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The Doctrine of Official Immunity and Section 1983: A New Look at an Old Problem

There are additional problems involved in Rule 17(b) outside the scope of this note, which suggest the need for a complete integrated revision of the rule.[90] Because of the apparent continuing validity, despite *Almond,* of incapacity statutes for certain individuals, such as minors or the mentally incompetent,[91] the rule should not be amended to establish a blanket authorization of capacity for all individuals. Rather, the rule should provide that federal standards shall determine the capacity of individuals to sue or be sued under federal law. The 1966 amendments[92] to Federal Rules 19 (joinder of persons needed for a just adjudication) and 23 (class actions) indicate that a realistic approach might be to state the factors which a federal court should consider in deciding capacity questions in such cases. One such factor should be that the federal court should strive to apply the same capacity law it would apply in a diversity case when this is feasible.[93] However, when federal claims are involved, the federal courts should be permitted to allow capacity to litigate upon such conditions as are just when compliance with state law would be unreasonable, would destroy the jurisdiction of the federal court, or would effectively deny a forum for a remedy.[94]

Such an amendment to Rule 17(b) would spare the federal courts the task of examining the legislative history of state incapacity statutes, making fine distinctions between total incapacity, suspended capacity, and formal incapacity, or deciding whether the judicially-created exception to Rule 17(b) in section 1983 actions should apply to suits brought under other federal substantive statutes.

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THE DOCTRINE OF OFFICIAL IMMUNITY AND SECTION 1983: A NEW LOOK AT AN OLD PROBLEM

The doctrine of immunity of public officials from personal liability frequently clashes with the right of private citizens to seek redress for injuries caused by those officials. There is a need for protection of public officials from harassment and the resultant hazards of damage suits

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[90]KENNEDY at 310-16.

[91]Text accompanying notes 23-27 *supra.*

[92]*See* C. WRIGHT, LAW OF FEDERAL COURTS § 71-72 (2d ed. 1970).

[93]Rule 17(b) currently provides that an individual's capacity to litigate is to be determined by the law of his domicile. Note 77 *supra.* However, in revising Rule 17(b), it might be more desirable in light of the *Erie* doctrine to require a federal court in a diversity case to apply the capacity law of the state in which it sits. *See* Urbano v. News Syndicate Co., 358 F.2d 145, 148 (2d Cir.) (Lumbard, C.J., dissenting), *cert. denied,* 385 U.S. 831 (1966).

[94]*Cf.* KENNEDY at 316.

brought by anyone who may feel himself injured by officials' acts.[1] But this public need conflicts with the right of a citizen to seek compensation under 42 U.S.C. § 1983 for injuries caused by deprivations of constitutional rights.[2] The common law doctrine of immunity protects public officials, while § 1983 provides a civil remedy for deprivations of civil rights to private citizens.[3] A literal reading of § 1983 admits of no exceptions to state officials who may be reached under it.[4] The greatest tension in the common law doctrine of immunity occurs between the doctrine and § 1983's apparent exception to it.

The purpose of the doctrine of immunity is to protect the broad use of discretion for those officials who must exercise judgment in their duties.[5] Public officers in the higher government positions generally exercise a broader range of responsibilities and a wider scope of discretion than do those in the lower echelons.[6] For instance, the immunity of federal legislators (who exercise wide discretion in every legislative act) is pro-

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[1]*See* Norton v. McShane, 332 F.2d 855, 857 (5th Cir. 1964).

[2]*See* Monroe v. Pape, 365 U.S. 167, 180 (1961). With reference to the federal right created by § 1983, Mr. Justice Douglas stated in his majority opinion:

> It is abundantly clear that one reason the legislation [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id.

[3]42 U.S.C. § 1983 (1970). This section provides:

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

[4]*Id.* The section by its very language purports to impose liability for certain acts upon "[e]very person."

[5]*See* Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), where Judge Learned Hand commented:

> [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial . . . would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Id. at 581.

[6]*See* Barr v. Matteo, 360 U.S. 564, 572-76 (1959). A recent opinion confirming the validity of the doctrine of official immunity, the *Matteo* case involved a common law tort action for libel against the Acting Director of the Office of Rent Stabilization. The Court held that the application of the doctrine of immunity to a cabinet officer in Spalding v. Vilas, 161 U.S. 483 (1896), should be extended to executive officers of lower rank. In doing so the Court added the caveat that the higher officers exercise greater responsibility and discretion than do those at a lower level.

vided for in the Constitution,[7] whereas clerks of court and policemen are probably nearer the bottom of the scale in the exercise of discretion. Of course, a particular official may perform some duties which require discretion and some which do not. For example, in Florida, municipal court clerks, in addition to their specifically directed duties of receiving fines and preparing court dockets and records, are authorized to determine probable cause for the issuance of arrest warrants, a purely discretionary function.[8] A municipal court clerk in Florida might therefore be found liable for filing papers (a non-discretionary function) improperly, but be protected against claims arising from his determination of probable cause.

The conflict between the doctrine of immunity and § 1983 stems from the fact that the application of the statute is not limited only to those officials who perform non-discretionary functions.[9] Section 1983 was originally enacted[10] to provide private citizens a remedy in federal courts against any state official who neglected or refused to enforce a complainant's constitutional rights.[11] The Reconstruction years between 1865 and 1871 had seen the rise to power of the Ku Klux Klan in southern states

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[7]U.S. CONST. art. I, § 6. The section provides in part:

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

[8]*See* FLA. STAT. ANN. § 168.04 (1966).

[9]Notes 3 & 4 *supra*. The broad application of the statute admits of no exceptions.

[10]Originally enacted as ch. 22, § 1, 17 Stat. 13 (1871), the section was part of the Ku Klux Klan Act, entitled by Congress, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."

[11]The purpose of the act was stated by Representative Lowe on the floor of the House during debates pursuant to passage of the Ku Klux Klan Act of 1871:

> [R]ecords of the [state] tribunals are searched in vain for evidence of effective redresss [of federally secured rights] . . . . What less than . . . [the Civil Rights Act of 1871] will afford an adequate remedy. . . . The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into effect.

Mitchum v. Foster, 407 U.S. 225, 240-41 (1972), *quoting* CONG. GLOBE, 42d Cong., 1st Sess. 374-76 (1871) Representative Perry expressed his opinion for the need for the act as follows:

> Sheriffs, having eyes to see, see not; judges having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices . . . all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection.

Mitchum v. Foster, 407 U.S. at 241 (1972), *quoting* CONG. GLOBE, 42d Cong., 1st Sess. App. 78 (1871).

and the failure of state governmental agencies (through fear or neglect) to prevent or redress wrongs suffered by citizens,[12] and Congress reacted by enacting a broad measure, unlimited in its application to classes of state officials.[13] The present form of § 1983 is virtually unchanged since 1871. The purpose of § 1983, as originally envisioned by Congress, would doubtless be nullified by a wide application of immunity to state officials which would, in effect, amount to a judicial repeal of § 1983.

On the other hand, the Supreme Court has directed that § 1983 not be read literally so as to allow all state officials to be reached under the section. In *Pierson v. Ray*,[14] the Court held that judges were to be granted immunity in § 1983 damage actions. In reaching its decision, the Court reviewed the common law doctrine of judicial immunity and observed that the doctrine was one of the most solidly established doctrines at common law, its primary purpose being to preserve the independence of the judiciary in its decision making, free of intimidation by potential damage suits.[15] It existed for the benefit of the public whose interest is best served by a strong judiciary, free even against claims of malice or corruption.[16] Concluding that the legislative record of the enactment

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[12]Remarks by Senator Pratt of Indiana, during debates pursuant to passage of the Ku Klux Klan Act of 1871, described conditions in the southern states:

> But it is a fact, asserted in the report, that of hundreds of outrages committed on loyal people through the agency of this Ku Klux organization not one has been punished.

Monroe v. Pape, 365 U.S. 167, 178 (1961), *quoting* CONG. GLOBE, 42d Cong., 1st Sess. 505 (1871).

[13]42 U.S.C. § 1983 (1970).

[14]386 U.S. 547 (1967). In 1961 a group of black and white clergymen travelled from Detroit to Mississippi for the purpose of challenging the segregation laws of that state. They were arrested in the local segregated bus facilities by local police officers, charged under state law with unlawful congregation in the bus terminal, and found guilty by one Spencer, a municipal police justice. On appeal the county court overturned their convictions, and they initiated § 1983 actions against Spencer and the arresting officers. In the district court the jury returned verdicts for the judge and police officers. On appeal the Court of Appeals for the Fifth Circuit held that Spencer was immune from liability because he was a judge. 352 F.2d 213, 217 (5th Cir. 1965).

[15]*Id.* at 554. The Court relied heavily on Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). Although *Bradley* was decided subsequent to the Ku Klux Klan Act of 1871, it served as a clear statement of the doctrine of judicial immunity at common law and became a cornerstone of the doctrine. The Court in *Bradley* based its decision in large part on English common law and observed that England had observed the doctrine for centuries, citing Floyd & Barker, 12 Coke 25 (1608).

[16]Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). The court stated:

> If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be swept away. Few

of § 1983 indicates no clear intention of Congress "to abolish wholesale all common-law immunities,"[17] the Court held that judges are immune from damage actions, notwithstanding the broad wording of § 1983. Although the case was limited to the issue of judicial immunity from damages, the reference of the Court to "all common-law immunities" suggests that § 1983 must, to some extent, always be read in the light of the doctrine of official immunity. The Court's limited decision left undecided the extent of the protection to be afforded other officials against whom an action is brought under § 1983. Thus, the problem facing the courts is to determine at what point the public need for protection of its officials outweighs the right of redress under § 1983 when such an action is brought.

In *McCray v. Maryland*,[18] the Fourth Circuit Court of Appeals confronted the immunity - § 1983 dilemma as it applied to a clerk of court in Maryland. The appellant in *McCray* filed a complaint *pro se* alleging that the clerk of the Baltimore City Court, through negligence, had impeded the progress of his petition for post-conviction relief by failing to file it properly, but the appellant did not plead violation of a federal right or statute. In dismissing the complaint, the district court concluded that the allegation of negligence without an allegation of a violation of a federally protected right was not sufficient to state a claim under § 1983.[19] The district court further held that even if the claim had been sufficiently stated, a clerk of court is absolutely immune from suit because he is a quasi-judicial officer and thus cloaked with judicial immunity.[20]

In reversing the district court, the Fourth Circuit, in an opinion by Judge Sobeloff, decided first whether the complaint stated a cause of action independent of the clerk's defense of immunity. Viewing the complaint with the liberality customarily afforded *pro se* pleadings,[21] the court found a cause of action to have been stated because the complaint suffi-

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> persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

Id. at 348.

[17]386 U.S. at 554. The Court adopted the reasoning of Tenney v. Brandhove, 341 U.S. 367 (1951), in which state legislators had been held immune from suit under § 1983. In *Tenney* the Court reasoned that if Congress had intended to abolish the common law doctrine of immunity for legislators, it would have done so expressly; because the immunity of judges is equally well established, the Court in *Pierson* presumed Congress would have specifically abolished the immunity if that had been its intent. 386 U.S. at 554-55.

[18]456 F.2d 1 (4th Cir. 1972).

[19]*Id.* at 2-3.

[20]*Id.* at 2.

[21]*Id.* at 6.

ciently alleged that appellant's constitutionally based right of access to the courts had been violated[22]—a denial of a right redressable under § 1983.[23] Having established the sufficiency of the complaint, the court then concluded that the clerk was not immune from suit. The court referred to the applicable state statutes[24] and found that the filing of papers was a ministerial duty which did not require the exercise of discretion: the clerk was required to file *all* papers.[25] The court also found that the state of Maryland had imposed a penalty of $200 on the clerk for negligently or wilfully failing to perform his ministerial duties.[26] Since the state did not feel compelled to protect the clerk in certain of his duties, the court reasoned that a federal cause of action also would not be inhibitory to the clerk or contrary to expressed state policy.[27]

Because the clerk's duties were so clearly ministerial,[28] and because of the existence of the punitive statute, the decision in *McCray* was not particularly difficult to reach, but the conflict between the doctrine of immunity and § 1983 is not always easy to resolve. Courts must somehow weigh the competing interests to determine when the doctrine of immunity will shield an official from suit under § 1983. Generally the intensity of these interests will vary with the position held by an official in the public hierarchy.

At the upper levels of officials, the superior public interest in official immunity has been made evident by the Supreme Court.[29] Such officials are granted immunity not because of the importance of their positions but because of the public interest in the unfettered exercise of their discretion.[30] Thus, in *Tenney v. Brandhove*,[31] the Supreme Court held that

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[22]*Id.* at 6. On this point the court relied upon decisions in Boddie v. Connecticut, 401 U.S. 371, 376 (1971) and Chambers v. Baltimore & O.R.R. Co., 207 U.S. 142 (1907).

[23]*Id.* at 6.

[24]MD. ANN. CODE art. 17, §§ 1, 32 (Repl. vol. 1966).

[25]MD. ANN. CODE art. 17, § 1 (Repl. vol. 1966). The statute states:

> Every clerk shall have the custody of the books and papers pertaining to his office, and shall carefully keep current and preserve the same; he shall file all papers delivered to him to be filed, and shall record all judgments, decrees, deeds and writings which by law are required to be recorded in the office of which he is clerk. . . .

[26]MD. ANN. CODE art. 17, § 32 (Repl. vol. 1966). The statute states:

> [I]f any clerk of a court shall neglect or refuse to make proper entries of all proceedings in the court of which he is clerk, all as required by law or by the Maryland Rules, said clerk shall be guilty of a misdemeanor and shall forfeit the sum of two hundred dollars for the use of the State.

[27]456 F.2d at 4.

[28]*See* note 25 *supra*.

[29]*See* note 6 *supra*.

[30]*See* Barr v. Matteo, 360 U.S. 564, 572-73 (1959).

[31]341 U.S. 367 (1951). In *Tenney* a state legislator was sued for his acts as chairman

state legislators are immune from suit under § 1983 from claims which arise incident to their legislative functions. In the case of the legislator, the remedy for violations of rights is presumably at the polls at elections.[32]

Likewise, one rationale for immunity given to judges from § 1983 suits in *Pierson* is that here, too, a sufficient remedy for constitutional wrongs exists in the form of appeal, and while the route of appeal will not compensate wrongs, it will restore the individual's rights which have been infringed by a judge.[33] The single, somewhat obscure qualification of judicial immunity is that judges' acts, to be protected, must be done "within their jurisdiction."[34] An early use of this concept came where immunity was denied to a state judge who was indicted for refusal to select blacks for jury duty.[35] The Supreme Court held that he was not performing a judicial act, for which the protection of immunity was required, but that he was performing an act that might have been accomplished by a non-judicial officer such as a court clerk or bailiff.[36] It would

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of a state legislature investigative committee on un-American activities. The Court held that the defendant was acting within a proper legislative function in the performance of the acts on which suit was brought. The Court quoted from a member of the Committee of Detail, the body responsible for the constitutional provision (note 7 *supra*) protecting legislators:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence.

Id. at 373.

[32]*Id.* at 378.

[33]*See* Note, *The Doctrine of Official Immunity Under the Civil Rights Act*, 68 HARV. L. REV. 1229, 1237 (1955).

[34]Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1871). Only those acts which are done pursuant to an exercise of jurisdiction over the subject matter are to be protected by immunity. When a judge acts without jurisdiction over the subject matter, his acts are not protected.

[35]*Ex parte* Virginia, 100 U.S. 339 (1879).

[36]*Id.* at 348. The breadth ascribed to a judge's jurisdiction is illustrated in McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972). In *McAlester* appellants (husband and wife) went to the county courthouse where their son was to stand trial on criminal charges. They alleged that when they inquired at the judge's office as to the time of the trial, he lost his temper and ordered them to leave. When they didn't leave promptly, the judge had the husband jailed, and the husband was not tried for contempt of court for a period of almost two months. Appellants brought a damage action against the judge under § 1983 alleging that the husband was imprisoned without due process of law. The district court dismissed the action on the ground that the judge was acting within his jurisdiction and was thus immune from liability under the doctrine of judicial immunity. The Fifth Circuit Court of Appeals affirmed, holding that the judge was acting within his jurisdiction. The court based its determination on four factors: (1) the use of contempt power is a normal judicial

seem to be a rare case, however, where a judge, under this test, would be subject to a § 1983 cause of action. "Jurisdiction" is broadly defined to include not only a judge's usual actions from the bench, but also decisions rendered in chambers, or in almost any circumstance connected with the normal activity or conduct of a judge.[37]

While little doubt remains as to the immunity of legislators and judges from damage actions under § 1983, the resolution of the conflict is not so clear as it applies to officers at the lower levels of government where the exercise of discretion is not as significant and is often less well defined. For example, a prosecuting attorney exercises a great deal of discretion in determining whom to charge with a crime and what crime he will charge.[38] A prosecutor was found to be immune from suit where he erroneously charged a defendant with an adult crime when in fact the accused was a minor.[39] Yet a prosecutor has been held liable for a violation of rights allegedly committed while he was acting as an investigative officer.[40]

One possible source of inconsistency in the opinions is the tendency of courts to characterize duties of officials by attaching common-law labels to them and to base decisions on the category into which the specific duty falls. Chief among these characterizations is the term "discretionary" which is used to describe those duties which require the exercise of judgment and independent decision making.[41] The antithesis of the term discretionary is the term "ministerial," which is used to describe duties which do not require the exercise of discretion but rather are specifically required of an official,[42] such as a registrar of deeds who has no alternative but to file correctly submitted deeds.[43] The label "quasi-judicial" is also frequently applied and usually refers to administrative

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function; (2) the alleged events occurred in the judge's chambers; (3) the controversy involved a case then pending before the judge; and (4) the controversy occurred during a visit to the judge in an official capacity. *Id.* at 1282.

[37]*Cf.* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 352 (1871).

[38]*See* Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

[39]*Id.*

[40]Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965). The immunity granted a prosecutor is derived from his close identification with the judicial process. To ensure that he may act freely in his functions, the prosecutor is granted immunity similar to that of judges. When a prosecutor acts in some capacity outside of his integral relationship with the judicial process, the need for his protection ceases to exist. If he acts as an investigator he is entitled to no more protection than a police officer, who is liable if he has acted to deny another of his federally protected rights. *Accord*, Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955).

[41]*See* Johnson v. State, 69 Cal.2d 782, 447 P.2d 352, 356, 73 Cal. Rptr. 240, 244 (1968).

[42]*See* Roberts v. United States, 176 U.S. 221, 231 (1900).

[43]*See* Rising v. Dickinson, 18 N.D. 478, 121 N.W. 616 (1909); Johnson v. Brice, 102 Wis. 575, 78 N.W. 1086 (1899).

officers who exercise judgment in the course of their duties.[44] Insofar as his duties extend to determining the cause of a fire, a fire marshal may be a quasi-judicial officer.[45] While these labels may be employed to assist a court in deciding whether or not to grant immunity, they are conclusionary: it is one thing to discuss discretion, it is an entirely different matter to find it. It is a rare act, a judge once said, which does not require at least some discretion, "even if it involve[s] only the driving of a nail."[46] All too often, it seems, a court will summarily conclude, without analysis, that an officer is a quasi-judicial official and go no further in its discussion of immunity.[47] The Fourth Circuit in *McCray v. Maryland*, however, must be excepted from this criticism.

The court in *McCray* did refer to the clerk's duties as ministerial, but it applied the label only after determining the exact nature of his duties from the state statute.[48] Having determined that the clerk's duties were ministerial in nature and that officials were not immune at common law for duties which are mandatory, the court found no basis in common law or state policy for protecting the clerk by immunity.[49] In referring to the common law approach, the court applied the term ministerial only after it had analyzed the duties of the clerk in terms of the facts and the Maryland statute.

In its analysis of the facts, the court in *McCray* relied strongly upon the recent District of Columbia Court of Appeals decision in *Carter v. Carlson*.[50] The *Carter* court approached the conflict between immunity

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[44]*See* Brown, *Administrative Commissions and the Judicial Power*, 19 MINN. L. REV. 261 (1935).

[45]*See* Phelps v. Dawson, 97 F.2d 339 (8th Cir. 1938).

[46]Ham v. Los Angeles County, 46 Cal. App. 148, 189 P. 462, 468 (Dist. Ct. App. 1920).

[47]*See* Sullivan v. Kelleher, 405 F.2d 486 (1st Cir. 1968); Henig v. Odorioso, 256 F. Supp. 276 (E.D. Pa. 1966), *aff'd*, 385 F.2d 491 (3d Cir. 1967), *cert. denied*, 390 U.S. 1016 (1968). In both cases defendants were court employees. The courts made reference to quasi-judicial immunity and granted dismissal of the complaints. Neither court examined the acts alleged by plaintiffs to be injurious or considered the purpose behind the doctrine of immunity. Furthermore, the courts applied the term "quasi-judicial" to those officers whose duties were merely related to the judicial process—not forming an integral part of the process as do the duties of a prosecutor—thus stripping the label of its most limited usefulness. 405 F.2d at 487; 256 F. Supp. at 281.

[48]456 F.2d at 4.

[49]*Id.*

[50]447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 41 U.S.L.W. 4127 (U.S. Jan. 9, 1973). Plaintiff alleged that he was arrested by police officer Carlson without probable cause and was beaten by that officer while two others held him. He brought an action against Carlson, Carlson's precinct captain, the Chief of Police, and the District of Columbia under common law tort theories and § 1983. Plaintiff alleged that the senior police officials and the District of Columbia were negligent in failing to train Carlson properly. He further alleged that the District of Columbia was

and § 1983 by first considering the precise function of the defendant official which gave rise to the § 1983 action and then determining whether the threat of liability would "unduly inhibit" the official in the performance of that function.[51]

Since not all factual situations before the courts will involve a statute to which the courts may resort in ascertaining what is, or is not, unduly inhibitory, it would seem that courts should consider a number of factors underlying the bringing of a suit. For example, short of the threat of financial loss resulting from allowance of a suit, an important factor might be the detrimental effect of the time consuming nature of litigation. Courts might consider the degree of inhibition of an official caused by the threat of loss of time spent in litigation in determining whether a particular class of officials should be subject to litigation. An official subject to suit at any time is unable to function efficiently if he must devote much time to defending himself,[52] and the mere threat of litigation may be sufficient to deter him from acting vigorously.[53] It would be an unusual parole board member who would not be inhibited one way or another if faced with continuous suits for his decisions to deny parole. While he might not fear that an action against him could be successfully brought, he might surrender a degree of his independent judgment in favor of making his decisions less apt to give rise to the need to defend himself in court frequently.[54]

Courts might also look to remedies in previous § 1983 actions to determine if prior awards have been exceptionally high. Certainly few state officers could fail to be intimidated by the threat of a judgment of

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responsible for the torts of Carlson and the police officials on a theory of *respondeat superior*. The district court dismissed the complaint against all defendants without explanation. On plaintiff's appeal the superior officials interposed the defense of official immunity.

[51]*Id.* at 362.

[52]*See* Littleton v. Berbling, 468 F.2d 389, 412 (7th Cir. 1972). The court in this case recognized one purpose of the doctrine of immunity to be the elimination of time an official must spend defending himself. However, that case involved a claim for injunctive relief under § 1983 brought against two judges, a prosecutor, and the prosecutor's assistant. Plaintiffs, on behalf of their class (persons of Cairo and Alexander County, Illinois, and presumably blacks, and poor) complained that defendants had systematically used state laws to discriminate against them by depriving them of their constitutional rights. The court felt that the use of the class action would reduce the number of cases a prosecutor would have to defend, and that the number of potential class actions against him for discrimination predictably would be small. Furthermore, in this case the claim of defendants was not insubstantial and went right to the heart of the prosecutor's duties: the even-handed, nondiscriminatory enforcement of the laws. Thus the court reversed the district court's dismissal of the complaint and remanded it to the lower court. *Id.* at 413.

[53]*See* Barr v. Matteo, 360 U.S. 564, 571 (1959).

[54]Note 5 *supra*.

thousands of dollars against them. For example, the clerk of the Baltimore City Court, who was the defendant in *McCray*, is authorized an annual salary of between $12,000 and $20,000.[55] A damage judgment of a few thousand dollars against him would represent a substantial portion of a year's income. Section 1983 itself makes no limitation on potential damages, and none has been developed by the courts. Proper damages for deprivation of rights are difficult to ascertain; in the absence of any limit, it is impossible to say that damages in a particular suit might not be substantial, especially if punitive damages were to be awarded.[56] The absence of readily ascertainable damage awards will not prevent the bringing of a suit because the courts may fashion relief on any available remedy.[57]

Notwithstanding the above considerations which might favor application of the doctrine of immunity, in some circumstances the sanctions of § 1983 for violations of rights may frequently serve the public interest more effectively than would the immunity of officials. Certainly the intent of Congress in enacting the legislation in 1871 was to provide some remedy against public officials.[58] Section 1983 has been successfully used to redress and restore the right to vote[59] and to seek damages against discrimination in hiring[60] and against illegal search and seizure.[61] The public interest in these critical constitutional areas might be served better by officials who act cautiously in the shadow of § 1983 than by officials who have no fear of personal liability, even if they should violate an individual's basic constitutional rights.

A final factor, which the court in *McCray* considered, is the effect of a § 1983 suit in federal court might have upon state-federal relationships. Concern for the uninhibited functioning of state judicial proceedings has caused federal courts to abstain from enjoining such proceedings,[62] even

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[55]MD. ANN. CODE art. 17, § 23(d) (Supp. 1971).

[56]*See* Basista v. Weir, 340 F.2d 74, 87-88 (3d Cir. 1965). Granting the difficulty of proof of damages for a violation of a constitutional right, high punitive damages may be awarded even in the absence of nominal damages.

[57]Bell v. Hood, 327 U.S. 678, 684 (1946); *see* Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 569-70 (1930).

[58]*See* notes 11 & 12 *supra*.

[59]Smith v. Allwright, 321 U.S. 649 (1944); Lane v. Wilson, 307 U.S. 268 (1939).

[60]Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968).

[61]Monroe v. Pape, 365 U.S. 167 (1961).

[62]This concern for the untrammeled functioning of state court proceedings was originally found in the Judiciary Act, ch. 22, § 5, 1 Stat. 335 (1793). The present form of the anti-injunction statute is 28 U.S.C. § 2283 (1970) which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

though the state action itself is allegedly violative of constitutional rights under § 1983.[63] One of the justifications for abstention in such cases is that state officials should be free to carry out the laws of their state without fear of interference from federal court orders.[64] This is one rationale that appears, at least implicitly, to have been used to preclude § 1983 damage actions against state officials.[65] However, even in the face of the strong policy of federal abstention from interference with state court proceedings, certain § 1983 actions have been allowed, particularly where first amendment rights have been involved.[66] In these cases it has been felt that the importance of the right involved and the possibility of irreparable harm from prosecution in the state court justify the interference in spite of the well-established policy of federal court abstention from injunctions of state court proceedings.[67] It would seem that, by analogy, the significance of the right involved in a § 1983 damage action

[63]Younger v. Harris, 401 U.S. 37 (1971). In *Younger* the state of California had indicted Harris under the California Criminal Syndicalism Act. He sought an injunction against the state prosecution, claiming that because of such prosecution he would suffer immediate and irreparable harm. A three-judge federal district court granted an injunction, holding that the state Criminal Syndicalism Act was unconstitutionally void for vagueness and overbreadth. 281 F. Supp. 507, 517 (1968). In reversing the lower court's decision, the Supreme Court stressed the force of the policy against injunctions of state proceedings and stated that such injunctions could only be ordered where the petitioner could show that great and immediate irreparable harm would result from the prosecution. The only injury that Harris faced from state prosecution was incidental to any other lawful criminal proceeding and was not sufficient to justify a federal injunction of the prosecution. The state court was a suitable forum to protect Harris' first amendment rights. *Id.* at 49.

[64]*See* 401 U.S. at 44. The Court discussed reasons for the policy against injunctions of state court proceedings and emphasized the importance of "comity," which constitutes

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

[65]*See* Bauers v. Heisel, 361 F.2d 581, 589 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

[66]Mitchum v. Foster, 407 U.S. 225 (1972); Dombrowski v. Pfister, 380 U.S. 479 (1965).

[67]*See* Mitchum v. Foster, 407 U.S. 225, 242 (1972). In *Mitchum* the Supreme Court ruled for the first time that Congress intended to "interpose the federal courts between the states and the people" through § 1983. *Id.* For that reason it authorized federal courts to issue injunctions of state court proceedings by authorizing "suits in equity." *See* note 3 *supra*. Thus § 1983 is an act of Congress within the exception of 28 U.S.C. § 2283 (1970). *See* note 62 *supra*. The Court repeated the caveat of earlier cases that federal injunctive relief against state court proceedings is proper only when it is necessary "to prevent great, immediate, and irreparable loss of a person's constitutional rights." 407 U.S. at 242. The Court further emphasized that it did not question or qualify principles of comity and federalism by its decision.