resulted in the off-duty assault was the officer's earlier investigation of a domestic disturbance). This appears to be closer to a "scope of employment" analysis traditionally used in determining whether an employer is vicariously liable for the common law tort of its employee, and would therefore seem out of place in the "color of law" inquiry. *See infra* discussion in text accompanying notes 100-14.

(1) "the conduct is a substantial factor in bringing about the harm," and (2) there is no independent rule of law excusing the conduct.[56] A later section makes it clear that the "substantial factor" test includes within it a threshold "but for" test: in other words, the conduct was not a substantial factor if the harm would have been sustained even had the conduct not occurred.[57] But as the comment explains, the primary question is whether the conduct had "such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in its popular sense, in which there always lurks the idea of responsibility."[58] The comment goes on to note the utter inadequacy of "but for" causation as a primary test: "but for" causation represents the purely philosophical aspects of causation, and is easily satisfied in the vast run of cases.[59] For this reason, it is a necessary but not sufficient part of legal cause.[60]

The *Restatement*'s "substantial factor" approach might appropriately limit the reach of the statute, while at the same time being expansive enough to include the broader metaphorical understanding that Professor Winter would

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56. RESTATEMENT (SECOND) OF TORTS §431 (1965). *See also* § 430 (in order for negligence to be proven, the tortfeasor's conduct must be the legal cause of the harm).

57. *Id.* §432. *See also* 3 STUART M. SPEISER, ET AL., THE AMERICAN LAW OF TORTS §11:1 at 383 (1986) (proximate cause is "that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injuries, and without which the results would not have occurred.").

58. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965).

59. *Id.* Injection of the "substantial factor" limitation helps to mollify critics of the pure test, because it gives play to the natural human tendency to consider the ultimate *purpose* of the inquiry: to attach blame. Wex Malone has written eloquently of objections to the test:

> In passing homely judgments on everday affairs we assume that we should not blame a person whose conduct "had nothing to do with" some unfortunate occurrence that followed. . . . The bifurcated approach [*i.e.*, the approach that requires causation to be decided independently from responsibility] is one adopted by the law in an effort to separate that which is to a large extent inseparable, and in the process we lose much of the meaning of the very phenomenon we are investigating. For the layman, cause and purpose are a single blend. His pronouncement on causation is pregnant with a purposive quality. . . . . The but-for rule is hardly an adequate substitute for this homely blend of fact and policy that is so deeply rooted in our approach to everyday problems. . . . The essential weakness of the but-for test is the fact that it ignores the irresistable urge of the trier to pass judgment at the same time that he observes. It is an intellectual straitjacket to which the human mind will not willingly submit. The test was discredited even for philosophical usage by David Hume, its originator [,] because of the impossibility of establishing to a philosophical certainty what would have occurred in the absence of the asserted cause . . . .

Wex. S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 66-67 (1956) (footnotes omitted). More recently, Saul Levmore has pointed out that remoteness and the role of intervening actors must be considered in order to avoid the absurdity of the pure "but for" approach: otherwise, "Christopher Columbus [would be] held responsible for today's torts [because], in a sense, if not for Columbus the world might be sufficiently different that the torts we are familiar with today would never occur." SAUL LEVMORE, FOUNDATIONS OF TORT LAW 103 (1994).

60. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965).

bring to bear. The *Restatement* itself notes that there are many considerations that should be brought to bear in a "substantial factor" analysis.[61] (Interestingly, one of these is the lapse of time between the conduct and the harm.[62] This reminds us that the model is not a perfect fit: there *is* no time lapse between *status* and harm, because status has no temporal referent.)

This is not to deny that the "but for" test has some intuitive appeal, or that it might still play a role in a "color of law" test. There might be some harm that we do wish to include that indeed would not have occurred if the actor had not had a strong connection to the government. One is reminded of the election cases, in which a party charged with conducting a primary election has improperly excluded voters or improperly certified results.[63] If the party itself had not been approved by the government, the party could not exclude anyone, or certify any result. Of course, a defendant here would try to assert that others (or perhaps the defendant himself, using only means available to private citizens) could have accomplished the same harm, if they had put their minds to it. This approach is supported by the "made possible" language in some of the cases[64]: only if it would have been *impossible* for a private citizen to cause this harm are we going to call it harm by a public actor. But impossibility is too high a standard, and puts far too heavy a burden on the plaintiff. Moreover, impossibility is not the test in "but for" causation. The question would be whether *the same harm* would *probably* have occurred, if the defendant had been a private citizen, but all other circumstances had been the same.[65] If the same harm would probably have occurred anyway, there is no causal connection, and the conduct was

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61. *Id.* § 433.

62. *Id.*

63. *See, e.g.*, Gray v. Sanders, 372 U.S. 368 (1963); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941).

64. *See supra* cases quoted in text accompanying notes 41-50.

65. *See* Moncreaux v. Jennings Rice Drier, Inc., 590 So.2d 672, 674 (La. Ct. App. 1991) (the fact that the accident *might* still have occurred if the defendant had done his job properly is not relevant; the test is whether it *probably* would have occurred anyway); Mortenson v. Memorial Hosp., 483 N.Y.S.2d 264, 270 (App. Div. 1984) (the harm can be said to result from a surgeon's improper refusal to perform an operation where the surgery would, more probably than not, have been successful in avoiding the harm); Johnson v. Misericordia Comm. Hosp., 294 N.W.2d 501, 522 (Wis. Ct. App. 1980) (the *possibility* that another hospital would have negligently let the same unqualified doctor perform the surgery must be ignored).

The concept of "same harm" is itself significant. Section 432 of the *Restatement* makes it clear that "but for" causation is concerned with harm that is the same in character and extent as that actually suffered. This "sameness" presumably has a temporal aspect as well; otherwise (to take the idea to its logical conclusion), a defendant in a wrongful death case could defend simply by pointing out that the victim would eventually have died anyway, regardless of the defendant's misconduct. Thus, in a case citing the *Restatement*, where the defendant's malfeasance made a heart operation necessary sooner than it otherwise would have been, the court had no difficulty concluding that the "but for" test had been satisfied: "Though the need for surgery may indeed have been inevitable, the accident may have aggravated that condition

not under color of law. A defendant in one of the election cases would be hard pressed to show that the same harm would probably still have occurred even if he or she had had no connection to the government.

Alexander and Horton also undertake a brief review of the dominant submodels, and they would classify most of the Supreme Court pronouncements as embodying an "abuse of authority" test. In their view, the "abuse of authority" test may be based upon the premise that "government officials . . . are unique in their capacity to harm constitutional values, even when they are acting contrary to state law."[66] "The problem with such an argument," according to them, "is that it is just not true."

> Sometimes, perhaps, government officials may have a unique capacity, by virtue of their official position, to harm constitutional values. More often, however, their capacity to do so is not unique at all. Moreover, the ability to harm constitutional values through illegal acts that government officials possess by virtue of their legal status, as a general proposition, is no different either in kind or in degree from the ability of private citizens to harm constitutional values through illegal acts that they possess by virtue of their legal status and rightful authority. . . . [The Court] more likely was asserting that acts of government officials have some presumptive legality under the law, even if those acts turn out to be illegal; and that this presumptive legality poses a special threat to constitutional values because it precludes citizens from resisting or ignoring such acts.[67]

This is a puzzling passage in what is, overall, an exceptionally clear book. Alexander and Horton appear to acknowledge that some instances of particular constitutional harm simply *could not have* been inflicted by a private actor, while other instances just as easily *could have* been inflicted by a private actor. Thus, they appear to agree that this distinction would qualify as a "test," even though the premise or corollary that they themselves created (that government officials are unique in their capacity to harm constitutional values) is false. Because the distinction qualifies as a test, however, the next question would seem to be whether the test is desirable and consistent with the underlying meaning of Section 1983 and the Constitution. Yet Alexander and Horton never ask this question, launching instead into the idea of a "presumption of legality." At least one reader appears to have interpreted this passage to mean that the authors are *proposing* some sort of presumption of legality to be included in the color of law test itself.[68] Instead, I read the passage as merely suggesting that the

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and hurried the onslaught of a crisis." Walsh v. Snyder, 441 A.2d 365, 369 (Pa. 1981). *See also* O'Connell v. Albany Med. Ctr. Hosp., 475 N.Y.S.2d 543, 544 (App. Div. 1984) (there was harm caused by the defendant's malpractice if "there was a substantial possibility that plaintiff['s] recovery would have been faster, less painful, and less disabling but for the malpractice.").

66. ALEXANDER & HORTON, *supra* note 22, at 34-35.

67. *Id.* at 35.

official status of government actors often plays a role in making the harm possible: the victims of harm themselves view conduct by government actors as "presumptively legal," and respond differently than if the same conduct had been engaged in by a purely private actor. Even though the authors fail to acknowledge it specifically, the logical thrust of this suggestion is that the "government status made the harm possible" test may have some merit.[69]

Alexander and Horton are correct to note the connection between the "made possible" language and the "abuse of authority" language. "Abuse" is most commonly understood as simply "use" for an improper purpose.[70] So the question of whether a certain status or position *caused* or *made possible* a particular result might be restated as whether the status or position was *used* to cause a particular result. The Supreme Court has recently had occasion to make a few comments on the meaning of "use," in the context of a federal criminal statute requiring a harsher penalty if a firearm was used "during and in relation to [a] drug trafficking crime."[71] The crime was attempting to possess drugs with intent to distribute,[72] and the defendant had offered a firearm in exchange for the drugs. The Court, in a sharply divided opinion, held that the firearm had indeed

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68. Lewis, *supra* note 27, at 495.

69. The "status caused harm" approach is illustrated in Martinez v. Colon, 54 F.3d 980, 992 (1st Cir. 1995) (Bownes, J., dissenting). Martinez was a rookie police officer, and was repeatedly hazed by Valentin, a veteran officer, while other officers looked on. As part of the hazing or harassment, Valentin pointed his service revolver at Martinez' genitals at least three times; the third time, whether by accident or not, the revolver discharged, severely injuring Martinez. In a § 1983 action against the other officers for not intervening, the Court of Appeals held that dismissal was appropriate because Valentin was not acting under color of law. *Id.* at 987-88. Judge Bownes disagreed, noting that

> Valentin's status as a police officer was the only reason the defendants took no action. If Valentin had been a private citizen and had been tormenting Martinez in the same manner, the bystander officers certainly would have intervened. The record gives rise to a reasonable inference that Valentin's police-officer status led the bystander officers to conclude that: (1) Valentin was not mentally imbalanced to the point that he might actually shoot Martinez, but a stable person only engaged in harassment or horseplay; and (2) Valentin was skilled enough with firearms to be allowed to engage in this sort of stupidity. Consequently, the record gives rise to an inference that Valentin's police-officer status was a *sine qua non* of the bystander officer's non-intervention.

Id. at 992. Yet if "but for" is the test, Judge Bownes seems to have taken the long way around to his conclusion. Why not simply draw the reasonable inference that if Valentin had been a private citizen, Martinez himself would never have tolerated the harassment, and the harm would never have occurred?

In any event, the majority applied a more expansive test and concluded that Valentin's conduct was not "related in any meaningful way" to his status or his duties. *Id.* at 988. Rather than confront Judge Bownes' speculation about what would have happened had Valentin, the wrongdoer, been a private citizen, the majority took up the question of what would have happened had Martinez, the *victim*, been a private citizen. *Id.* at 988 n.6.

70. "1. To use wrongly or improperly; misuse." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 8 (3d ed. 1992).

71. Smith v. United States, 508 U.S. 223 (1993), interpreting 18 U.S.C. § 924(c)(1) (1994).

been "used" in the way intended by Congress in the statute.

> [O]ver 100 years ago we gave the word "use" [the meaning] "to employ" or "to derive service from." Petitioner's handling of the weapon in this case falls squarely within those definitions. By attempting to trade his MAC-10 for the drugs, he "used" or "employed" it as an item of barter to obtain cocaine; he "derived service" from it because it was going to bring him the very drugs he sought.[73]

Justice Scalia, joined by Justices Stevens and Souter, took a much narrower view of the term.

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks "Do you use a cane?" he is not inquiring whether you have your grandfather's silver-handled walking-stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.[74]

The "intended purpose" limitation referred to in the dissent would seem out of place in the context of trying to describe the necessary relation between, on the one hand, a public official's position or status, and, on the other hand, the harm caused by that official's misconduct. The majority's idea of "deriving service" seems more helpful, in that it carries the connotation of actually having accomplished something that would probably not have been accomplished had the instrumentality in question not been available. Thus, one might be said to have "used" a gun to commit a robbery if one referred to the gun or showed it as part of the threat of violence, or otherwise made the victim aware of the gun's presence, and that awareness was part of the victim's fear of force. The idea is that the harm might not otherwise have been accomplished.[75]

Of course, "using" one's status or authority is not the same as "using" a

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72. *See* 18 U.S.C. §841(a)(1) (1994).

73. *Smith*, 508 U.S. at 229 (citation omitted).

74. *Id.* at 242. The majority had an answer for Justice Scalia's hypothetical:

> To be sure, "use" as an adornment in a hallway is not the first "use" of a cane that comes to mind. But certainly it does not follow that the only "use" to which a cane might be put is assisting one's grandfather in walking. Quite the opposite: The most infamous use of a cane in American history had nothing to do with walking at all, see J. McPherson, Battle Cry of Freedom 150 (1988) (describing the caning of Senator Sumner in the United States Senate in 1856); and the use of a cane as an instrument of punishment was once so common that "to cane" has become a verb meaning "[t]o beat with a cane."

Id. at 230-31 (citation omitted).

75. Two years after *Smith*, the Court adopted a new test for "use" of a firearm under this statute: whether the firearm was "actively employed." Bailey v. United States, 116 S.Ct. 501, 506 (1995). Some courts have in fact adopted the "use" idea and applied it to "color of law" inquiries. *See, e.g.*, United States v. Lanier, 33 F.3d 639, 653 (6th Cir. 1994) ("there

physical object, so the analogy of the "abuse of authority" model to the firearm statute is imperfect.

Similar points can be made about the Court's occasional use of the "by virtue of" language. Winter has some very particular views about the meaning of this phrase,[76] but in context I think it clear that the Court was using the phrase only as a shorthand for the concept of use or abuse of office, or the causal link between office and harm.[77]

The question of what it means to cause "the same harm" deserves further exploration. The *Restatement* suggests that the harm suffered must be the same in character and extent.[78] The legislative history of Section 1983 and its criminal analog contains several statements supporting the view that harm caused by public officials is different in character, and probably in extent as well. For example, one senator observed that

> the means employed to effect a deprivation, might in law be an assault and battery [or some other crime] ordinarily punishable exclusively in the State courts. But because these constitutional acts . . . related to a class of persons whose rights were placed under the guardianship of Federal legislation, they

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was evidence that defendant used his position to intimidate his victims into silence"), *rev'd on other grounds*, 74 F.3d 1380 (6th Cir.) (en banc), *cert. granted*, 116 S.Ct. 2522, (June 17, 1996); Barna v. City of Perth Amboy, 42 F.3d 809, 816 (3d Cir. 1994) ("a police officer's purely private acts which are not furthered by any actual or purported state authority are not acts under color of state law"); Strohm v. Shanahan, 1994 WL 315560 (E.D. Pa 1994) (there was nothing about the officer's status that made him uniquely capable of making the off-duty harassing telephone calls); Hunte v. Darby Borough, 897 F.Supp. 839 (E.D. Pa. 1995) (although the underlying dispute grew out of the officer's status as a police officer, no actual or purported authority was used in the eventual altercation). Interestingly, the complaint in *Hunte* stated that, when the assault by the off-duty officer began, the plaintiff "told defendant he would not resist because he knew him to be a police officer." *Id.* at 840-41. Thus, the court in *Hunte* might have concluded that the status *did* help to make the harm possible, had the plaintiff submitted any evidence in opposition to the defendant's motion for summary judgment.

76. The officer who acts *under color of office* acts within his or her role as an officer, but without fidelity to that role — hence, "in malem partem" (the evil or wicked part of the office). This understanding explains why the standard definition of *under color of law* speaks in terms of "[m]isuse of power, possessed *by virtue of state law*" which would otherwise be self-contradictory.
Winter, *supra* note 22, at 403-04, quoting United States v. Classic, 313 U.S. 299, 326 (1941). Far from being self-contradictory, the phrase makes perfect sense if "possessed by virtue of state law" is understood to mean "possessed only because of the actor's status as a state official." Winter seems to be confusing authority with power here: the Court's focus on power indicates that it was trying to describe the precise means by which the malefactor was able to accomplish the harm.

77. "By virtue of" is an idiomatic use of the word "virtue," used to mean "on the grounds or basis of; by reason of: 'well off by virtue of a large inheritance.'" AMERICAN HERITAGE DICTIONARY, *supra* note 70, at 1996. The example phrase does not suggest any link between the inheritance and moral goodness. *See also* OXFORD ENGLISH DICTIONARY 3721 (2d ed. 1989) (listing as synonyms "by the power of," "in consequence of," and "because of," and showing origins of "virtue" in the sense of powers possessed by supernatural beings). The

become offenses against the United States . . . .[79]

Winter is adamant about the different character of the harm: "Action *under color of law* is conduct that is understood to be that of 'the State' and, therefore, has all the affective power of an act of betrayal by those upon whom one relies for protection."[80] In his analysis of *Paul v. Davis*,[81] for example, Winter objects strongly to the notion that libel by a police officer is parallel to libel by a private citizen. When police officers distribute a leaflet identifying someone as a shoplifter, as they did in *Paul*, "the stigma is greater and the harm worse than if a private citizen had made the same defamatory statement."[82] This is true, according to Winter, because "[t]he average person is likely to ascribe greater credibility to the government's determination; it has the files, the computer banks, the information networks and, therefore, is more likely to know."[83] Winter is apparently aiming these remarks at the Supreme Court's ultimate conclusion that Davis was deprived of no liberty or property interest: he cannot be criticizing the court's color of law or state action jurisprudence here directly, because there was no real question but that the police acted under color of law in distributing the leaflets with Davis' name on them. Under almost any test, including a straightforward causation analysis, this is state action: no one except police can really create a "police leaflet," and it was the official nature of the leaflet that made it so damaging. But Winter goes further:

> Even when the action is such that it does not carry that extra credibility, the imprimatur of "the State" implicates another incremental harm also on the basis of social meaning. The victim is not likely to view the harm as the same as that inflicted by a private actor because the malefactor is, in Brandeis' famous words, the "Government . . .the potent, the omnipresent teacher." "[t]he State" as the social manifestation of law is the projected parent, the first faithful other. When "the State" is unfaithful, when the actors who embody it do not conform to the law, the harm is greater because it is experienced as the most basic form of betrayal.[84]

This analysis may beg the question. Winter posits that there is different or greater harm every time a public official does something that is perceived as the action of "the State." It follows that when this occurs, the "but for" test is automatically satisfied, and probably the "substantial factor" test as well: if the

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causation model shines through strongly here.

78. RESTATEMENT (SECOND) OF TORTS § 432 (1965). *See supra* discussion in note 65.

79. Remarks of Senator Pratt, CONG. GLOBE, 42d Cong., 1st Sess. 504 (1871).

80. Winter, *supra* note 35, at 404.

81. 424 U.S. 693 (1976).

82. Winter, *supra* note 35, at 417.

83. *Id.* 417-18.

84. *Id.* at 418 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J.,

important part of the harm is "betrayal by the state," the status of the actor as a state employee is clearly a substantial factor in causing the harm. But what does it mean to "perceive" or "experience" conduct as the action of the state? This is a purely subjective test that many would find objectionable, because it puts the "color of law" question solely in the hands of the plaintiff, with little opportunity for the defendants to rebut.[85]

Moreover, there are questions about the temporal frame of reference. Consider the pedestrian struck by a private vehicle negligently operated by an off-duty police officer. If he testifies that he learned a few weeks *after* the accident that the driver was a police officer, and that he *now* feels betrayed because he now perceives the accident as the conduct of his state, does a court or jury have any choice but to conclude that, under this subjective test, the "color of law" requirement has been met? But shouldn't a Section 1983 violation be determinable at the time it occurs?[86]

One might propose the addition of an objective component to the perception test, to remedy this defect. Now the test would be "did the plaintiff reasonably perceive that the conduct was that of the state?" This time the test clearly begs the question. What guidance are we to give when the court is asked to decide whether conduct could reasonably be perceived as that of the state? We might make a beginning: "Conduct may reasonably be perceived as that of the state when . . . ." But to fill in this blank, we are back at our original question.

D. The Nexus Submodel

Some courts have indeed leapt into the breach and supplied a kind of test to fill in the blank left by the causation-based tests. We can call this, for lack of a better name, the "nexus" test. Courts find color of law when "there is enough of a nexus between the status of the actor and the conduct that the conduct is fairly attributable to the state."[87] Under this approach, no single factor

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dissenting), and citing Robert M. Cover, *The Supreme Court 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 45 (1983)).

85. *See* Lanier, 33 F.3d at 653 ("contrary to the defendant's assertions, the government did not establish that he acted under color of law based merely upon the subjective impressions of his victims [,but instead] presented considerable objective evidence . . . which supported the jury's conclusion that defendant acted under color of state law"). *See also* Barna v. City of Perth Amboy, 42 F.3d at 813, 817 (3d. cir. 1994) (mere knowledge that an actor is a police officer is not enough to show action under color of state law); Hunte v. Darby Borough, 897 F.Supp. 839, 842 (E.D. Pa. 1995).

86. The standard tentatively proposed in Part IV of this Article may eliminate this difficulty, in that, while it does incorporate some consideration of the victim's mental state, it shifts the focus to whether the mental state was used to cause the harm. A mental state that develops *after* the harm is inflicted cannot be relevant to this inquiry. (Of course, this approach will not solve the dilemma if we accept Winter's notion that the mental state is *always* part of the harm itself; however, for reasons explained in the text, Winter's approach to this question seems to create an undesirable tautology).

is dispositive, including where and when the offending conduct occurred, or the relation between the wrongdoer and the victim.

The case whose facts are outlined at the beginning of this Article, *Barna v. City of Perth Amboy*,[88] may fall into this category. In *Barna*, the Third Circuit refused to attach much significance to either the fact that the officers used their police-issue nightsticks or the fact that the victim knew the defendants were police officers. Generally, according to the court, "off-duty police officers who purport to exercise official authority will . . . be found to have acted under color of state law," but "a police officer's purely private acts which are not furthered by any actual or purported state authority" will be found not to have so acted.[89] The court concluded that the officers were not purporting to act with any police authority during the altercation, relying heavily on the fact that, after the altercation, they attempted to leave, rather than attempting to arrest Mr. Barna.[90] (As the officers attempted to leave, Mr. Barna retrieved a gun from his house, then pointed it at the officers and told them not to go anywhere until other police arrived; the end result of this conduct was that Mr. Barna was arrested.[91]) The court refused to attach much significance to Officer Echevarria's comment, "I'll show you jurisdiction," made immediately before the assault on Mr. Barna:

> Officer Echevarria's comment regarding the officers' "jurisdiction" is too ambiguous to be of value on the issue of state authority. As noted, the of-

87. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) ("the inquiry must be whether there is a sufficiently close nexus between the State and the challenged activity . . . so that the action . . . may fairly be treated as that of the State itself."). The "nexus" language is not always used in conjunction with the "fairly attributable" language. In a case involving a public high school teacher's seduction of an underage student, the Fifth Circuit held that "if a 'real nexus' exists between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher, then the teacher's conduct is taken under color of state law." Doe v. Taylor Indep. School Dist., 15 F.3d 443, 452 n.4 (5th Cir.) (en banc), *cert. denied*, 115 S.Ct. 70 (1994). (quoting D.T. v. Indep. School Dist. No. 16, 894 F.2d 1176, 1188 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990)). *See also* Bennett v. Pippin, 74 F.3d 578, 589 (5th Cir. 1996) (a sheriff's rape of a suspect was done under color of law, because his "actions were an abuse of power held uniquely because of a state position . . . , and the explicit invocation of governmental authority constituted a 'real nexus' between the duties of Sheriff and the rape."). Note that the court in this case has combined the "abuse of power" and "nexus" models.

The six dissenting judges in *Doe* read the Supreme Court's precedents as requiring a different question: did the state employee, while admittedly exceeding his *specific* lawful authority, at least act pursuant to a *general* grant of legitimate authority? 15 F.3d at 483-86 (Jones, J., dissenting). *See* discussion *infra* in text accompanying notes 185-91.

88. 42 F.3d 809 (3rd Cir. 1994).

89. *Id.* at 816. Note that there is a sort of disjunction here between asking whether an officer was "purporting to exercise official authority" and asking whether his acts were "furthered by . . . actual or purported authority": the former relates more to mental state, either the victim's or the wrongdoer's, while the latter relates more to causation. *See infra* at note 126 the discussion of "purported." They are separate tests that could be applied independently, and might not be mutually exclusive.

> ficers were in fact out of their police jurisdiction. Instead of indicating that Echevarria intended to exercise official police authority, the comment could just as likely have been meant to convey that Echevarria intended, despite the lack of any real or purported authority, to put Mr. Barna in his place.[92]

The use of the nightsticks was the most troublesome fact for the *Barna* court, but it was not insurmountable.

> The nightstick was an objective indicia [sic] of police authority, and Echevarria was legally entitled to possess it only because of his position as a police officer. At the time . . . , however, Echevarria did not have actual authority to use the nightstick, since, by law an officer may only carry the weapon while on duty or while traveling to or from an authorized place of police duty. . . . Nor, under the circumstances of this case, do we view the use of the nightstick to hold Mr. Barna during the assault as an assertion by Echevarria of official authority. . . .
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> To hold otherwise would create a federal cause of action out of any unauthorized use of a police-issue weapon, without regard to whether there are any additional circumstances to indicate that the officer was exercising actual or purported police authority.[93]

However admirable the court's refusal to let one factor be conclusive, its remarks about the role of actual authority are troubling. Whether the use of the nightstick generally was or was not authorized, we are starting from the premise that the Constitution was violated, and local authorization cannot be the determining factor, unless the court is retreating to a purely Legalist model.[94] More-

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90. *Id.* at 817.

91. *Id.* at 814.

92. *Id.* at 818.

93. *Id.* (citing N.J. STAT. ANN. § 2C:39-3(e), (g) (West 1996)).

94. The court appeared to recognize this when it dismissed the plaintiff's argument that the defendants *were* in essence on duty, because the official county policy makes the officers on duty 24 hours a day. 42 F.3d at 818 n.11. *See also* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 288 (1913) ("the theory of the Fourteenth Amendment is that where an officer . . . misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant."); Keller v. District of Columbia, 809 F. Supp. 432, 437 (E.D. Va. 1993) ("[m]aking an arrest, by means of a marked police car, a police uniform and badge, and a state-issued firearm, is an act performed 'under color of' state law, regardless of whether the state official has the actual jurisdiction to make an arrest."). Other cases that appear to give great weight to the legality of the conduct under local ordinance or regulation, implying a Legalist model, include Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980) (under "secondary hiring" program, off-duty police officers employed as security guards still owed primary duty to the department if a crime was committed in their presence or action was otherwise necessary); Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975) (police regulations required off-duty officers to carry police-issue pistols and mace at all times, and to take action "in any type of police or criminal activity 24 hours a day."); Layne v. Sampley, 627 F.2d 12, 13 (6th Cir. 1980) (noting as significant the fact that the off-duty officer was legally authorized to carry the revolver he

over, the court is raising the specter of *automatic* constitutionalization of much "rogue" police behavior, when that result would not naturally follow from a contrary outcome in *Barna* itself. To recap: Barna argues that the use of the nightstick was an objective indication that police authority was being used. The court at first accepts this proposition, but then rejects it, on grounds that the use was unauthorized by law, instead of moving on to the question that one might have expected: how this indication of authority fits in with the indications of *non*-authority (like Barna's knowledge that the officers lacked jurisdiction) in the context of the entire case. Contrary to the court's suggestion, to move on to that next question would not make a "color of law" finding automatic whenever a police-issue weapon was used; indeed, in this very case, a court could reasonably conclude that, under all the circumstances, there were not enough indicators to make this an exercise of purported authority.

Because the court in *Barna* proceeded no further, we do not have an extended consideration of what it means to look for "objective indicia of authority," but the phrase raises questions posed in the previous subsection: from whose perspective are we to view the facts, and what significance, if any, should we attach to the mental state of the victim of the harm?[95]

This refusal to be swayed by a single factor shows up outside the context of actions against off-duty police officers, as well. For example, several courts have expressly held that sexual harassment by co-workers is not done under color of state law merely because it occurs at a government workplace.[96] In one of the sexual harassment cases, the court gave some careful analysis to the question of state action.

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used to cause the harm). *See also* cases discussed in introduction to Part II, *supra* in text accompanying notes 9-21. Viewed alternatively, these cases might be read to mean simply that courts should give weight to the mental state of the actor causing the harm, who might or might not believe himself legally bound to act, and to the mental state of the victim, who might or might not believe that the person causing the harm is acting in some official capacity.

95. These questions are taken up more fully in discussion of the "pretense" model in subsection II. F., *infra* at notes 112-138 and accompanying text.

96. *See, e.g.*, Edwards v. Wallace Community College, 49 F.3d 1517, 1523 (11th Cir. 1995); Noland v. McAdoo, 39 F.3d 269, 271 (10th Cir. 1994) ("in order to establish the state action necessary to support a Section 1983 claim" for sexual harassment, the "defendant . . . had to be plaintiff's supervisor or in some other way exercise state authority over her."); Woodward v. City of Worland, 977 F.2d 1392, 1400 (10th Cir. 1992); Hughes v. Halifax County School Bd., 855 F.2d 183, 186-87 (4th Cir. 1988); Murphy v. Chicago Transit Authority, 638 F. Supp. 464, 468 (N.D. Ill. 1986), citing Polk County v. Dodson, 454 U.S. 312 (1981); Redpath v. City of Overland Park, 857 F. Supp. 1448, 1462 (D. Kan. 1994).

In sexual harassment cases brought under § 1983, courts have tended to use many of the principles developed in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1994). Of course, there is no "color of law" requirement under Title VII, so the analogous issue in the Title VII context is merely whether the harassment amounted to discrimination in the "terms or conditions *of employment*." And even under Title VII, many courts have required a direct supervisor-supervisee relationship

> The defendants were capable of harassing plaintiff only because their jobs enabled them to have frequent encounters with her. Therefore, it may be said that defendants 'contacts with plaintiff were made possible only because defendants were given certain state authority, . . . and that in the course of exercising their authority, the defendants abused plaintiff in a sexually discriminatory manner. . . . This conclusion, however, does not mean that defendants' actions were pursued under color of state law. [A]ctions taken under color of state law must be related to the state authority conferred on the actor, even though the actions are not actually permitted by the authority. Here, however, the abusive conduct was not in any way related to the duties and powers incidental to the job[s of the defendants].[97]

Similarly, the Tenth Circuit recently concluded that there was no nexus between improper sexual conduct and the defendant's status as a school district employee, even though the plaintiff was a student and the improper conduct occurred in a vacant classroom.[98] The proper inquiry, according to the courts that take this sort of approach, is whether the harasser had some authority over the harassed worker, and used that authority to effect the harassment.[99]

Thus, when carefully applied, this approach begins to look much more like some variant of the causation model, especially when it includes the emphasis on use of official position. But the courts that use slightly different language, the courts that, through lack of care or otherwise, include some reference to the conduct being "attributable" to the government, are adding another, more troubling dimension, whether they realize it or not. At bottom, this is the same as asking "is it fair to attribute this conduct to the state?", a question that, again, lacks the specificity necessary for consistent application. Moreover, the "fairly attributable" standard seems to have its genesis not in Section 1983 or in the Fourteenth Amendment, but in the common law. Thus, courts are taking a

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in order for a harassment cause of action to lie. *See, e.g.*, Ball v. Renner, 54 F.3d 664, 668 (10th Cir. 1995).

97. *Murphy*, 638 F. Supp. at 648.

98. Jojola v, Chavez, 55 F.3d 488, 493-94 (10th Cir. 1995). *See also* D.T. v. Independent School Dist., 894 F.2d 1176 (10th Cir. 1990) (sexual abuse of a student by a teacher was not state action because it occurred during the summer, when the teacher was engaged in a community volunteer effort, and not while classes were being held), *cert. denied*, 498 U.S. 879 (1990).

99. Poulsen v. City of North Tonawanda, 811 F. Supp. 884 (W.D. N.Y. 1993); *see* Faragher v. City of Boca Raton, 864 F. Supp. 1552, 1565 (S.D. Fla. 1994) (supervisory authority of defendant city employees "lent the weight of the City to their decisions and conduct toward" the women they sexually harassed). *See also* Wright v. South Arkansas Regional Health Ctr., 800 F.2d 199, 205 (8th Cir. 1986) (§ 1983 due process claim dismissed on grounds that the named defendant was not plaintiff's supervisor or employer and played no role in any decisions related to the plaintiff's job benefits or his termination); Doe v. Taylor Indep. School Dist., 15 F.3d 443, 461-62 (5th Cir. 1994) (Higginbotham, J., concurring) (sexual abuse of a student by a teacher was state action because it was the teacher's status and conduct *as her teacher* that allowed him to exert such influence over her); Wilson v. Webb, 869 F. Supp. 496 (W.D. Ky. 1994); Boykin v. Bloomsburg University, 893 F. Supp. 409, 417 (M.D. Pa. 1995) (no

concept traditionally used to determine entity liability, and using it as a test for determining something quite different. In other words, this approach seems divorced from the question that it purports to answer: because there is no vicarious liability under Section 1983,[100] the consequence of an affirmative answer to the "under color of law" question is not, *a priori*, to expose the government entity to liability (or to "attribute" the conduct to the government in a pure sense), but to expose the individual to liability.

Another way to look at this problem is to say that the question of whether conduct is "fairly attributable to the state" seems more closely akin to the "policy or custom" inquiry the Supreme Court has mandated for determining liability of a governmental entity. Under the now-mandated *Monell* approach, the governmental entity is responsible under Section 1983 when "execution of [the] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury."[101] Thus, the "fairly attributable" standard cannot be reflective of the true "color of law" inquiry, unless the scope of entity liability and "color of law" are identical. The Supreme Court has maintained since at least 1978 that these two are different in scope, and that "color of law" is broader. Indeed, the "policy or custom" approach to color of law was precisely the one urged upon the Court by Justice Frankfurter in *Screws* and *Monroe*.[102] The problem is that Frankfurter was *dissenting*. Thus, while it might still be possible as a theoretical matter to merge the two standards ("under color of law" and "pursuant to policy and custom"), this would require overruling a fair amount of Supreme Court precedent, as well as ignoring much of the historical analysis of Section 1983 offered by Professor Winter.

E. The Agency Submodel

Analysis of the "fairly attributable" language raises the slightly more general question of whether an agency submodel might be appropriate for de-

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state action when a clerk-typist at a public university filed an allegedly false complaint that a co-worker raped her on university property).

100. Monell v. New York City Dep't of Social Services, 436 U.S. 658, 694 (1978).

101. *Id.* The inquiry posed by this test is essentially the one identified by Alexander and Horton as necessary for proper application of the Legalist model: whether there has been "lawmaking." ALEXANDER & HORTON, *supra* note 22, at 15-17. This inquiry has not proven to be an easy one for the Court. *See* City of Canton v. Harris, 489 U.S. 378 (1989); Pembaur v. City of Cincinnati, 106 S.Ct. 1292 (1986); Oklahoma City v. Tuttle, 471 U.S. 808 (1985); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988). *See also* Bryan County Bd. of Comm'rs v. Brown, 64 U.S.L.W. 3707 (April 23, 1996) (granting cert.). Alexander and Horton even use *Pembauer* to illustrate some of the close calls under the Legalist model. ALEXANDER & HORTON, *supra* note 22, at 16-17 (noting difficulty of determining whether an administrative decision to conduct a particular search amounted to "lawmaking," but noting also that "[s]imilar issues arise whenever administrators make *ad hoc* decisions that are neither explicitly authorized nor explicitly forbidden by more paradigmatic 'laws'.").

termining "color of law." Because of the different purposes, and because the "scope of employment" doctrine used to determine an employer's liability for the torts of its employees[103] has never been noted for consistency of application or doctrinal purity, [104] courts would seem better advised to find a different model for determining when a state employee has acted under color of law. Alexander and Horton concur in this. They point out that even if Section 1983 were interpreted as imposing vicarious liability, this would not itself solve the "color of law" or state action dilemma: "The fact that, under agency doctrine, the state as principal might be vicariously liable on grounds does not prove — but rather assumes to be the case — that the agent was a constitutional duty-bearer."[105] In other words, there is no exact common law analog to the "color of law" requirement. The employee of a private business will still be liable for an intentional or negligent tort he has committed against a third party, even if a court ultimately concludes that the intentional or negligent tort was not committed in the scope of employment, while a determination that an act was not under color of law will end a Section 1983 case against the individual *as well as* the entity.

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102. *See* Monroe v. Pape, 365 U.S. 167, 250 (1961) (Frankfurter, J., dissenting) (a plaintiff might still be able to show that a defendant's conduct was under color of law, even where no statute or ordinance is involved, if he can show some 'custom or usage' which has become the common law.").

103. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 219 (1958) ("A master is subject to liability for the torts of his servants while acting in the scope of their employment"). The *Restatement* provides the following test:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Id. at § 228.

See also id. § 229 (2) ("In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered. . . . ").

104. *See* Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988). While some commentators have concluded that negligence has not posed too much difficulty, there is, of course, an even less coherent body of case law attempting to explain when intentional torts should be deemed to have occurred "in the scope of employment." (The *Restatement* makes it clear that neither the fact that the tortious act itself was forbidden by the employer nor the fact that the act was "consciously criminal or tortious" will automatically preclude a finding that it was within the scope of employment. *See* RESTATEMENT *supra* note 103, at §§ 230, 231.) *See, e.g.*, Hirase-Doi v. U.S. West Communications, Inc., 61 F. 3d 777, 783 (10th Cir. 1995) (employee who repeatedly harassed co-workers was not acting in scope of his employment); N. Denise Asher, Note, *When Murder and Rape are Job Related: Official*

Interestingly, this is not the case under the Federal Tort Claims Act (FTCA), which follows yet another model. Under this statutory scheme, if the act falls within the scope of employment test, as explicated in the Act itself, it is attributable to the federal government alone, and not to the individual tortfeasor.[106] Conversely, an act taken outside the scope of employment will not be attributed to the federal government, and the individual tortfeasor is deprived of the immunity that would have been granted had the conduct been attributable to the government.[107] Because the consequences of the "scope of employment" determination under the FTCA are not analogous to the consequences of a "color of law" determination under Section 1983, it seems that the FTCA is unlikely to be the source of a useful "color of law" model.[108]

In a similar way, liability for employment discrimination under Title VII of the Civil Rights Act of 1964,[109] automatically attaches to the principal (the employer) but not to the individual who caused the deprivation, under the current majority view, although the individual will remain liable for any common law torts that arise out of the same conduct.[110] Thus, the fact that the Supreme Court has held that agency principles should be used to determine employer

Misconduct and Respondeat Superior, 1 SAN DIEGO JUS. J. 163 (1993).

105. ALEXANDER & HORTON, *supra* note 22, at 34.

106. 28 U.S.C. §§ 1346, 2674-2680 (1994). Section 2674 waives sovereign immunity for conduct by federal employees that would be tortious under the law of the state in which it occurred. Section 2679 (b)(1) provides that this remedy against the federal government will be exclusive of any other civil action that might be filed against the federal employee whose conduct gave rise to the action and that is based on the same subject matter. Section 2680 defines "scope of employment" and creates exceptions to this waiver of sovereign immunity for, *inter alia*, some specific intentional torts. However, it also creates *exceptions* to the intentional tort exception when the tort arose out of law enforcement activity.

107. 28 U.S.C. §2679 (b)(1) (1994).

108. Indeed, the cases interpreting "scope of employment" under the FTCA have been criticized almost as much as the Supreme Court's state action cases. There is some evidence that "scope of employment" is viewed more narrowly in the FTCA context than it is in state law tort context, even though the FTCA requires courts to apply the law of the state in which the wrong occurred. *See, e.g.*, Hallett v. United States, 877 F. Supp. 1423, 1430 (D. Nev. 1995) (Navy officers were not acting in scope of employment when they organized the "hospitality" events at the infamous Tailhook convention, despite the fact that they were on duty and being paid for the time spent at the convention); Bates v. United States, 517 F. Supp. 1350, 1357 (W.D. Mo. 1981) (military policeman not acting within scope of employment when he committed assault, rape, and murder, despite the fact that he was in uniform and on duty at the time), *aff'd*, 701 F.2d 737 (8th Cir. 1983).

109. 42 U.S.C. §2000e(2) (1994).

110. *See* cases collected in Steven K. Sanborn, Note, *Individual Liability for Supervisory Employees under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143 (1995). *See also* Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39 (1994); Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589; Kendra Samson, Note, *Does Title VII Allow for Liability Against Individual Defendants?*, 84 KY L.J. 1303 (1996); Glen A. Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual*

liability under Title VII[111] should have no bearing on whether agency principles should be used in formulating a test for determining whether conduct occurred "under color of law."

Alexander and Horton support the view that an agency model would lack usefulness even if it could be doctrinally justified:

> One serious problem with "agency" as the measure of the Governmental model is that no principled test has yet been developed for determining when an agent who is disobeying her principal's orders is still acting on behalf of the principal. We doubt that such a test can be developed, largely because the underlying notion of a legally authorized yet illegal act is incoherent.[112]

Winter also rejects the agency model:

> [T]he color of office metaphor . . . should not be confused with analogous doctrines of agency law such as the doctrine of apparent authority. The issue exemplified in the section 1983 cases is not whether the agent is authorized to act for the principal. Who exactly is the principal? There is no "authentic" State separate from the amphibious and ambiguous public-private actors and the reification they temporarily embody. Rather, the problem in the section 1983 cases is conceptually closer to those that arise in the corporate context. But even this analogy is deficient because the problems that result from the conceptual opacity of a reified entity like a corporation or a "State" are refracted through different policy concerns.[113]

In sum, agency tests are inappropriate because they were designed for different purposes.[114]

F. The "Pretense" Submodel

Another way of looking at the "under color" language in Section 1983 is to ask whether the employee has acted under "pretense" of some state law. In *Screws v. United States*, Justice Douglas stated for the majority that "under 'color' of law means under 'pretense' of law."[115] Alexander and Horton observe

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Harassment, 48 VAND. L. REV. 1057 (1995); Justin S. Weddle, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724 (1995).

111. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 73 (1986).

112. ALEXANDER & HORTON, *supra* note 22, at 33. It is not immediately clear what the authors mean by "a legally authorized yet illegal act," so in this sense one is forced to agree that the notion is "incoherent." Perhaps the authors mean an act that violates both the employer's explicit command and the law's command, but is in some broad sense "within the authority" of the employee. If this is the meaning, the authors are indeed condemning not only a large chunk of the common law of agency, but also the entire Governmental model, and *Monroe v. Pape* as well. And the argument may in this sense amount to a tautology: "We condemn the Governmental model, as embodied in the common law doctrine of *respondeat superior*, because *respondeat superior* is based on the same principle as the Governmental model."

that, as a test, this is not a particularly helpful standard.[116] This observation is borne out in some of the cases in which courts have tried to apply a "pretense" model. For example, the First Circuit has recently noted that "pretense" is lacking if the wrongful acts are not "related in some meaningful way either to the officer's governmental status or the performance of his duties."[117] Of course, a "meaningful relation" test seems indistinguishable from the "nexus" test already examined, and like the "nexus" test, the "meaningful relation" test leaves something to be desired as a guide for the consistent application of the law.

Yet it may be that "pretense" gets closer to the heart of the "color of law" idea than most other models.[118] Winter traces "color of law" back to the "color of office" metaphor — *colore officii* — and finds additional meaning in the metaphor.

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113. Winter, *supra* note 35, at 401 (footnotes omitted).

114. The appropriateness of the agency doctrine of "apparent authority" as a model for a color of law test is discussed more fully *infra* in text accompanying notes 134-41.

115. 325 U.S. 91, 111 (1945).

116. ALEXANDER & HORTON, *supra* note 22, at 33.

117. Martinez v. Colon, 54 F.3d 980, 987 (1st Cir. 1995). The *Martinez* court covered all bets by also making the following preliminary remarks:

> To be sure, violence is attributable to state action if the perpetrator is acting under color of state law, . . . but that is a virtual tautology. Furthermore, the construct — "acting under color of state law"— rarely depends on any single, easily determinable fact, such as a policeman's garb, . . . duty status, . . . or whereabouts . . . .
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> The point is that segregating private action from state action calls for a more sophisticated analysis. In general, section 1983 is not implicated unless a state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or unless the conduct is such that the actor could not have behaved in that way but for the authority of his office.

Id. at 986. Ultimately, the court concluded that the test, whatever it was, had not been satisfied:

> Here, the record is transpicuously clear that throughout the course of Martinez' ordeal Valentin did not exercise, or purport to exercise, any power (real or pretended) possessed by virtue of state law. To the contrary, Valentin was bent on a singularly personal frolic: tormenting an acquaintance. Though on duty and in uniform, Valentin's status as a police officer simply did not enter into his benighted harassment of his fellow officer. [Moreover, w]e do not think it is reasonable to hold that every use of a policeman's gun, even in the course of purely personal pursuits, creates acause of action under section 1983. Instead, we are of the view that the context in which a service revolver is used, not just the mere fact of its use, must be consulted to determine the constitutional relevance . . . . In the absence of any additional indicia of state action, we believe that the unauthorized use of a government-issue weapon is too attenuated a link to hold together a section 1983 claim.

> [T]he *color of office* metaphor connotes the sense that the evil of official misconduct is not so much a matter of deception as of duplicity and betrayal. In this sense, the notion of *color of office* as "guise of authority" is subtly different from the sense of *under color of law* as "false light." The latter metaphor suggests that the problem is a matter of false appearances. But the fundamental difficulty addressed by the *color of office* metaphor is that there is no other "reality" beneath the social meaning of "the State," as there is no other "State" separate from the officials who instantiate it. The actor *is* an officer *and* a wrongdoer. Thus, the *color of office* metaphor signifies that the fundamental problem is not a matter of truth and falsity so much as a problem of integrity of role performance. To put it another way, the concern is less a matter of truth and deception than a matter of virtue and vice.[119]

Id. at 987-88 (footnote omitted).

118. One case that might have benefitted from an explicit "pretense" approach is Bennett v. Pippin, 74 F.3d 578 (5th Cir. 1996). In *Bennett*, a woman accused of shooting her husband was placed in a Sheriff's custody, then questioned by deputies and fingerprinted at the Sheriff's office, then released, only to find the Sheriff himself waiting on her porch. After talking to the Sheriff on the porch for a while, Ms. Bennett excused herself and went to bed.

> She awoke to find the Sheriff standing naked over her and attempting to remove her clothes. When she protested, the Sheriff responded that he was the sheriff and could therefore do what he pleased. When she persisted in objecting, the Sheriff stated, "What are you complaining about? I could have thrown you in jail and sorted it out later." The Sheriff then raped Ms. Bennett. Afterwards, the Sheriff ordered her to take a shower and not to tell anyone of the incident.

Id. at 583. The Court of Appeals had no difficulty affirming the trial court's conclusion that the Sheriff acted under color of law, but was not specific about exactly what test was being employed. The court relied on the following facts, in addition to those already mentioned: (1) the talking on the porch included questioning about the earlier shooting; (2) the Sheriff used his authority as Sheriff to determine whether Ms. Bennett would be returning to her home that evening; and (3) under the terms of her release, Ms. Bennett would need the Sheriff's permission to retrieve her pickup truck and to change her place of residence. *Id.* at 589.

> Under such circumstances, we cannot argue with the district court's observation that "it was not lost on Gail Bennett (or the Sheriff) that the Sheriff carried the keys to the Archer County Jail with him in his pocket and wielded coercive power over Gail Bennett." The Sheriff's actions were an abuse of power uniquely held because of a state position, and the explicit invocation of governmental authority constituted a "real nexus" between the duties of Sheriff and the rape.

Id. (citations omitted). The main thrust of the court's remarks is that the Sheriff *used* his authority to accomplish the rape (or at least to make it easier; an argument could be made that the Sheriff could and would have overcome any resistance on her part even had he not spoken at all). *See* discussion of "use" submodel, *supra* in text accompanying notes 70-75. But the court also properly relied on the Sheriff's "invocations of authority": his statements to the effect that he could do what he wanted, because of his position. In a sense, the Sheriff was engaging in the pretense that he needed to question her further (he testified that his main reason for going to her house was that he was aroused by the way she had touched him earlier), and then the pretense that his authority extended even to raping her.

Of course, *Bennett* might be reconciled with other submodels, or even the Legalist model, in light of the fact that the court also found that the rape was attributable to the county, because the Sheriff was a final policymaker within the meaning of City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988). 74 F.3d at 586.

This is a curious passage. Winter first assumes the existence of some well-known distinction between "deception" and "duplicity," a distinction heretofore not recognized by the *Oxford English Dictionary*[120] or any other dictionary I could find. And he ends by concluding that the shade of meaning he is after has to do not with true and false but with right and wrong. In the paragraph that follows the quoted passage, he uses Coke to link *color officii* and the notion of *in malem partem*: "the evil or wicked part of the office."[121] A few sentences later, he concludes a section of the article with a passage quoted earlier about the "affective power" of conduct that is "understood to be that of 'the State'."[122]

There is a fundamental conflict among the various ideas posited by Winter in this portion of the article. Some relate more to the mental state of the victim, while others relate more to the mental state of the wrongdoer. "Evil" and "wickedness" and "vice" all suggest a mental state held by the *wrongdoer*, but conduct would seem to be "understood to be that of 'the State'" only if in fact the *victim* (or at least someone *other* than the wrongdoer) understands it to be so. "Duplicity" and "deception" implicate the mental states of both wrongdoer *and* victim, because they suggest the wrongdoer's *intentional* creation of a false *belief* on the part of the victim.[123]

In this Article, I have already acknowledged that the mental state of the victim might play a role in "color of law" determinations. This mental state has

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119. Winter, *supra* note 35, at 403. Winter takes great pains to emphasize the dual nature of a § 1983 wrongdoer. An official who commits a wrong continues to be an official. The officers who beat Rodney King were acting as police officers but also as thugs. "The issue is not," according to Winter, "that the officer is sometimes a lamb and sometimes a shark." *Id.* at 402. If an officer could only be one thing at a time — fish or fowl — then courts would be in even more difficulty than they already are. "Imagine the opinion in *Screws*," Winter tells us:

> "When the sheriff beat the petitioner, he was alternating — striking some blows as Sheriff Screws and others as Mr. Screws. We hold these two people to be jointly and severally liable."

Id. at 402 n.388. While Winter's view seems sound on the surface, one of the main metaphors he relies upon seems a poor choice. "Amphibians" are those beings that can live on water or on land, or more figuratively, those things that can operate in two different media, OXFORD ENGLISH DICTIONARY 413 (2d ed. 1989), but *not both at once.* An "amphibian" might also be a vehicle that can operate either on land or in water, *id.* at 414, but, again, it cannot operate in *both at once.* More fundamentally, the reason that Winter's alternative opinion for the *Screws* case strikes us as ridiculous is that there was nothing to differentiate one of Sheriff Screws blows to his victim from the next blow, not that it is absurd to ask courts to make narrow distinctions. After all, as Winter himself acknowledges, § 1983 itself requires that a line be drawn, and there will be a great many cases in which public officers engage in a sequence of conduct, some of which will be on one side of the line, and some of which will be on the other side of the line. If there were some facts that were true about some of Sheriff Screws' actions, but not true of others, and these facts had significance under the appropriate model used to determine "color of law,' then a court would have no choice but to draw exactly the line that Winter attempts to ridicule.

been granted significance by many courts, regardless of the other models referred to in these cases.[124] Indeed, as suggested by the analysis of *Barna v. City of Perth Amboy* above,[125] courts that follow the "nexus" model tend to incorporate into that model a strong reliance on the victim's mental state. Any test that asks whether the actor "purported" to act with official authority could be seen as asking either about the victim's mental state or the actor's mental state, with an emphasis on the former.[126] The victim's mental state could play an even greater role in the "use" variant of the causation submodel, as explained above in the subsection on the causation submodel,[127] because often the officer is *using* the indicia of authority to create a mental state on the part of the victim (*e.g.*, the belief that resistance would be either illegal or futile), and it is the mental state that in turn makes the harm possible.[128] Because "use" may well incorporate the victim's mental state, it may be the most advantageous of the models considered thus far.

It is true that Winter's goal is not to create a positivist rule for determining state action or conduct under color of law. Yet he must see that there are practical implications that flow from a choice among metaphors. Only a page or two after his musings on metaphoric meaning, in a section entitled "Interpreting Section 1983," Winter seems to reject a model that would grant significance

120. "Deception" is "[t]he action of deceiving." OXFORD ENGLISH DICTIONARY 327 (2d ed. 1989). To "deceive" is to "cause to believe what is false; to mislead as to a matter of fact, lead into error, impose upon, delude, 'take in.'" *Id.* at 324. The earliest and most usual sense for "duplicity" is "the character or action of acting in two ways at different times, or openly and secretly; deceitfulness, double-dealing." *Id.* at 1131.

121. Winter, *supra* note 35, at 403.

122. *Id.* at 403-04.

123. *See supra* note 117.

124. *See, e.g.*, Layne v. Sampley, 627 F.2d 12, 13 (6th Cir. 1980) (relying in part on the fact that the plaintiff encountered the defendant officer "with a revolver [and] in the company of police officers, and did not know that [the officer] was on vacation. ..."); Keller v. District of Columbia, 809 F.Supp. 432, 436 & n.5 (E.D. Va. 1993) (the presence of "outward indicia of state authority . . . naturally imbues an officer's actions with an aura of authority not possessed by an ordinary citizen engaged in the same activity," and the conduct of the plaintiff in this case indicates that he "was not cognizant that the officers were operating without lawful authority").

125. 42 F.3d 809 (3rd Cir. 1994), discussed *supra* in text accompanying notes 88-95.

126. To "purport" is "[t]o have or present the often false appearance of being or intending; [to] profess." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1471 (3d ed. 1992) (Anne H. Soukhanov, ed.). To "have" an appearance is to create or have the power to create an impression in the mind of the viewer; to "present" an appearance might be seen, to the extent it differs from "have," as to *strive* to create an impression, which implicates the mental state of the presenter. To the extent that "purported" has any meaning beyond being the past tense of "purport," it means "[a]ssumed to be such," which implicates solely the mental state of the viewer. *Id.*

127. Part II. C., *supra* in text accompanying notes 70-75.

128. *See, e.g., Keller*, 809 F.Supp. at 436:

to the wrongdoer's mental state.

> [T]he "good faith but mistaken" gloss applied to the Captured and Abandoned Property Act and to the post-War removal act cases . . . makes little sense in this context. It would yield a bizarre and counterintuitive reading of section 1983 in which state officers would be subject to suit in federal court only when they made honest mistakes in applying state law and not, for example, when they intentionally abused their authority in order to discriminate on the basis of race.[129]

But what about the other possibility, the one that fits more closely with *"in malum partem"*? A court might conclude that a government official has acted with the pretense of authority when he knew that his government duties did not include the act.[130] The objections that Winter interposed to the reverse ("good faith but mistaken") approach would not apply to this test. Of course, a whole new set of objections might be offered. Indeed, the practical objections to a subjective test would likely mirror those the Supreme Court found convincing in *Harlow v. Fitzgerald*,[131] where the Court eliminated the subjective component of the qualified immunity test.[132] And even if the test were made into an objective one (*e.g.*, "an officer acted under color of law if, at the time of the act, he could reasonably have believed that his government duties did not include the act"), there would still be the glaring difficulty that this by itself is insufficient as a test, because it excludes all acts that any reasonable officer *would* see as part

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> The traffic stop of a motorist, the use of firearms in effecting an arrest, and the ensuing physical restraint . . . of an individual are quintessential police actions . . . . Almost certainly, plaintiff would not have stopped his car and then remained, following orders, simply at the behest of an ordinary citizen . . . . When confronted with such [outward] indicia of authority, an individual should not be forced to conduct a split-second analysis of whether the state official has jurisdiction to undertake the offending act. [To argue] that the proper course for Keller to have taken under these circumstances would have been to defy the defendants and ignore their orders because they had no legitimate authority . . . strains credulity.

129. Winter, *supra* note 35, at 405.

130. A federal district court recently rejected this approach. "Neither reason nor precedent supports the argument that the 'under color of' law determination should turn on the subjective understanding of the actor concerning the scope of his duties. To the contrary, the law is clear that the inquiry should be directed at 'the nature of the act performed'." Keller v. District of Columbia, 809 F.Supp. 432, 435 (E.D. Va. 1993), quoting Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989). The court appeared to give weight to the mental state to the victim of the harm, but limited its main conclusion to the somewhat less-than-helpful observation that "[h]ere, the nature of the act performed is redolent with the aroma of state action." 809 F.Supp. at 436.

131. 457 U.S. 800 (1982).

132. The need for clarity as well as objective standards in a "color of law" submodel is even more important when it is considered that the "color of law" question may ultimately be one for the jury. Winter is vehement in arguing that it is a perfect opportunity for ordinary citizens to give content to what is in essence a legal metaphor. Winter *supra* note 35, at 414 ("[o]nce we recognize that questions such as who has authority to make policy for a social

of his duties. We might want to add these, either because they look like they might fit within the Legalist model, which is included in the Governmental model, or for other sound reasons, but then we are left with a non-test: "an officer acts under color of law, *regardless* of whether or not, at the time of the act, he could reasonably have believed that the act was within his government duties." The only conclusion is that the actor's mental state should play no role in the test for whether conduct was "under color of law."

This conclusion is bolstered by the Supreme Court's holding that Section 1983 itself contains no mental state requirement.[133] It would be anomalous to say that there is no mental state requirement in the phrase "subjects [a] person . . . to the deprivation of any rights," but that there is a mental state requirement in the phrase "acting under color of . . . law."[134]

Alexander and Horton make more sweeping objections to the use of mental state here. Because "pretense of authority" goes beyond the traditional agency notions of "actual" or even "implied" authority,[135] they say, this test requires us to look back at an illegal act

> from the perspective of those to whom "pretense" appears — victims, onlookers, or strangers (like courts) looking back upon the transaction. The heavy implication is that government officials who are pretending to be private citizens while actually engaged in government business would not come under constitutional commands.[136]

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organization like a municipality are questions of social meaning and social values in their very essence, it follows that the jury is the entity most competent to decide the issue"). While the Supreme Court has taken the opposite view on the narrow question of entity liability under *Monell*, *see* City of St. Louis v. Proprotnik, 485 U.S. 112, 124 (1988), the other battle Winter seeks to join here may have already been won, in that courts already have made "color of law" a jury question. Jones v. Gutschenritter, 909 F.2d 1208, 1210 (8th Cir. 1990); Layne v. Sampley, 627 F.2d 12, 13 (6th Cir. 1980); Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975) (the trial court "submitted this factual issue to the jury for its determination [and w]e see no objection to this procedure. . . .").

133. Daniels v. Williams, 474 U.S. 327, 329-30 (1986).

134. Of course, by recognizing qualified immunity in § 1983 actions where a reasonable officer could have believed that his conduct would not violate the rights of the plaintiff, the Court has, in a sense, contradicted its own conclusion that the mental state of the actor is irrelevant to § 1983 itself, but I leave that anomaly for others to decode.

135. Alexander and Horton include no support for this proposition. The *Restatement*, in addition to creating employer liability for torts of employees committed in the scope of employment, would also create employer liability even for torts *not* committed in the scope of employment, where

> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was

It is not clear whether the authors are saying that requiring courts to look back at an illegal act from a particular perspective is undesirable in and of itself, but it is difficult to see why this would be true: this is the stuff of everyday litigation, in every case in which a mental state is at issue or the "reasonable person" standard is applied. Nor is it clear why all public officials pretending to be private citizens would be outside the command of the Constitution. For one thing, merely "pretending" might not be enough: presumably, for the actor to escape the reach of the Constitution, the pretense must have succeeded in fooling the victim into not understanding that the actor was a public official. More fundamentally, Alexander and Horton seem to forget that they are purporting to describe what the Governmental model *adds* to the Legalist model. Because the Governmental model *includes* the Legalist model, conduct that is "actually . . . government business" (*i.e.*, legal under state law, and pursuant to legally delegated authority) would seem to fall within the Legalist model and thus could not escape the Constitution's command. If the conduct turns out to be illegal, it would fall outside the pure Legalist model, but it might still fall within an expanded "custom or usage" Legalist model.[137] In other words, making the victim's mental state relevant does not necessarily mean it is the determining factor, and a victim's lack of awareness of government involvement in the harm would not necessarily insulate the conduct from constitutional scrutiny.

They continue with their objections, however:

> The equally heavy implication is that nonofficials, pretending to be officials who are legally authorized to take the actions in question, *would* come under constitutional commands. After all, if "pretense" not "actual" authority is what matters for the Governmental model . . . then it would seem clearly to follow that a rapist who lures his victims by flashing a fake police badge would be the subject of constitutional commands, while a police officer who engages in illegal government surveillance while in plainclothes would be acting beyond the reach of those commands.[138]

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some reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219 (1958). The *Restatement* also contains technical definitions for "apparent authority" and "agency," but it is unclear if these apply here. *Id.* §§ 1, 8. In any event, the use of words like "purported" and "reliance" suggest that the authors of the *Restatement* strongly believe that mental state and "pretense" should play a role in determining whether an employer is liable for the torts of his employee. (Note also the incorporation of the "aided by the agency relation" approach, which mirrors the "use" variant of the causation submodel.)

136. ALEXANDER & HORTON, *supra* note 22, at 33.

137. Alexander and Horton do acknowledge that exercises of administrative discretion should probably be included within the Legalist model, and that "one might wish to deem certain decisions by administrators to be 'lawmaking' even if explicitly forbidden by higher-order laws." *Id.* at 16-17. In fact, they even acknowledge that an expanded Legalist model

The latter example (plainclothes surveillance) fails to convince for the reasons put forward above: a duly authorized officer, acting pursuant to government authority and directive, falls within the Legalist model.[139] The former example (impersonating a police officer) is more troublesome. Alexander and Horton seem to believe that the outrageousness of the suggestion is apparent on its face, for they add no explanation of exactly what would be wrong with subjecting such an impersonator to constitutional command.[140] Yet why is it so outrageous? The actor in this case accomplished arguably the same harm that Section 1983 is designed to prevent. The victim would no doubt carry the same feelings of betrayal described by Winter as inseparable from constitutional violations (although those feelings might dissipate when the victim learns that her attacker was not in fact a government employee). To the extent that Section 1983 (or 18 U.S.C. §242 for that matter) allow greater penalties to attach to the conduct or greater likelihood of successful prosecution than would state law causes of action available for the rape, that furthers the goal of deterrence, which

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might have room for whatever is truly valuable in the Governmental model:

> We suggest that whatever virtues some might perceive in the "pretense" and "agency" tests for making the Governmental model workable are probably better conceived of as suggestions for identifying features of official actions that make those actions "lawmaking" on the Legalist model. [A]n expanded Legalist model could count as "lawmaking" acts that are illegal yet carry some presumptive legal authority.

Id. at 137 n.9.

138. *Id.*

139. It is unclear what Alexander and Horton mean by "illegal government surveillance." If they mean wiretapping, then it would seem that the officer's attire would be irrelevant, because the victim would never see the wrongdoer. If they mean recording of an undercover agent's own conversations with suspected criminals, or visual surveillance, then there is the problem that this is not unconstitutional or even illegal, in most instances, because the private citizen has no reasonable expectation of privacy. *See* Katz v. United States, 389 U.S. 347 (1967) (in order for something to have been a "search" within the meaning of the Fourth Amendment, it must have interfered with a reasonable expectation of privacy); 18 U.S.C. §2011 *et seq.* (1994).

140. Winter agrees with Alexander and Horton on this point, but offers little more in the way of explanation:

> In the section 1983 context . . . , the issue is not that the injured party mistakenly thinks that the agent acts for the governmental entity. . . . . Rather, the problem of conduct *under color of office* concerns the distinctive social meaning occasioned by abuse of official authority. It arises only when the actor has a bona fide identity as a state official or when he or she acts in concert with such an official — a point confirmed by the otherwise incomprehensible state action decisions.

Winter, *supra* note 35, at 401 (footnote omitted). It is slightly ironic that Winter uses the "otherwise incomprehensible state action decisions" to justify his conclusion. And, in any event, the cases he cites fail to support his conclusion. *Id.* at 401 n.386. *But see* Robinson v. Davis, 447 F.2d 753 (4th Cir. 1971) (no state action where municipality supplied private security guard with a police uniform). Winter's more general point about color of law models may be more persuasive: "One can easily confuse the *color of office* concept with one of the agency doctrines if one fails to recognize the metaphoricity of the phrase and attempts instead

operates as much on the individual as it does on the governmental entity. More importantly, under Section 1983's remedial meta-regime, the governmental entity is no more subject to command than it would be without extending the model to cover impersonation of an officer. *Monell* and similar cases ensure that liability could never attach to the governmental entity in these situations (unless the entity had violated its own constitutional obligations by, for example, distributing fake police badges and encouraging citizens to impersonate officers).[141] Similarly, injunctive relief, even if somehow obtained in a case like this, would pose no threat to entity autonomy: an entity would surely not object to an injunction against using fake police badges.

Of course, it might be objected that such an interpretation is not consonant with the history and purposes of the Constitution, even if it is somehow consonant with the history and purposes of Section 1983. But this objection overlooks another of the fundamental principles put forward by Alexander and Horton: that each individual constitutional provision might have its own model for whom it commands. A corollary to this principle is that Section 1983 might have *its* own model as well. Indeed, the very disjunction of language between "no person shall, under color of . . . law" and "no state shall" suggests that Section 1983 must have its own model. For example, in constructing a test for "color of law," there might be sound reasons for using a Governmental model tending toward the Naturalist approach, even as someone setting out to construct a test for use in the "state action" inquiries under particular constitutional provisions might settle upon a Governmental model tending toward the Legalist approach.[142]

It might be objected that Congress could not have intended a different meaning to attach to "color of law" than that typically used in "state action" inquiries, because Section 1983 appears to require both, and thus whichever phrase is given the more expansive meaning would end up having no practical effect, a result we cannot assume to have been intended. Yet this objection

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to treat it in more reductive terms." Winter, *supra* note 35, at 400 n.383. *See supra* discussion of the agency submodel, at text accompanying notes 104-114. Interestingly, while Winter, Alexander, and Horton all reject the concept of implied or apparent authority, it does not appear that any agency doctrine would really impose liability on the "principal" or the "apparent agent" in a situation like the one posited (false identification, with no employment relationship or other involvement by any principal), so it is not really agency law that is being rejected here. *See* RESTATEMENT (SECOND) OF AGENCY §§ 7,8, 219 (1958). (The putative employee might himself well be liable to the third party under some theory, but not by virtue of agency law.)

141. In Griffin v. Maryland, 378 U.S. 130 (1964), the Supreme Court found state action when a sheriff authorized deputies to carry badges and wear uniforms while working as security guards at an amusement park, where the security contract specifically required the deputies to exclude blacks from the park. The Court had no occasion to discuss anything like the *Monell* test in this pre-*Monell* case, but presumably this would be action by the county under *Monell*.

overlooks several points. First, Section 1983 creates liability for deprivations of rights secured by the "laws" of the United States as well as the Constitution. If a particular law without a state action requirement is the basis of the action, "color of law" rather than any state action test traditionally used for the Constitution will be the relevant inquiry, so it is not true that there is no practical significance. Second, there might be a constitutional provision that contains no state action requirement. The Thirteenth Amendment, for example, has traditionally been viewed as imposing no such requirement,[143] so a Thirteenth Amendment claim brought under Section 1983 is another situation in which the definition of "under color of law" would have great practical significance.[144] Finally, the disjunction of language itself suggests a different reach for "color of law." It seems unlikely that Congress could have intended that a single phrase, "color of law," should mean something different in every case, depending upon the law or Constitutional provision relied upon to show the underlying deprivation; yet this is the necessary result of unbundling the various constitutional provisions without unbundling "color of law" from them. If Congress had intended the phrases "color of law" and "deprivation" to incorporate the *same* level of government involvement, no matter what the nature of the deprivation, there was little reason to include "color of law" at all. There is no way to accomplish a "deprivation" without satisfying whatever requirement for government involvement inheres in the statutory or constitutional provision underlying the claim, so it would have been sufficient to say simply that "any person who deprives another of any right arising under" a federal law or a Constitutional provision is liable.[145]

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142. Winter acknowledges this possibility somewhat explicitly: "I think it would be a mistake if state action doctrine were conflated with the *color of office* conception." Winter, *supra* note 35, at 401 n.386. Even Eric Zagrans, perhaps the harshest critic of the holding in *Monroe*, recognizes, even embraces, the possibility of separate models; of course, Zagrans proposes a model of Fourteenth Amendment state action that is *more*, rather than *less*, expansive than the model he proposes for "color of law." Zagrans, *supra* note 36, at 569. This seems less likely to be adopted, for the reasons suggested in Lugar v. Edmonson, 457 U.S. 922, 935 (1982), and explained in the next paragraph of the text.

143. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1147 n.1 (1978). *But see* ALEXANDER & HORTON, *supra* note 22, at 86:

> Naturalists may derive support ... from the Thirteenth Amendment's text[ual command that "Neither slavery nor involuntary servitude ... shall exist."].
>
> Nevertheless, the rather extreme implications of the Naturalist model should lend credence to an alternative ... view. On the Naturalist model, if A holds B against B's will, A has violated the Thirteenth Amendment even if A's act violates the laws of the state. The Naturalist easily would consider garden variety kidnapping and false imprisonment to be direct violations of the Thirteenth Amendment. .... To the thoroughgoing Naturalist, the fact of involuntary servitude — not the fact that involuntary servitude was legally enforced by the slave states — is the essence of the "involuntary servitude" that was banned by the Thirteenth Amendment.

The logical thrust of these arguments is that either color of law is surplusage, or it has a different model than the traditional view of Fourteenth Amendment "state action." For all the reasons Winter so elegantly sets forth in his article, it seems unlikely that "color of law" is surplusage. Congress must therefore have intended that "color of law" should have meaning independent of the traditional state action inquiry, and that the lack of traditional "state action" should not *a fortiori* preclude a successful claim.

Unfortunately, the Supreme Court has only vaguely recognized that "color of law" might be unbundled from the command or constraint inquiry under particular constitutional provisions,[146] and that "state action" for purposes of one constitutional provision might be unbundled from "state action" for purposes of another constitutional provision. To do so would seem to offend the sense of symmetry that the Court appears to have about the Constitution. In recent years the Court *has* begun to use different models of state action for the constitutional provisions, but it has preferred to describe them as components of the substantive constitutional provisions themselves rather than as the answers to the "state action" question that lurks in each provision. Winter sees this as the bending of substantive constitutional law in order to compensate for the effects of using a deficient "state action" or "color of law" model.[147] Alexander and Horton note

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These "extreme implications" are apparently enough to condemn this interpretation for Alexander and Horton.

144. Indeed, an independent model for "color of law" would solve the very dilemma posed by Alexander and Horton in the passage quoted in the preceeding note. *See supra* note 143.

145. *See also* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 509 n.108 (1982):

> Congress' enactment and the Court's invalidation of the Civil Rights Act of 1871 . . . and of other nineteenth century civil rights laws suggest that the Reconstruction Congresses did not anticipate the broad outlines of the state action doctrine. If subsequent views of the limitations imposed by the state action doctrine differ from the views of the Reconstruction Congresses, one should not make too much of the relationship between the subsequent views of state action and other concepts, such as color of law, in assessing the will of the Reconstruction Congresses.

146. In Lugar v. Edmondson Oil, 457 U.S. 922, 935 (1982), the Court stated that conduct that amounts to state action under the Fourteenth Amendment will constitute action under color of law. However, the Court did acknowledge that "it does not follow . . . that all conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth Amendment requirement of state action." *Id.* at 935 n.18. Moreover, *Lugar* involved a state official's issuance of a writ of attachment, at the request of a private creditor. In holding that the private creditor was essentially a state actor, the Court would seem to have been favoring a Naturalist model for both state action and color of law. However, in emphasizing that the official's involvement was crucial, the Court threw a wrench in the works of the Naturalist model. (This is one reason that Alexander and Horton call *Lugar* a "terribly confused case." *Supra* note 22, at 115.) Thus, under the particular facts of *Lugar*, the Court had no real occasion to consider any subtle differences between "state action" and "color of law": the actions of the creditor in applying to the state official were either both or neither.

147. One example used by Winter is the area of due process, in which the Court has restricted

that the process has worked the other way as well: in addition to limiting the reach of some substantive constitutional guarantees, sometimes the Court has bent or changed its "state action" model more explicitly, in response to perceived pressures created by its earlier, more expansive, substantive constitutional jurisprudence.[148]

Thus, the Supreme Court intuitively recognizes the possibility of different constraint models for different constitutional provisions, even as it continues to chase after a chimerical universal model, sometimes causing it to bend the meaning of a particular constitutional provision out of fear that the provision might be used to turn Section 1983 into what the Court is pleased to call, in the now famous phrase, a "font of tort law,"[149] and sometimes causing it to reshape

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constitutional coverage by narrowing the definition of "life, liberty or property." It might be assumed, for example, that one might have a liberty or property interest in one's reputation that would be invaded by defamation at the hands of the government. Yet well-pleaded allegations of injury to reputation do not by themselves raise a protected liberty interest, according to the Court. In Siegert v. Gilley, 500 U.S. 226 (1991) and Paul v. Davis, 424 U.S. 693 (1976), the Supreme Court has made it clear that injury to reputation, by itself, does not rise to the level of a constitutional deprivation. Before any reputational injury is constitutionally recognizable, it must be great and it must be accompanied by a change in the injured person's status. Silano v. Sag Harbor Union Free School Dist., 42 F.3d 719, 724 (2d Cir. 1994); Buxton v. Plant City, 871 F.2d 1037, 1042-43 (11th Cir. 1989); Beitzell v. Jeffrey, 643 F.2d 870, 878 (1st Cir. 1981); Barcelo v. Agosto, 876 F. Supp. 1332,1345 (D. P. R. 1995). *See also* Ratliff v. City of Milwaukee, 795 F.2d 612, 625-26 (7th Cir. 1986) (even when made in the course of an involuntary dismissal, the statements must make it virtually impossible for the employee to find a new position in his or her chosen profession); Wilde v. County of Kandiyohi, 811 F. Supp at 446, 454 & n.8 (D. Minn. 1993) (even though plaintiff had alleged sexual harassment, no liberty interest was implicated because she did not allege any stigma that would keep her from taking advantage of other employment opportunities). Winter sees this as a semi-legitimate response to the fear that § 1983 could be used to create liability for any misconduct that is related in some broad way to government employment, no matter how insignificant or inadvertant the misconduct. *See* discussion under causation submodel, *supra* notes 51-65 and 80-85, and accompanying text.

148. A relaxed interpretation of the eleventh amendment and the expanded interpretation of section 1983 could easily eliminate most state court control over controversies arising from state governmental action. As long as an individual claimed deprivation of a colorable federal "right, privilege, or immunity" by state officials and willingly limited the relief sought to relief against the officials themselves, federal district courts would have original jurisdiction over the claim under section 1983.

> [G]iven the spectre presented by such possibilities, one might presume that federal courts would devise ways to limit federal preemption and federal-court overcrowding. The courts have used two basic tactics, neither of which secures a firm boundary between the inside and the outside of federal district courtrooms.
>
> The first tactic, judge-created limitations upon the exercise of federal original jurisdiction, has spawned a number of pragmatic boundary markers whose application follows few clear principles. [These boundaries have their outer limit in the language of *Monroe v. Pape* itself, never squarely discountenanced by the Supreme Court.]
>
> The second tactic centers on the interpretation of the federal "rights, privileges, or

the "universal" state action model itself. As explained above, this interplay has been documented by others, but it is worthwhile to examine the phenomenon again briefly, because it sheds light on the true nature of both state action and "color of law."

III. INTERPLAY BETWEEN SUBSTANTIVE CONSTITUTIONAL LAW AND THE LAW ON CONSTITUTIONAL CONSTRAINTS

The Court has tended to limit its *explicit* discussion of constitutional constraints to the "color of law" cases and "state action" cases discussed in Part II, implying the existence of a universal model. Yet the Court's pronouncements as to the meaning of particular constitutional provisions sometimes set forth a different model, or bend the supposedly universal model beyond recognition. It might be useful to examine some of the interplay in five discrete areas of substantive constitutional law, and see what models are in fact being used, and could be used. In doing this, it may be helpful to keep in mind two hypotheticals previously suggested. In one, a woman is first detained in an isolated area by an off-duty but in-uniform police officer pretending to investigate a crime, and then sexually assaulted by the officer. In the other, the facts are the same, except that the rapist is a private citizen using a fake badge and uniform, obtained through no negligence of any government actor.

A. *Fourth Amendment*

There has been little direct focus on state action for purposes of the Fourth Amendment, in part because the Court has held that some form of intent is required for a seizure:

> It is clear . . . that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . ., nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . but only when there is a governmental termination of freedom of movement *through means intentionally applied*.[150]

The requirement of a "governmental" termination of freedom of movement suggests a typically vague Governmental model rather than a Legalist model for the Fourth Amendment, no more refined than the conclusion in *Monroe* that the officers were "about their business." Of course, there is also the requirement that a search or seizure be "reasonable" within the meaning of the Fourth Amendment. This means that a court must balance "the nature and

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> immunities" to which section 1983 refers. When does deprivation of an individual's interest become a deprivation of a right, privilege, or immunity secured by the Constitution or by federal laws?

Lawrence A. Alexander & Paul Horton, Ingraham v. Wright: *A Primer for Cruel and Unusual*

quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[151] Where an officer is acting for a purely personal purpose, the search or seizure would presumably always be unreasonable, because there is no legitimate governmental interest to be weighed against the intrusion. Thus, the Fourth Amendment "reasonableness" requirement could itself be a source of limitation on the definition of state action in these cases: it makes little sense to define state action broadly when the constitutional provision itself is defined in such a way that it will necessarily be violated in all the marginal cases.[152] But because the argument that officers were not going about their official duties has been put forward almost exclusively under the "color of law" rubric, no court appears to have independently addressed whether the Fourth Amendment applies to government employees acting on purely personal missions.[153] Arguably, neither of the hypothetical situations put forward above would fall within the Fourth Amendment prohibition, if it follows the constraint model suggested here.[154]

Alexander and Horton agree that the Fourth Amendment might be the "best chance" for a Governmental model to operate in a principled way:

> We believe that it is plausible to assume that some provisions of the Constitution — and the Fourth Amendment is a highly eligible candidate —

Jurisprudence, 52 U.S.C. L. REV. 1305, 1312-13 (1979).

149. Paul v. Davis, 424 U.S. 693 (1976) ("such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.").

150. Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989). *But see* Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person"). The Court has held that § 1983 does not itself impose any state of mind requirement, so that the only state of mind requirement in a § 1983 case must come from the constitutional or statutory provision that underlies the claim. Daniels v. Williams, 474 U.S. 327, 329-30 (1986).

151. *Brower*, 489 U.S. at 597.

152. This question has great practical significance, because the objective reasonableness standard, rather than any standard arising out of the due process clause, applies to "all claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen," Graham v. Connor, 490 U.S. 386, 395 (1989), and to arrests without probable cause generally, Albright v. Oliver, 114 S.Ct. 807 (1994).

153. Of course, the Fourth Amendment is applicable to the states only by means of the Fourteenth Amendment, so that in theory any of the more traditional state action approaches could be brought to bear on Fourth Amendment claims against non-federal law enforcement officers. However, as explained in the text, the Supreme Court has shown little inclination to adopt this approach to constitutional provisions it sees as more "specific" than the Fourteenth Amendment. *See* Graham v. Connor, 490 U.S. at 395.

154. The hypotheticals are probably distinguishable from the police conduct in *Monroe*, in that the police in *Monroe* were clearly attempting to execute a search and an arrest. Although

> speak directly to non-lawmaking persons who possess a certain legal authority. For example, the feature that distinguishes an illegal police search and seizure from an illegal private citizen search and seizure may be that the legal authority of the police is understood to preclude the victim's resistance to its illegal exercise. Moreover, possession by the police of such legal authority might well be consistent with the legal regime that is prescribed by the Fourth Amendment. Therefore, it is conceivable that the Fourth Amendment is concerned, not only with laws governing searches and seizures, but also with particular acts of searching and seizing when those acts are committed by persons possessing certain (constitutionally proper) legal authority.[155]

"Nevertheless," they continue, "even in such a highly favorable environment as the Fourth Amendment, the Governmental model is threatened by collapse into either the Legalist or the Naturalist model":

> On the Legalist side, the argument comes that possession of unusual legal authority is akin to having a limited lawmaking power. Thus, when the police engage in an illegal search and seizure, even one that seems to be illegal under state law, their act is one of lawmaking. Peculiar lawmaking, to be sure: it is contrary to higher order laws of the state; and it is valid only temporarily and only with respect to its restriction of the ordinary legal right of the victim to resist . . . . Nevertheless, whenever an act is one that can only be engaged in by one possessing unusual legal authority, the proponent of the Legalist model can deem it to be an act of lawmaking, and thus assimilate it into his model.[156]

It seems to me irrelevant whether we call this an "expanded" Legalist model or a "hybrid" Governmental model, so long as it finds its source in the Fourth Amendment itself. And there is strong appeal to the idea that exercise of broad discretion or authority delegated by the legislature ought to be treated as lawmaking: after all, we would presumably treat administrative rulemaking and even adjudication as lawmaking. Yet, for Alexander and Horton, use of this model seems to have its source in the way that state law insulates law enforcement officers rather than in the Fourth Amendment itself. It might, perhaps, be more principled to incorporate this more expansive model into the "unbundled" color of law model suggested at the end of Part II of this Article. (Moreover, even under this more expansive view of whom the Fourth Amendment commands, the conduct in the hypotheticals might still fail to qualify as state action, because it falls so far outside the bounds of the authority delegated to investigative officers. There might still be the limitation that the officers must be engaged in the enforcement of the law, broadly speaking.[157])

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the search and the arrest far exceeded the scope permitted by the Fourth Amendment under those circumstances, it was still the search and the arrest that were being challenged; arguably, this misconduct must be treated differently than sexual assault following a seizure executed *solely for the purpose of facilitating the assault* (the situation in the second hypothetical).

B. Eighth Amendment

The Eighth Amendment is violated only by conduct that amounts to deliberate indifference, and this mental state requirement has been held to apply both to claims of inadequate medical care[158] and challenges to prison living conditions.[159] Moreover, something worse than deliberate indifference is necessary for an Eighth Amendment claim alleging excessive force in a prison setting: the court must examine whether force was applied in a good faith attempt to maintain or restore discipline or "maliciously and sadistically" in order to cause harm.[160]

This limitation of liability, based on the mental state of the prison officer rather than explicitly on the connection between the conduct and the government, seems somehow at odds with the other forms of the Governmental model we have found thus far, but this may be the result of the unique nature of confinement. A prisoner has been deprived by the government of almost every conceivable means of resisting or preventing harm, particularly where the person causing the harm is a prison officer; under these circumstances, any person who manages to cause harm to the prisoner has almost certainly either used some power of office, or at least acted with the connivance of a government

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Alternatively, *Monroe* might best be understood as purely a "color of law" case. After all, having concluded that municipalities are not "persons" suable under § 1983, the Court may have seen it as incongruous to grant a large role to the "state action" idea in § 1983 jurisprudence. In other words, "color of law" seemed to be sufficient by itself; the Court could have been suggesting that once that test was satisfied, neither the Fourth nor the Fourteenth Amendment should form a separate barrier to successful prosecution of the claim. Under this approach, the plaintiff need only show conduct that (1) is "under color of law" and (2) would constitute a constitutional deprivation if it had been ordered by the government in its "lawmaking" capacity. *Monroe* is thus compatible with the "unbundling" approach put forward at the end of Part II and again in Part IV of this Article.

155. ALEXANDER & HORTON, *supra* note 22, at 88.

156. *Id.* (footnote omitted).

157. The expanded Legalist model is also subject to the criticism that, in its expansion, it has begun a freefall toward the Naturalist model:

> On the Naturalist side, the rejoinder comes that *everyone*, without as well as within government, possesses special legal authority with respect to particular acts. A property owner has special legal authority with respect to her property. A parent has special legal authority with respect to her child. . . . If the concept of "lawmaking" is broad enough to encompass "abuse of legal authority," and if the concept of "legal authority" is expansive enough to encompass the powers possessed by private citizens, then any act that the Naturalist would deem to be unconstitutional can be labeled an act of lawmaking and deemed to be unconstitutional on the Legalist model.

Id. at 89. One possible answer to this lies in the original expansion. It might be that the particular authority given to law enforcement officers is different from the kind of authority given to parents and property owners. Even where law enforcement officers are themselves violating state law, they are normally favored under law in any clash with private citizens, and it is in this way that state law "precludes resistance," as Alexander and Horton put it. In clashes between two private citizens, *e, g.*, a property owner and a trespasser, the law does

officer. This conduct satisfies the requirements of all the submodels developed thus far as part of the Governmental model. Two consequences seem to have flowed from this: (1) it has become necessary for the Court to find something *else* to include in the Eighth Amendment test, to avoid almost automatic liability for individual prison officers (and it has done this); and (2) the Court has had little occasion to differentiate between "color of law" and some independent state action requirement in the Eighth Amendment context.

Of course, there is the limitation that the Eighth Amendment can only be implicated by conduct occurring after conviction,[161] which might be viewed as a kind of Legalist limitation.[162] Significantly, however, the Court has rejected a purely Legalist approach, as embodied in the argument that the Eighth Amendment applies only to penalties purposefully imposed by a governmental entity.[163] Thus, the closest model remains some variant of the Governmental approach, at least in the context of those persons convicted of a crime.

C. Procedural Due Process

Under current doctrine, a procedural due process claim must allege facts that would support a finding of a Fourteenth Amendment life, property, or liberty interest that was invaded.[164] This requirement arises out of the Court's

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not normally allow the conclusion that both have violated the law at the same time: either the landowner acted unlawfully, and the trespasser's rights were violated, in which case we cannot say that the law "precludes resistance" to what the property owner did; or the property owner acted lawfully. Only rarely does the law truly do what it does to citizens confronted by outrageous police conduct: preclude resistance to what is itself an unlawful act. The special nature of this status might, at least in theory, justify a special model.

158. Estelle v. Gamble, 429 U.S. 97 (1976).

159. Wilson v. Seiter, 501 U.S. 294 (1991). The Court later clarified the deliberate indifference standard, holding that in the Eighth Amendment context, it requires a showing that prison officials knew of a "substantial risk of serious harm." Farmer v. Brennan, 114 S.Ct.1970, 1980 (1994).

160. Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. McMillian, 503 U.S. 1, 9 (1992).

161. Ingraham v. Wright, 430 U.S. 651, 671 (1977). This means, of course, that the Eighth Amendment could not be successfully invoked by the plaintiff in the hypotheticals of the off-duty officer or the private citizen using a show of authority to effect a rape. *See also* Cornwell v. Dahlberg, 963 F.2d 912 (6th Cir. 1992). Pretrial detainees have rights at least as great as those of prisoners in custody following conviction and sentencing; the question not yet answered by the Supreme Court is whether their rights are greater. Hill v. Nicodemus, 979 F.2d 987, 991 (4th Cir. 1992). Of course, this raises an interesting problem under the Supreme Court's new, narrowly circumscribed view of due process: if the Eighth Amendment is not directly applicable to pretrial detainees, and the due process clause is the only limitation on state mistreatment of detainees, but random and unauthorized conduct for which state law appears to provide a remedy does not amount to state action under the due process clause (*see* discussion, *infra* at text accompanying notes 168-193), aren't pretrial detainees in a *worse* position than post-conviction prisoners, because they are left with no federal recourse following a random and unauthorized infliction of harm?

162. Alexander and Horton were among the most vocal of critics when the Supreme Court announced this limitation on the reach of the Eighth Amendment. Alexander & Horton,

creation of a two-part test for due process claims. First, a claimant must allege deprivation of a federally-protected liberty or property interest. To emphasize: this is not just *any* liberty or property interest,[165] but one that ascends to the level of an interest sufficient to invoke the due process clause.[166] Only *after* conclud-

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supra note 148, at 1334-47. *See also* Irene Rosenberg, Ingraham v. Wright: *The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978).

163. Justices Thomas and Scalia have stated the argument in two recent dissents. Hudson v. McMillian, 503 U.S. at 17-20 (Thomas, J., dissenting); Helling v. McKinney, 509 U.S. 25, 38-40 (1993) (Thomas, J., dissenting). For a more elaborate discussion of the argument, *see* Thomas K. Landry, Punishment and the Eighth Amendment, 57 OHIO ST. L.J. 1607 (1996).

164. Geddes v. Northwest Missouri State College, 49 F.3d 426, 429 (8th Cir. 1995); Winegar v. Des Moines Indep. School Dist., 20 F.3d 895, 899 (8th Cir.), *cert. denied*, 115 S.Ct. 426 (1994); Miller v. Lovell, 14 F.3d 20, 21 (8th Cir. 1994); *see also* Wilde v. County of Kandiyohi, 811 F. Supp. 446, 454 (D. Minn. 1993), *aff'd* 15 F.3d 103 (8th Cir. 1994); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985) (property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"); Mummelthie v. City of Mason City, 873 F. Supp. 1293, 1329-31 (1995); Koelsch v. Town of Amesbury, 851 F. Supp. 497, 500 (D. Mass. 1994) (because the plaintiff "remains in his job as Town Manager . . . the complaint on its face fails to allege that he was deprived of an identifiable property interest"); Pierce v. Engle, 726 F. Supp. 1231, 1237 (D. Kan. 1989) ("[a] public employee's suspension with pay does not implicate a constitutionally protected property interest").

165. It is unclear now whether there can be an "interest" that is *not* a life, liberty, or property interest. In a 1979 article, Alexander and Horton noted the difficulty of conceiving of such a thing, and added:

> Indeed, human interests in "life" and in "liberty" probably ought to be included within the ordinary legally trained individual's notions of "property." This is so because all "interests" — or at least "interests" the law recognizes or ought to recognize — are coextensive with all "property."

Alexander & Horton, *supra* note 148 at 1311 & n.32 (citing, RESTATEMENT OF PROPERTY §§ 1-13 (1936) and W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 35-64 (1919)). One might object that this "telescoping" of the language makes the words "life" and "liberty" as used in the Fourteenth Amendment superfluous, and that courts must strive to interpret the language of the Constitution so as to not make words superfluous. Nevertheless, the basic idea that, taken together, the three words are inclusive of all "interests" seems sound.

166. Board of Regents v. Roth, 408 U.S. 564 (1972). In *Roth*, the Court makes the distinction explicitly:

> It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.
>
> [And, while Roth] surely had an abstract concern in being rehired, . . . he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 575, 578. Perhaps it is unfair to say that the interest must "ascend" to constitutional significance, because this carries the implication that interests are measured on a vertical scale:

> Undeniably, the respondent's re-employment prospects were of major concern to him — concern that we surely cannot say was insignificant. And a weighing process has long been part of any determination of the *form* of hearing required in particular

ing that the claimant was deprived of a constitutionally protected life, liberty, or property interest (as opposed to a constitutionally *un*protected life, liberty, or property interest) should a court proceed to the question of whether the deprivation has taken place according to the requirements of the due process clause.

The creation of this two-step approach was a major development in procedural due process, and, as Winter suggests, it may have been in part the *result* of an overbroad conception of state action, because it was obvious to the Court that this approach would have the effect of limiting the number of due process claims that can withstand a motion to dismiss,[167] but at least it had little direct

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> situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake .... We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

Id. at 570-71 (footnote omitted). There seems to be some overlap between a property interest inquiry and a liberty interest inquiry in cases of sexual harassment. Plaintiffs who allege property deprivations based on sexual harassment have had mixed success, in part because courts try to use a constructive discharge model. As noted by the court in Campbell v. Kansas State Univ., 780 F. Supp. 755, 765-66 (D. Kan. 1991), "a finding of sexual harassment does not necessarily mandate a finding of constructive discharge," and where the harassment is not ongoing, and no complaint is made, constructive discharge will not be found. *See also* Landgraf v. USI Film Products, 968 F.2d 427, 430 (5th Cir. 1992) ("[t]o prove constructive discharge, the plaintiff must demonstrate a greater severity of pervasiveness of harassment than the minimum required to prove a hostile working environment"), *aff'd*, 114 S.Ct. 1483 (1994); Smith v. World Ins. Co., 38 F.3d 1456, 1461 (8th Cir. 1994) (plaintiff must show that a reasonable person would find the conditions intolerable and that the employer created the conditions with the intent to force the plaintiff to quit); Angarita v. St. Louis County, 981 F.2d 1537, 1544 (8th Cir. 1992) (resignations by public employees are presumed to be voluntary); Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987) (for constructive discharge, working conditions must have been "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign"); Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1162 (3d Cir.) ("a reasonable employee will usually explore ... alternative avenues thoroughly before coming to the conclusion that resignation is the only option"), *cert. denied*, 114 S.Ct. 441 (1993); Stewart v. Weis Mkts. 890 F. Supp. 382, 392 (M.D. Pa. 1995) ("[p]art of the employee's obligation of reasonableness is an obligation to give the employer an opportunity to correct a situation before resigning on the grounds that conditions are intolerable. . . .").

167. The two-step inquiry seems to pose particular problems for courts in cases where no physical harm is alleged. Some plaintiffs have asserted a liberty interest in not being subjected to sexual advances, with mixed results. Some courts have taken the view that sexual advances that do not involve touching are no more severe than racial or other insults, which have frequently been held not to rise to the level of a liberty deprivation. *See* McDowell v. Jones, 990 F.2d 433, 434 (8th Cir. 1993); Martin v. Sargent, 780 F.2d 1334, 1338 (8th Cir. 1985); Smith v. Copeland, 892 F. Supp. 1218, 1230 (E.D. Mo. 1995) ("[g]estures and abusive language, without more, are not actionable under § 1983."); Cummings v. McCarter, 826 F. Supp. 299, 302 (E.D. Mo. 1993); Ellis v. Meade, 887 F. Supp. 324, 329 (D. Me. 1995). *See also* Patton v. Przybylski, 822 F.2d 697, 700 (7th Cir. 1987) (derogatory remarks do not constitute a constitutional violation); Slagel v. Shell Oil Refinery, 811 F. Supp. 378, 382 (C.D. Ill. 1993) ("[v]erbal harassment and abusive language, while unprofessional and inexcusable, are simply not sufficient to state a constitutional claim under Section 1983"). *Cf.* Doe v. Taylor Indep. School Dist., 15 F.3d 443, 451 (5th Cir. 1994) (en banc) (recognizing

effect on the Court's state action or "color of law" jurisprudence. The same cannot be said of some of the Court's more recent procedural due process cases. In cases such as *Parratt v. Taylor*[168] and *Hudson v. Palmer*,[169] the Court crafted a rule whereby a "random and unauthorized" deprivation cannot be said to violate the due process clause, so long as the state provides a mechanism by which such deprivations can be addressed. The state's "action," at least for purposes of procedural due process, "is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy."[170] This approach fits squarely within the Legalist model described by Alexander and Horton, and amounts to a rejection of the Governmental model: the conduct was conceded to be conduct generally within the scope of official duties, but was, because of its random and unauthorized nature, outside the scope of "lawmaking," the important line for the Legalist model.[171] What appears to be driving the Court

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liberty interest in "bodily integrity" that is necessarily violated when a state actor sexually abuses a child); Wilson v. Webb, 869 F. Supp. 496 (W.D. Ky. 1994) (same); Obersteller v. Flour Bluff Indep. School Dist., 874 F. Supp. 146, 148 (S.D. Texas 1994) ("*Doe* does not stand for the proposition that a student has a liberty interest in remaining free from harassment . . . ."), citing Santiago-de-Castro v. Morales-Medina, 737 F. Supp 729 (D. P.R. 1990). *But see* Benigni v. City of Hemet, 879 F.2d 473, 478 (9th Cir. 1988) (constant police harassment of a small business might be violative, because the "due process clause protects a liberty or property interest in pursuing the common occupations or professions of life...."). Even some unwelcome touching does not rise to the level of a constitutional deprivation. Wade v. Yarbrough, 887 F. Supp. 126, 130 (S.D. Miss. 1995) (although plaintiff alleged that a police officer "grabbed her derriere without her consent, and although this may state a claim for battery under Mississippi law, such an action . . . does not rise to the level of a deprivation of a right guaranteed by the United States Constitution").

Attempts to recast these claims as property deprivations, using a quid pro quo model from Title VII sexual harassment cases, have been less successful. In other words, there is little authority for the proposition that a state employee has a property interest in not being *in fear of* anything, particularly not in fear of being discharged from an at will position. Even under Title VII, there might not be liability under these circumstances:

> [I]t takes more than saber rattling alone to impose *quid pro quo* liability . . . ; the supervisor must have wielded the authority entrusted to him to *subject the victim to adverse job consequences* as a result of her refusal to submit to unwelcome sexual advances.

Gary v. Long, 59 F.3d 1391, 1396 (D.C. Cir. 1995) (emphasis added). *See also* cases cited in *Gary* to same effect. *Contra* Nichols v. Frank, 42 F.3d 503, 513 (9th Cir. 1994) ("a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo sexual harassment").

168. 451 U.S. 527 (1981).

169. 468 U.S. 517 (1984).

170. *Id.* at 533. The continued effect of *Parratt* and *Hudson* cannot be denied. Indeed, it would seem that the definition of random and unauthorized is expanding rather than contracting. *See* Cathey v. Guenther, 47 F.3d 162, 164 (5th Cir. 1995) (dismissing § 1983 action by a cat owner against police chief who allegedly instructed a neighbor of the cat owner that stray cats may legally be shot, because the alleged misconduct (incorrect legal advice by a chief of police) was essentially random and unauthorized, and the cat owner had not sought

here, perhaps more than the principled conclusion that procedural due process should follow a different model than other constitutional provisions, is the fear that, having created a high standard of procedural protection for citizens dealing with the government, extension of that protection to all conduct covered by the previously-approved Governmental model for state action would simply impose too high a burden on governments and, perhaps more importantly, federal courts. (The burden on courts would seem greater than the burden on governments because, by the time *Parratt* was decided, the development of qualified immunity and a Legalist model for entity liability meant that the actual disruption of *government* business would be little worse than it had been prior to *Monroe*, despite the Warren Court's expansion of due process.)

Winter refers to the *Parratt/Hudson* rule as one of the "distortions" that occur when the Court attempts to limit the reach of Section 1983.[172] Moreover, he recognizes that this development reflects a reductionist trend that, if taken to its logical extreme, could ultimately lead to adoption of a pure Legalist model for all constitutional provisions, or perhaps even the elimination of the incorporation doctrine, depending on how the Legalist model is envisioned. Under the fully reductivist view, the state has never "acted" until all state avenues of relief have been exhausted, and "no 'deprivation' could truly be said to have the sanction of 'the State' as long as some state court remedy remained available."[173] Of course, as another commentator has noted, any approach that shifts the focus from the conduct of individual state officers to the remedial process available is a rejection of the Governmental model and a reversal of *Monroe*: if Monroe brought suit under this new regime, the court would have to conclude that "because Illinois provided a damage remedy for the assault and battery and the trespass . . . Monroe received all the process that was due."[174]

Another "distortion," or another step toward the Legalist model, came in the 1986 companion cases of *Daniels v. Williams*[175] and *Davidson v. Cannon*.[176] The negligence claims of two prisoners were rejected on grounds that negligence cannot amount to conduct "attributable" to the state, at least under the due process clause: in other words, it is not "lawmaking" as that concept is used in the Legalist model. Again, there was no doubt that the guards were acting in the scope of their official duties, so that the Governmental model would have dic-

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compensation for the cat under state law); Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990) (dismissal of § 1983 action by student who allegedly had been beaten by school principal was appropriate because the state provided remedies for this sort of misconduct); I-Star Comm. Corp. v. City of East Cleveland, 885 F. Supp. 1035, 1040 (N.D. Ohio 1995) (any complaint in a due process case must contain an allegation that state remedies are unavailable or inadequate).

171. Interestingly, the development of a Legalist model for procedural due process was predicted a year before *Parratt* by at least one commentator:

> It is reasonable to suppose that any prior hearing requirements imposed by the due process clause apply, if at all, only to those situations in which a government or its

tated a finding of state action; the mental state requirement operates to exclude many of the same cases that the Legalist model would exclude.[177]

Much of the confusion surrounding these cases could be eliminated if the Court (1) explicitly adopted a quasi-Legalist model for procedural due process purposes, and (2) explained what it is about the due process clause that requires a model different from that used for other constitutional protections. Of course, if, as Winter suggests, it is simply the volume of litigation that has caused the court to retreat toward the Legalist model in this area, a principled explanation could hardly be forthcoming.

Under the current model, however, neither of the hypotheticals described above could result in a successful claim based upon procedural due process, if we assume that the state in which this occurred provides some tort recourse for victims of sexual assault, because they represent exactly the kind of random and unauthorized conduct described in *Parratt*.

D. Substantive Due Process

In *Daniels*, the Court suggested that a state's provision of a post-deprivation remedy will not be fatal to a complaint that fairly alleges not simply a violation of purely procedural due process rights, but something more: a violation of the right to be free of "certain government actions regardless of the fairness of the procedures used to implement them."[178] Thus, the Court appears to be trying to preserve a Governmental model for this species of "substantive" due process claim. However, the Court has left the scope of substantive due process so unclear as make its availability in any particular case a matter of doubt, and the lower courts have done little to provide a workable framework in this area. This is perhaps an inevitable consequence of trying to preserve the Governmental model here: as plaintiffs are forced to abandon all procedural due process claims that stem from "random and unauthorized conduct" and for which the state provides a constitutionally adequate remedy, it is only natural that they will turn to substantive due process as a way of recasting the original claim and bypassing the *Parratt/Hudson* barrier. A court that either does not understand or dislikes the *Parratt/Hudson* limitation could be expected to take an expansive view of substantive due process and be receptive to such claims, while a court that understands and approves of the *Parratt/Hudson* limitation can be

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> representative has made a *deliberate* decision that threatens a protected interest. The Constitution then may require process that ensures that the decision is made carefully and with full information. . . . But it would be nonsense to ask for similar safeguards when the deprivation is accidental . . . . [In that instance, there is] no deprivation of a constitutional right because no prior process was due.

Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 32-33 (1980) (footnotes omitted).

172. Winter, *supra* note 35, at 410 n.432.

173. *Id.* at 410-11.

expected to either (1) take a narrow view of substantive due process and reject these claims as merely procedural due process claims recast in new language, or (2) take an expansive view of *Parratt/Hudson*, and reject the claims on grounds that they involved random and unauthorized conduct, even if they would otherwise qualify as violations of substantive due process.

For example, some courts adhere to the view that substantive due process liberty interest violations are limited to instances of physical harm that shock the consciences of reasonable people. The origin of this limitation is *Rochin v. California*,[179] in which the Court held that involuntary pumping of a suspect's stomach violated substantive due process.[180] In *United States v. Lanier*, a recent case involving the prosecution of a state judge, the Sixth Circuit rejected the argument that *all* sexual misconduct by government actors *necessarily* violates substantive due process, noting the lack of authority for the argument:

> To bolster their constitutional theory, government counsel . . . cite several lower court decisions . . . . These are civil cases which created a general constitutional right to be free from sexual harassment and coercion. All of these civil decisions, rather than pointing to precedent establishing the right, make assertions such as: "surely the Constitution protects a schoolchild from physical sexual abuse . . . by a public schoolteacher," . . . or "the notion that individuals have a fundamental substantive due process right to bodily integrity is beyond debate" [T]hese broad statements are not supported by precedent indicating that a general constitutional right to be free from sexual assault is part of a more abstract general right to "bodily integrity."[181]

In addition to being puzzled about what kind of assaults might automatically "shock the conscience" or violate the abstract "right to bodily integrity," the court was critical of the trial court's decision to simply shunt the question

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174. Zagrans, *supra* note 36, at 523.

175. 474 U.S. 327 (1986).

176. 474 U.S. 344 (1986).

177. Alexander and Horton see *Daniels* and *Davidson* as steps toward a Legalist model, except insofar as Justice Rehnquist's opinion denies any relevance for a state's decision to immunize officials from tort liability: "the Legalist would have examined fully the substantive constitutional merits of the state laws that failed to provide Daniels and Davidson with damages remedies against their jailors." ALEXANDER & HORTON, *supra* note 22, at 117. Of course, if Justice Rehnquist meant that mere negligence does not implicate any constitutional values, the opinions could be reconciled with a more pristine Legalist model. *Id.* at 118.

178. Daniels v. Williams, 474 U.S. 327, 331 (1986).

179. 342 U.S. 165 (1952).

180. Presumably, the facts in *Rochin* would today be analyzed under the Fourth Amendment only. Since *Rochin* was decided, the Court has held that the Fourth Amendment is applicable to the states through the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643 (1961), and that claims of excessive police conduct should be analyzed directly under the more specific Fourth Amendment standards rather than under substantive due process principles, Graham

onto the shoulders of jurors:

> [The *Rochin*] Court intended the standard to be one of law, to be interpreted and applied by judges .... When a jury is asked to make a factual determination of whether a particular act "shocks the conscience," the instruction requires them to make an essentially arbitrary judgment. "Shocks the conscience" is too indefinite to give notice of a crime. The language as applied in different cases will yield results that depend too heavily on factual particularity of an individual set of events and upon biases and opinions of individual jurors.[182]

Indeed, as Justice Stevens himself noted in *Collins v. City of Harker Heights*,[183] "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and openended."[184]

But other courts are more receptive to these claims, even as they seek to keep the cause of action somewhat circumscribed. In *Doe v. Taylor Independent School District*,[185] the Fifth Circuit concluded that a teacher's seduction of a student amounted to a substantive due process violation. The court leaned heavily on the oft-quoted language in *Daniels* describing substantive due process, and on the following language in *Planned Parenthood v. Casey*:

> Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well.[186]

The Fifth Circuit also relied heavily on one of its own precedents, in which it had recognized that "corporal punishment in public schools 'is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated

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v. Connor, 490 U.S. 386, 395 (1989). It is unclear whether this undercuts *Rochin*'s value as precedent. *See* Fagan v. City of Vineland, 22 F.3d 1296, 1316 (3d Cir. 1994) (Cowen, J., dissenting) (*Rochin* now applies only to the question of whether to exclude evidence, and the "shocks the conscience" test should not be applied to harm that results from police pursuit); McKinney v. Pate, 20 F.3d 1550, 1556 n.7 (11th Cir. 1994) (en banc) ("The *Rochin* standard has no place in a civil case for money damages.").

181. United States v. Lanier, 78 F.3d 1380,1388 (6th Cir. 1996), *cert. granted*, 116 S.Ct. 2522, 64 U.S.L.W. 3837 (June 17, 1996), quoting Doe v. Tayor Indep. School Dist., 15 F.3d 443, 451 (5th Cir. 1994) (en banc), and Walton v. Alexander, 44 F.3d 1297, 1306 (5th Cir. 1995) (Parker, J., concurring). *Lanier* involved a prosecution under the criminal analog to section 1983, 18 U.S.C. § 242 (1994), but the court in this section was grappling with the underlying constitutional violation.

182. *Lanier*, 78 F.3d at 1389.

183. 503 U.S. 115 (1992).

184. *Id.* at 1068. *See also Doe*, 15 F.3d at 476 & n.2 (Jones, J., dissenting) (since *Rochin*, the Supreme Court has spoken of a substantive due process right to bodily integrity only in

to the legitimate state goal of maintaining an atmosphere conducive to learning'."[187]

Thus, the substantive due process inquiry, like the procedural due process inquiry, is evolving into a two-step affair. The first step is the same: has there been a deprivation of a life, liberty, or property interest that is of constitutional significance. But the second, rather than focusing on process, asks whether the interest at hand is so important that its invasion would "shock the conscience" or violate a "fundamental right," even if every possible procedural protection had been afforded the victim.[188]

This attempt to separate the procedural from the substantive fails to convince, at least in the context of unauthorized conduct, because it fails to recognize the level of generality with which most of these substantive due process claims are pursued. Presumably, if pumping Rochin's stomach had been done to save Rochin's life, rather than to acquire evidence, then the conduct would not have shocked the conscience. Thus, the interest invaded was "the right not to have one's stomach pumped solely to acquire evidence of a crime," rather than the more general "right not to have one's stomach pumped." Similarly, there might be circumstances under which a child might be subject to force, as acknowledged by the Court in *Ingraham v. Wright*, even though it might shock the conscience for a teacher to administer force solely to punish or solely to gratify a desire to cause pain, no matter how much process was afforded the child. The right might thus be described as "the right not to be struck with a stick solely to gratify a desire to cause pain," rather than the more general "right not to be struck." The Fifth Circuit acknowledged as much when it quoted the language from its earlier opinion on corporal punishment: the focus on arbitrariness and lack of relation to a legitimate state goal makes the procedural component obvious.[189] The right acknowledged in the earlier case is the "right not to

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abortion-related cases: "[T]he heavy guns of constitutional law — particularly a subjective doctrine like substantive due process — should be deployed in service of goals that implicate basic policies of government."); Skinner v. City of Miami, 62 F.3d 344, 347-48 (11th Cir. 1995) (new employee had no substantive due process right to be free from hazing, which included rubbing of genitals over the top of the new employee's head); Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990) ("[t]he Substantive Due Process Clause is not concerned with the garden variety issues of common law contract...."); McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) (rights created only by state tort law and employment law do not implicate substantive due process interests).

185. 15 F.3d 443 (5th Cir. 1994) (en banc).

186. 505 U.S. 833, 846 (1992) (*quoted in* Doe v. Taylor Indep. School Dist, 15 F.3d at 450).

187. Fee v. Herndon, 900 F.2d 804, 808 (5th Cir.), *cert. denied*, 498 U.S. 908 (1990) (quoting Woodard v. Los Fresnos Indep. School Dist., 732 F.2d 1243, 1246 (5th Cir. 1984)).

188. The tendency to assert the existence of categorical or fundamental rights here is evident also in Walton v. Alexander, 44 F.3d 1297 (5th Cir. 1995), and Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476, 479 (9th Cir. 1991) (recognizing "constitutional right to be

be subjected to arbitrary and capricious invasions of bodily integrity." The Fifth Circuit sought to distinguish the facts in its case on grounds that "there is never any justification for sexually molesting a schoolchild, and thus, no state interest, analogous to the punitive and disciplinary objectives attendant to corporal punishment, which might support it."[190] But the court has fudged a little here, by characterizing the conduct as "molestation" rather than "touching" or even "penetration": the right has now metamorphosed into "the right to be free of touching done to gratify sexual desire" rather than "the right to be free of touching." The purpose of the conduct is now integral to its classification as a substantive due process violation.

But if the purpose of the conduct is crucial, three conclusions must follow: (1) the *Lanier* court must be correct in its assertion that there really is no absolute right to "bodily integrity"; (2) the *Doe* court must be incorrect in making the opposite assertion; and (3) there is no legitimate basis for not applying the *Parratt/Hudson* limitation. Once the focus includes purpose (*i.e.*, once the right is defined as "the right not to have an interest invaded for an improper purpose"), any "random and unauthorized" invasion of a constitutionally protected interest (*e.g.*, bodily integrity) will automatically violate substantive due process, because "random and unauthorized" invasions by definition have improper purposes.[191] In other words, any procedural due process claim that is defeated by use of *Parratt/Hudson* would be *guaranteed* to succeed as a substantive due process claim, if no similar limitation were applied, and *Parratt/Hudson* would have no meaning.

If we look at the dilemma another way, it may be that the Legalist model is itself a part of the "shock the conscience" test: in order for an act to be shock-

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free from sexual assaults"). Some courts and commentators have suggested that the "fundamental rights" inquiry is different, and potentially more inclusive, than the "shocks the conscience" inquiry. *See, e.g.*, United States v. Lutrell, 889 F.2d 806, 813 (9th Cir. 1989); JOHN E. NOWAK, *ET AL.*, CONSTITUTIONAL LAW 367 (3d ed. 1986). The Supreme Court's most recent pronouncements on substantive due process have tended to employ only the "shocks the conscience" test. *See* Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992).

189. Arbitrariness has been a consistent thread in the substantive due process cases. *Collins*, 503 U.S. at 126-27, n.10.; Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985); Hurtado v. California, 110 U.S. 516 (1884); Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989); Honore v. Douglas, 833 F.2d 565, 568 (5th Cir. 1987). *See also* Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (inquiry is whether there has been such a "substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment").

190. *Doe*, 15 F.3d at 452. *See also id.* at 461 (Higginbotham, J., concurring):

> State law may cure a constitutional violation by providing adequate post-deprivation state remedies, but only where the state may at times constitutionally infringe the interest at stake . . . . As the state never has a legitimate basis for inflicting physical sexual abuse on a child, no set of procedural safeguards whether available before or after such a violation would meet the requirements of due process.

ing in a constitutional sense, it must be the government that has done it. If a person who happens to be a government employee does it for his own personal reasons, the conscience cannot be shocked. In *Rochin*, it was important to the Court that Rochin's stomach was being pumped to gain evidence. It seems probable that, if police officers had kidnapped Rochin and pumped his stomach solely for the pleasure of watching him suffer, and Rochin had sued under Section 1983, the Court would either have said that the officers had not acted under color of law, or that there was no substantive due process violation.[192]

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191. Some courts have been explicit about the egregiousness of the conduct being a factor in both the color of law and the substantive due process inquiries. In concluding that Judge Lanier had acted under color of law, the original panel in *United States v. Lanier* stated:

> Furthermore, we wish to emphasize that [t]his case involves much more than a defendant who is a mere public official. Rather, this case involves a state judge who committed various abhorrent and unlawful sexual acts in his chambers, oftentimes while wearing his judicial robe. We consider such egregious misconduct on the part of the defendant to be shocking to the conscience of the court.

33 F.3d 639, 653 (6th Cir. 1994). This use of the governmental status of the actor to satisfy two purportedly unrelated elements of the cause of action seems to be a kind of "double counting," when we examine the case in its entirety, from the perspective of Alexander and Horton's "remedial meta-regime."

192. As suggested earlier in this subsection, some of the language in *Parratt* suggests that it is limited to procedural due process. However, commentators have pointed out that, at bottom, the plaintiff in *Parratt* was complaining about the loss itself, rather than the process that led up to the loss. Henry Paul Monaghan, Comment, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 984-86 (1986); Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 98-102 (1984). Partly in response to this view of *Parratt*, an increasing number of courts are willing to evaluate the adequacy of state postdeprivation remedies even where a substantive due process violation is alleged. Doherty v. City of Chicago, 75 F.3d 318, 325 (7th Cir. 1996) ("in addition to alleging that the decision was arbitrary and irrational, 'the plaintiff must show either a separate constitutional violation or the inadequacy of state law remedies'") (quoting New Burnham Prairie Homes v. Village of Burnham, 910 F.2d 1474, 1475 (7th Cir. 1990), and Polenz v. Parrott, 883 F.2d 551, 558 (7th Cir. 1989)); Weimar v. Amen, 870 F.2d 1989 (8th Cir. 1989); Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987); United of Omaha Life Insurance Co. v. Solomon, 960 F.2d 31 (6th Cir. 1992); McKinney v. Pate, 985 F.2d 1502, 1507 (11th Cir. 1993) (Tjoflat, J., concurring), *rev'd on other grounds* 20 F.3d 1550 (11th Cir. 1994) (en banc).

Sheldon Nahmod has recognized the intuitive attraction of this approach, yet he remains critical of it:

> What [these courts are] worried about is rather clear: the possibility of end running *Parratt* in cases where plaintiffs claim both procedural and substantive due process violations involving property (or liberty) interests grounded on state law. If one is concerned about federalism and overburdened federal courts, this worry is especially acute in substantive due process cases because the substantive component of the due process clause is open-ended and appears to invite federal judicial intervention in state and local government matters. Still, it would have been preferable if these courts had met the substantive due process issues presented head-on and decided squarely that the challenged acts were not arbitrary or capricious, without relying on the availability of state postdeprivation remedies. To do otherwise, as these courts did, was to partially resurrect the position that § 1983's color of law language applies

Because it seems impossible to understand either substantive or procedural due process without reference to the governmental interests that underlay a particular governmental act, a better way to understand all the due process cases might be to simply say that, once it is determined that a life, liberty, or property interest of constitutional significance is implicated, there will be process due, and there will be consideration of the governmental interest at stake; and the greater the encroachment on the interest (*e.g.*, the greater the intrusion into bodily integrity), the greater must be not only the process afforded, but also the governmental interest at stake.[193] Because the governmental interest is part of the calculus, acts undertaken with *no* governmental purpose would seem outside the purview of the due process clause.

Under this more narrow approach, neither hypothetical would support a

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only to conduct consistent with state law, a position unequivocally rejected in *Monroe v. Pape*.

1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, 188 (3d ed. 1991). *See also* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 16 (1985) (although there is some evidence that their reach will be confined, "the reasoning of *Parratt* and *Hudson* could be used to deny a § 1983 action to anyone claiming a constitutional violation by an official unauthorized to act as he did, as long as the State provides a damage remedy after-the-fact").

The unbundling of state action and color of law inquiries described at the end of Part II of this Article (and again in Part IV) would go some distance toward answering Professor Nahmod's objections to across-the-board use of the *Parratt/Hudson* limitation.

193. "Process" here would still include an inquiry into arbitrariness. Thus, any legislation invading constitutionally protected interests would still be examined in light of its possible purposes. However, as others have noted, this inquiry is indistinguishable from the "rational basis" inquiry undertaken for any non-suspect classification under the equal protection clause of the Fourteenth Amendment. *See* Robert Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1054-55 (1979). A similar point could be made as to more serious invasions. If legislation invading a right deemed "fundamental" is not necessary for a compelling governmental interest and narrowly tailored to meet that interest, the legislation would presumably shock the conscience of the Court, and violate substantive due process. (And the same analysis would presumably apply to a government policy, even if not reduced to legislation. *See* Collins, 503 U.S. at 126 (1992); Youngberg v. Romeo, 457 U.S. at 323; Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). Here, too, the equal protection clause would provide virtually identical protection, requiring strict scrutiny for governmental classifications that are either "suspect" or invasive of fundamental rights. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

It might be argued that this duplication means that, in essence, the due process clause adds only procedural protection to that which would otherwise be available, so that substantive due process in effect has no independent existence. Given that substantive due process has no textual referent in the Constitution, it would seem hard to mount a serious objection to the understanding proposed in the text on these grounds. Indeed, some would go further:

> It is a bit embarrassing to suggest that a text is informative when so many, for so long, have found it to be only evocative, . . . but there is simply no avoiding the fact that the word that follows "due" is "process." No evidence exists that "process" meant something different a century ago from what it is now . . . . Familiarity breeds inattention, and we apparently need periodic reminding that "substantive due process"

substantive due process claim, because the conduct was random and unauthorized, and not done for any governmental purpose. Under the broader view taken by the Fifth Circuit in *Doe*, of course, there would probably be no problem finding a substantive due process claim, at least as to the first hypothetical of the off-duty officer, because the court would conclude that there was enough of a nexus with official position, and bodily integrity was clearly violated.

E. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment confers a right to be free from government discrimination, but only in a limited sense. A classification that is based on race, alienage, or national origin, or impinges on fundamental rights will be upheld only where it is narrowly tailored to a compelling state interest.[194] A classification based on non-suspect criteria, like age or economic status, will be upheld where it is rationally related to a legitimate state interest.[195] A classification based on sex may be subject to an intermediate level of scrutiny, but will usually be upheld if it is substantially related to the achievement of an important governmental objective.[196]

Some courts appear to have adopted a Legalist model for the equal protection clause, noting that the equal protection analysis seems not to fit when applied to *ad hoc* actions. "An elementary prerequisite to equal protection analysis . . . is that there be a legislative or administrative scheme or state-promulgated rule which is subject to judicial review."[197] Under this view, a random and unauthorized act (for example, a corrections officer's alleged sexual harassment of a prisoner) could not violate equal protection, because equal protection involves only "the right to be free from invidious discrimination in statutory classifications and other governmental activity."[198]

The Supreme Court appears to apply a Governmental model, the outlines of which are less than clear. The Court held in *Adickes v. Kress & Co.*[199] that a

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is a contradiction in terms — sort of like green pastel redness.

JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1978). Even the proponents of a Naturalist model for the Fourteenth Amendment agree that it is *possible* there is no substantive component to the due process clause.

> There are three possible meanings of the due process clause. First, it may be read as if the words "without due process of law" were not appended . . . . This is the familiar substantive connotation which absolutely prohibits the doing of certain things, no matter by what procedure . . . . Third, the clause may be read as a simple statement that whenever the state by its own acts deprives persons of life, liberty, or property it shall adhere to certain procedural safeguards . . . .

JACOBUS TENBROEK, EQUAL UNDER LAW 238 (1965).

194. Adarand Construction, Inc. v. Pena, 115 S.Ct. 2097, 2113 (1995); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Loving v. Virginia, 388 U.S. 1 (1967).

195. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); Schweiker v. Wilson, 450 U.S. 221, 242 (1981).

single act of discrimination against a single member of a class may violate the Fourteenth Amendment, with no indication that a random and unauthorized act would not qualify. Yet the particular circumstances of that case may undercut the holding, as it relates to the Governmental model: the Court found state action in a restaurant owner's cooperation with police to *enforce* a local segregation *ordinance*, which would seem to fall within the Legalist model.[200]

More substantial evidence of the Governmental model might be found in the Court's recent cases finding state action in a private litigant's exercise of peremptory challenges in selection of a jury. In *Edmonson v. Leesville Concrete Co.*,[201] the Court held that a private litigant's use of a peremptory challenge to exclude a prospective juror in a civil case on the basis of race violates the prospective juror's equal protection rights.[202] Of course, the Court in *Edmonson* was applying a test developed in *Lugar* for evaluating *private* use of state procedures (in that case, for prejudgment attachments): in *Lugar*, the Court "asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, . . . and second, whether the private party charged with the deprivation could be described in all fairness as a state actor."[203] The Court seemed to attach great weight to the fact that, "[b]y their very nature, peremptory challenges have no significance outside a court of law."[204] The same cannot be said of private misconduct that falls into traditional tort or criminal patterns: this misconduct has full significance outside the courtroom, and so it presumably would be more likely to be considered non-state action.

In *Batson v. Kentucky* itself, the lead case on peremptory challenges as equal protection violations, the Court did not directly consider the full implications of its holding, and Justice Powell appeared to be exercising some care in attempting to limit the Court's consideration to *prosecution* use of *racial* stereo-

196. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Davis v. Passman, 442 U.S. 228, 234-35 (1979); Craig v. Boren, 429 U.S. 190, 197 (1976). *See also infra* note 216, discussing recent statements by Justice Ginsburg.

197. Hatcher v. Greater Cleveland Regional Transit Auth., 746 F. Supp. 679, 689 (N.D. Ohio 1989) (rejecting equal protection challenge to termination of employment allegedly on racial grounds). *See also* Koelsch v. Town of Amesbury, 851 F. Supp. 497, 501 (D. Mass. 1994) ("[A]n equal protection claim must be based upon a challenge to a legislative or administrative scheme or state promulgated rule, or upon an unconstitutional application of such laws or rules.") (citing Bettio v. Village of Northfield, 775 F. Supp. 1545, 1570 (N.D. Ohio 1991)).

198. Ellis v. Meade, 887 F. Supp. 324, 329 n.6 (D. Me. 1995).

199. 398 U.S. 144, 152 (1970).

200. *Id.*

201. 500 U.S. 614 (1991).

202. *Id.* at 616. Justice O'Connor, writing for herself and two other dissenting justices, took strong issue with the majority's presentation of the state action question.

types as a basis for exercise of a peremptory challenge.[205] Justice Burger noted in dissent that it was far from clear why the Court's holding should be so limited, and complained that the majority had ignored traditional equal protection analysis in its haste to condemn what it deemed to be a palpable evil.[206]

> [I]f conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex; age; religious or political affiliation; mental capacity; number of children; living arrangements; and employment in a particular industry or profession.
>
> In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny and . . . sustained only if . . . suitably tailored to serve a compelling state interest"; others would be reviewed to determine if they were "substantially related to a sufficiently important governmental interest"; and still others would be reviewed to determine whether they were "a rational means to serve a legitimate end."
>
> The Court never applies this conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling.[207]

The *Batson* majority made no attempt to answer Chief Justice Burger's argument on this point, and it might be difficult to do so. But the argument seems to suffer from a flaw: the Chief Justice suggests that conventional analysis requires evaluation of the state's interest in allowing unexplained peremptories, *generally,* but the actual state action being complained of in *Batson* was a *particular* prosecutor's exercise of a *particular* unexplained peremptory. Evaluation of a state peremptory challenge *scheme* is not the same as evaluation of a *particular* peremptory challenge, as we can see from the Chief Justice's suggested answer to the question he says the majority neglected to ask. The Chief Justice is suggesting that the peremptory challenge *scheme* would survive intermediate scrutiny, and that it might even survive strict scrutiny; but would he have agreed that exercise of a *particular* peremptory based solely on a racial stereotype could possibly survive strict scrutiny, *i.e.*, that a prosecutor

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> Not everything that happens in a courtroom is state action. A trial, particularly a civil trial, is by design largely a stage on which private parties may act; it is a forum through which they can resolve their disputes in a peaceful and ordered manner. The government erects the platform; it does not thereby become responsible for all that occurs upon it. As much as we would like to eliminate completely from the

could show a compelling state interest in pure racial bias? Even more fundamentally, the Chief Justice appears to assume that the scheme meets the rational basis test, but would he also have concluded that a particular peremptory challenge, exercised on the basis of pure hunch or instinct, would satisfy the rational basis test?

The answer to these questions is "no," because peremptory challenges are, at their heart, arbitrary and capricious. In objecting to the majority's failure to follow conventional equal protection standards, Chief Justice Burger was actually reiterating his objection to the application of *any* equal protection analysis to what is essentially a random act.

> [P]eremptory challenges are often lodged, of necessity, for reasons "normally thought irrelevant to legal proceedings or official action . . . ." Moreover, in making peremptory challenges, both the prosecutor and defense attorney act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to "an arbitrary and capricious right."[208]

Thus, Chief Justice Burger's shift of focus from particular peremptories to the peremptory scheme stems directly from the difficulty of applying conventional equal protection analysis to what are essentially random and unauthorized acts. Given that at least a rational basis must be posited for any state action that treats like-situated persons differently, there must necessarily be at least a rational basis for every random act by a public official that injures one person while leaving another, like-situated person uninjured, if in fact we conclude that the random act was state action.[209] Given that these random acts almost by definition have no rational basis, the result is the constitutionalization of all torts by public officials, or, in the *Batson* context, the elimination of the unexplained peremptory.[210] Chief Justice Burger is certain that equal protection analysis

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> courtroom the specter of racial discrimination, the Constitution does not sweep that broadly. Because I believe that a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action, I dissent.

500 U.S. at 631.

203. *Edmonson*, 500 U.S. at 620 (citing *Lugar*, 457 U.S. 939-42).

204. *Id.*

205. Batson v. Kentucky, 476 U.S. 79, 89 n.12 (1986) ("We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.").

206. *Id.* at 123-24 (Burger, C.J., dissenting).

207. *Id.* at 124-25 (citations and footnotes omitted).

cannot apply to individual peremptories, but he has failed to articulate exactly why. His reasoning runs as follows: (1) application of equal protection analysis to individual peremptories would mean the end of the peremptory challenge; (2) we cannot tolerate the end of the peremptory challenge; (3) therefore, we cannot tolerate the application of equal protection to individual peremptories.

Thus, the lack of a legitimate state action model leads both the majority and the dissenters in *Batson* and its progeny to a slightly warped view of equal protection. A better solution might be to adopt something closer to a pure Legalist model of state action for purposes of equal protection, which, in the *Batson* context, would lead to a preliminary analysis of whether the exercise of a particular peremptory challenge was the result of a policy or custom of the litigant.

The difficulty of applying equal protection analysis to random and unauthorized acts is apparent from cases outside the peremptory challenge realm as well. For example, in the context of public employment, some courts have held that intentional sexual harassment of employees by persons acting under color of law violates equal protection and is actionable under Section 1983.[211] Other

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208. *Id.* at 123 (citations omitted).

209. *See* Martinez v. Colon, 54 F.3d 980, 993 (1st Cir. 1995) (Bownes, J., dissenting) (suggesting that equal protection clause would be violated by the failure of "bystander" police officers to intervene in an assault by one officer against another, where the officers would have intervened had the victim been a private citizen).

210. Justice Scalia did not hesitate to put this analysis forward when, eight years later, the Court got around to the question of peremptories exercised on the basis of sex. *See* J.E.B. v. Alabama, 114 S.Ct. 1419, 1436 (1994) (Scalia, J., dissenting) (the majority's analysis "implies that sex-based strikes do not even rationally further a legitimate government interest, let alone pass heightened scrutiny," which "places all peremptory strikes based on any group characteristic at risk, since they can all be denominated 'stereotypes.'"). *See also* State v. Davis, 504 N.W.2d 767, 769 (Minn. 1993) ("If the life of the law were logic rather than experience, *Batson* might well be extended to include religious bias and, for that matter, an endless number of other biases"); D. Scott Crook, Note, *Peremptory Strikes and Religion — The Unworkable Peremptory Challenge Jurisprudence*, 9 B.Y.U. J. PUB. L. 309 (1995); Melissa R. Triedman, Note, *Extending* Batson v. Kentucky *to Religion-Based Peremptory Challenges*, 4 SO. CAL. INTERDISC. L. J. 99 (1994); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995). *But see* United States v. Santiago-Martinez, 58 F.3d 422 (9th Cir. 1995) (refusing to apply *Batson* to peremptory challenges exercised on the basis of obesity); United States v. Jackson, 983 F.2d 757, 762 (7th Cir. 1993) (allowing peremptory challenges based on age); Casarez v. State, 913 S.W.2d 468 (Tex. Ct. Crim. App. 1995) (allowing exercise of peremptories based on religion).

The majority in *J.E.B.* disputed this particular objection:

> The popular refrain is that all peremptory challenges are based on stereotypes of some kind, expressing various intuitive and frequently erroneous biases. See [Justice Scalia's dissent]. But where peremptory challenges are made on the basis of group characteristics other than race or gender (like occupation, for example), they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life.

courts have disagreed, and used the mental state requirement to limit the reach of equal protection. These courts reason that because a constitutionally-based Section 1983 suit in this context requires a showing of intentional discrimination on the basis of sex,[212] the plaintiff must allege severe harassment directed at him or her *because of* his or her sex, rather than because of other factors personal to him or her.[213] If this is so, it would seem difficult to make the traditional Title VII "hostile environment" species of sexual harassment fit this mold: under a strict view, a female plaintiff would have to allege, for example, that repeated offensive and unwanted sexual advances were made to her simply because she was a woman, and not because she was personally attractive to the harasser. The Seventh Circuit has stated as much:

> Certainly, the underlying fact is that Ms. Trautvetter is a woman. But, as we have noted, her status as a woman does not itself support an allegation of sexual harassment under the equal protection clause; she must demonstrate in a colorable manner that Mr. Quick's advances were because of her status as a woman as opposed to characteristics, albeit some no doubt sexual, which were personal to her. This she has failed to do. Indeed, there is nothing in the record to indicate that Mr. Quick's feelings were based on anything but a personal attraction to Ms. Trautvetter.[214]

The intentional discrimination requirement has traditionally been viewed as a hurdle significantly more difficult to clear than any mental state requirement imposed by Title VII.[215] One corollary of this distinction is that, in an

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114 S.Ct. at 1428 n.14 (citing B. Babcock, *A Place in the Palladium, Women's Rights and Jury Service*, 61 U. CINN. L. REV. 1139, 1173 (1993)). But by emphasizing the tradition of bias against some groups, the Court has only answered the question of why that bias must be given more strict scrutiny; it has not answered the question posed by Justice Scalia of how any bias, even a less-established one, can satisfy the rational basis test. *See* Joel H. Swift, *The Unconventional Equal Protection Jurisprudence of Jury Selection*, 16 N. ILL. U. L. REV. 295, 335-38 (1996).

211. Andrews v. City of Philadelphia, 895 F.2d 1469, 1473-74 (3d Cir. 1990); Bator v. Hawaii, 39 F.3d 1021 (9th Cir. 1994); Beardsley v. Webb, 30 F.3d 524 (4th Cir. 1994); Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991); Bohen v. City of East Chicago, 799 F. 2d 1180 (7th Cir. 1986); Crighton v. Schuylkill County, 882 F. Supp. 411 (E.D. Pa. 1995); Volk v. Coler, 845 F.2d 1422, 1431 (7th Cir. 1988). *See also* Cross v. Alabama, 49 F.3d 1490, 1508 (11th Cir. 1995) (allowing, without significant discussion, parallel actions under both Title VII and Section 1983 for sexual harassment); Doe v. Marshall, 882 F. Supp. 1504 (E.D. Pa. 1995) (creating a hostile learning environment for women students on the basis of their gender would violate the equal protection clause); Parks v. Wilson, 872 F. Supp. 1467, 1470 (D. S.C. 1995) (sexual harassment of a student by a professor at a state university violates the equal protection clause).

212. Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

213. Trautvetter v. Quick, 916 F.2d 1140, 1150-52 (7th Cir. 1990); King v. Board of Regents, 898 F.2d 533, 542 (7th Cir. 1990) (Manion, J., dissenting); *Huebschen*, 716 F.2d at 1171; Stafford v. Massouri, 835 F. Supp. 1136, 1141 (W.D. Mo. 1993). *See also* Annis v. Westchester County, 36 F.3d 251, 254 (2d Cir. 1994) (refusing to subscribe to "a categorical view that sexual harassment equals sex discrimination" under the Fourteenth Amendment, but concluding

equal protection case, the intent to harass might be seen as lacking where the plaintiff makes no claim that significant sexual advances continued after the plaintiff made it clear they were unwelcome.[216] Surely, it is tempting for courts to simply import all the Title VII jurisprudence and bring it to bear on equal protection claims,[217] but that does not make it correct to do so: the Constitution deserves its own jurisprudence. As in so many situations, the easy answer is probably not the correct one.

At any rate, in the cases that do impose a different mental state, use of the mental state requirement might be seen as a mere proxy or substitute for a more searching state action or color of law inquiry. The same focus on intent of the actor can be seen in Justice O'Connor's dissent in *Edmonson*: part of her analysis was driven by the idea that litigants use peremptory challenges "to further their own perceived interests, not as an aid to the government's process of jury selection."[218] Interestingly, the *J.E.B.* majority also took notice that mental state plays a key role in determining whether a particular strike violates the Consti-

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that harassment will rise to the level of a constitutional deprivation if it "includes conduct . . . calculated to drive someone out of the workplace.").

214. *Trautvetter*, 916 F.2d at 1152.

215. *See King*, 898 F.2d at 537 ("the precise parameters" of the equal protection harassment cause of action "have not been well defined," but one difference is that there must be an intent to harass); Stepp v. Proctor, 13 F.3d 407 (10th Cir. 1993) (it is not at all clear what constitutes a sexually hostile work environment under § 1983, but whatever the standard, "two specific instances do not"); Cuautle v. Tone, 851 F. Supp. 1236, 1242 (C.D. Ill. 1994) (mere fact that police treated a Hispanic arrestee differently than they had treated some non-Hispanic arrestees would not be enough to show an Equal Protection violation). *See also* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984) (suggesting that Title VII may need to be amended to make its application work more smoothly, because sexual harassment resembles a common law tort more closely than it does other Title VII claims; no suggestion that sexual harassment might be a constitutional violation if engaged in by a public employer).

216. *Cf. King*, 898 F.2d at 539-40 (equal protection claim may go forward where the defendant continued with sexual advances, fondling, and a physical attack, knowing that his advances were unwelcome). The Supreme Court has not squarely ruled on the question of whether the Equal Protection Clause is exactly coextensive with Title VII when it comes to sexual harassment, and the question certainly admits of some doubt. Even the Supreme Court's most recent pronouncement on sexual harassment contains an aside by Justice Ginsburg that might suggest the two provisions are not coextensive. After stating that a Title VII plaintiff need only show that the harassment so altered working conditions as to "ma[k]e it more difficult to do the job," and explaining that race and sex are equivalent for purposes of Title VII, Justice Ginsburg noted that "even under the Court's equal protection jurisprudence, which requires 'an exceedingly persuasive justification' for a gender-based classification, . . . it remains an open question whether 'classifications based upon gender are inherently suspect.'" Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 373 (1993) (Ginsburg, J., concurring). (The Court has stated that classification by sex will receive what is essentially an intermediate level of scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976)). Despite Justice Ginsburg's reference to this "open question," adoption of strict scrutiny in non-race contexts seems unlikely. *See* Earl M. Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers' Idea of Equality*, 7 CONST. COMMENTARY 251, 266-81 (1990).) Because

tution: what is forbidden is exercise of the strike "in reliance on gender stereotypes."[219]

Application of a more narrowly defined equal protection analysis would mean that neither of the hypotheticals could support a claim, because the conduct was random and unauthorized. And even under the currently accepted model, it is not absolutely clear that sexual assault by a government actor would violate equal protection.

IV. TOWARD A MORE WORKABLE STANDARD

Let us return for a moment to the question of what test to use for "color of law." A standard that might work better than the current assortment is the following two-part test:

> *Harm has been caused under color of law if*
>
> *(1) a government employee actually used the power of his or her office to accomplish the harm; or*
>
> *(2) the victim of the harm reasonably believed at the time the harm was suffered that the person causing the harm was a government employee, and the person causing the harm actually used this belief to accomplish the harm.*

This approach incorporates the causation submodel described in Part II of this Article, in its "use" variant. This approach also picks up some other cases identified earlier in the Article as probably meriting protection, but incorporates under this prong an objective test. The cases now excluded are essentially those in which (1) no government officer has used his or her office to accomplish the harm, *and* (2) the victim of the harm held either *no* belief or an objectively *unreasonable* belief that the person causing the harm was a government employee, *or* (3) the victim held a reasonable belief that the person causing the harm was a government employee, but the belief played no role in allowing the wrongdoer to accomplish the harm. None of these situations are important enough to warrant the application of the constitutional tort remedies made available under Section 1983. Although this might still exclude a broad array of cases in which a government employee has committed a common law intentional tort against a private citizen, the traditional state law tort remedies remain available to plaintiffs in those cases.[220] Although there would be some difficul-

racial classifications are inherently suspect, and receive closer scrutiny, the logical extension of Justice Ginsburg's remark is that while racial harassment by a government actor would currently violate the equal protection clause, sexual harassment by a government actor might not. *See also* Boutros v. Canton Regional Transit Auth., 997 F.2d 198, 205-06 (6th Cir. 1993) (Batchelder, J., dissenting) (national origin harassment alone is not actionable under § 1983 as an equal protection violation). But see Mummelthie v. City of Mason City, 873 F.

ties in applying this standard, these difficulties are relatively minor when compared with the difficulties encountered in applying other standards, and when compared with the harm that flows from trying to apply several different standards at once, which is the current state of affairs.

Given that the analysis in Part III of this article suggests an approach that tends toward the Legalist model for determining the requisite level of state involvement under many constitutional provisions themselves, one might ask whether there would be any practical significance to adopting this fairly broad, "causation plus" model for the "color of law" inquiry. To recap the answers suggested at the end of Part II: one answer is that there are still some constitutional provisions for which the requisite level of state involvement is low, or at least has not been determined yet. Another answer is that the statute may include a crucial corollary: liability will attach if a person, acting under color of law, does that which *would* have violated the constitution if actually done by the government. As explained at the end of Part II, this corollary is suggested by Congress's decision to combine a single term ("color of law") with a reference to a multitude of constitutional and statutory provisions. As to any deprivation falling squarely within the Legalist model (*i.e.*, actually inflicted by a government itself), the "color of law" language is superfluous, because it is impossible for a government to act *other* than by "color of law." It follows that the "color of law" language must have been intended to include a set of conduct not otherwise included within the ambit of the statute, conduct that would *not* otherwise amount to a violation of any constitutional or statutory provision referred to in the statute. To conclude otherwise is to conclude that the "under color of" language is surplusage, which seems extremely unlikely. If "color of law" is not surplusage, and in fact carries some meaning not contained within the idea of

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Supp at 1293, 1333 (1995) (importing all current Title VII burden-shifting jurisprudence into an equal protection inquiry into classification by age, even though court recognized that classifications by age are evaluated under rational basis test).

217. *See* Lipsett v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988) ("Our analysis is simplified by the fact that we can draw upon the substantial body of case law developed under Title VII to assess the plaintiff's claims under . . . section 1983.").

218. 500 U.S. at 642.

219. *J.E.B.*, 114 S.Ct. at 1427.

220. It might be objected that state governmental immunities would preclude recovery from government officers in these cases that fall outside the proposed test. It is difficult to see why this would be so: if the connection to the officer's authority is so tenuous that the plaintiff cannot meet the burden articulated in the test, presumably the defendant's invocation of the state law immunity would also fail. Moreover, state law plaintiffs would have the advantage of not having to overcome the defense of qualified immunity, available in every § 1983 action seeking damages from an individual officer unless the constitutional right alleged to have been violated was clearly established at the time of the alleged misconduct, and the officer could not reasonably have believed that his or her conduct would violate that right. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Of course, the preference for using § 1983 over state tort law probably stems from two

the deprivation itself, the only meaning that ultimately makes sense must somehow include the idea that, so long as the basic "color of law" requirement itself is met, *and there would have been a deprivation had this conduct occurred at the direction of the government*, liability will attach.[221]

If we apply the proposed standard, along with the corollary, to the hypotheticals put forward at the end of Part II and repeated at the beginning of Part III of this Article, we can discern some benefit. If it had been actually inflicted at the direction of the government (within the meaning of *Monell*), the assault would have violated due process and equal protection, and possibly the Fourth Amendment as well. The "color of law" test would be met, in *both* hypotheticals: in the first one, because the officer could probably be said actually to have used a show of authority, in the sense that it would have been more difficult to detain the woman without the show of authority; and, in both the first and the second ones, because the victim could probably show that she reasonably believed that the actor was a government employee, and this belief was used by the wrongdoer. Thus, in both hypotheticals, the individual wrongdoer would be subject to Section 1983 liability for damages (although the "real" officer would retain the potential qualified immunity defense[222]). The governmental entity would still not be subject to liability for damages, despite the corollary I propose for the "deprivation . . . under color of law" test, because, insofar as we know, the entity, unlike the individual, did nothing itself to *cause* any harm, an independent requirement under *Monell* and its progeny.

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unrelated concerns: the fee-shifting provisions of the Equal Access to Justice Act, 42 U.S.C § 1988 (1994), and the availability of a federal forum. Yet one might applaud the goals reflected in the Equal Access to Justice Act without wishing to turn every tort by a state employee into a § 1983 claim. If fee-shifting is a good thing, then ultimately the states will see that it is a good thing, and legislate accordingly, so that this perceived advantage of § 1983 will no longer exist. Similarly, if there is something in the federal forum that makes it more fair to plaintiffs, then state legislatures should decide what that is, and incorporate it into state court practice. If they do not, then it is their affair. Arguably, the differences of federal and state procedure are matters to be resolved by Congress and the state legislatures, respectively: there is no legitimate justification for federal courts to bend their interpretation of § 1983 or the Constitution simply because they believe state courts or state procedures to be inferior engines for the redress of all common law torts, as opposed to harms to constitutional values that truly implicate the government.

221. The corollary would no doubt prove unacceptable to many § 1983 scholars, and this Article is not intended as a full proof of the existence of the corollary. Moreover, the main thrust of the Article (that "color of law" should be unbundled from any state action requirements that inhere in individual constitutional provisions, and given coherent definition) operates independently of the corollary. I have included a statement of the corollary because I believe it flows naturally from the analysis of § 1983 put forward by Steven Winter and others, and because it adds tremendous practical significance to the main question of what definition to adopt for the unbundled "color of law" requirement.

222. *See* Catherine D. Glover & Elizabeth W. Fox, Note, *Qualified Immunity for Private Party Defendants in Section 1983 Civil Rights Cases*, 5 J. LEG. COMM. 267 (1990).