Tenney v. Brandhove

341 U.S. 367 (1951)

71 S.Ct. 783
Supreme Court of the United States

TENNEY et al.
v.
BRANDHOVE.

No. 338.
|
Argued March 1, 1951.
|
Decided May 21, 1951.

Synopsis
William Patrick Brandhove sued Jack B. Tenney, The Senate Fact-Finding Committee on Un-American Activities, a California Legislative Committee, and others, for alleged violation of plaintiff's civil rights. The United States District Court for the Northern District of California, Southern Division, George B. Harris, J., dismissed the complaint and plaintiff appealed. The United States Court of Appeals for the Ninth Circuit, 183 F.2d 121, entered a judgment holding that the complaint stated a cause of action against the committee and its members and the defendants brought certiorari. The United States Supreme Court, Mr. Justice Frankfurter, held that under the circumstances of the case, the committee and its individual members were acting in the sphere of legitimate legislative activities in calling the plaintiff before it and examining him and the civil rights statute did not create a civil liability for such conduct.

Judgment of the Court of Appeals reversed and that of District Court affirmed.

Mr. Justice Douglas dissented.

Attorneys and Law Firms

****784** Mr. ***368** Harold C. Faulkner, San Francisco, Cal., for petitioners.

Messrs. Martin J. Jarvis, Richard O. Graw, San Francisco, Cal., for respondent.

Opinion

***369** Mr. Justice FRANKFURTER delivered the opinion of the Court.

William Brandhove brought this action in the United States District Court for the Northern District of California, alleging that he had been deprived of rights guaranteed by the Federal Constitution. The defendants are Jack B. Tenney and other members of a committee of the California Legislature, the Senate Fact-Finding Committee on Un-American Activities, colloquially known as the Tenney Committee. Also named as defendants are the Committee and Elmer E. Robinson, Mayor of San Francisco.

The action is based on ss 43 and 47(3) of Title 8 of the United States Code, 8 U.S.C.A. ss 43, 47(3). These sections derive from one of the statutes, passed in 1871, aimed at enforcing the Fourteenth Amendment. Act of April 20, 1871, c. 22, ss 1, 2, 17 Stat. 13. Section 43 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 ****785** 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.' R.S. s 1979, 8 U.S.C. s 43, U.S.C.A. s 43.

Section 47(3) provides a civil remedy against 'two or more persons' who may conspire to deprive another of constitutional rights, as therein defined.[1]

***370** Reduced to its legal essentials, the complaint shows these facts. The Tenney Committee was constituted by a resolution of the California Senate on June 20, 1947. On January 28, 1949, Brandhove circulated a petition among members of the State Legislature. He alleges that it was circulated in order to persuade the Legislature not to appropriate further funds for the Committee. The petition charged that the Committee had used Brandhove as a tool in order 'to smear Congressman Franck R. Havenner as a 'Red' when he was a candidate for Mayor of San Francisco in 1947; and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end.' In view of the conflict between this petition and evidence previously given by Brandhove, the Committee asked local prosecuting officials to institute criminal proceedings against him. The Committee also summoned Brandhove to appear before them at a hearing held on January 29. Testimony was there taken from the Mayor of San Francisco, allegedly a member of the conspiracy. The plaintiff appeared with counsel, but refused to give testimony. ***371** For this, he was prosecuted for contempt in the State courts. Upon the jury's failure to return a verdict this prosecution was dropped. After Brandhove refused to testify, the Chairman quoted testimony given by Brandhove at prior hearings. The Chairman also read into the record a statement concerning an alleged criminal record of Brandhove, a newspaper article denying the truth of his charges, and a denial by the Committee's counsel—who was absent—that Brandhove's charges were true.

Brandhove alleges that the January 29 hearing 'was not held for a legislative purpose,' but was designed 'to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, and prevent and deprive plaintiff.' Damages of $10,000 were asked 'for legal counsel, traveling, hotel accommodations, and other matters pertaining and necessary to his defense' in the contempt proceeding ****786** arising out of the Committee hearings. The plaintiff also asked for punitive damages.

The action was dismissed without opinion by the District Judge. The Court of Appeals for the Ninth Circuit held, however, that the complaint stated a cause of action against the Committee and its members. 183 F.2d 121.[2] We brought the case here because important issues are raised concerning the rights of individuals and the power of State legislatures. 340 U.S. 903, 71 S.Ct. 279.

***372** We are again faced with the Reconstruction legislation which caused the Court such concern in Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, and in the Williams cases decided this term. Williams v. U.S., 341 U.S. 97, 71 S.Ct. 576; Id., 341 U.S. 70, 71 S.Ct. 581; Id., 341 U.S. 58, 71 S.Ct. 595. But this time we do not have to wrestle with far-reaching questions of constitutionality or even of construction. We think it is clear that the legislation on which this action is founded does not impose liability on the facts before us, once they are related to the presuppositions of our political history.

The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. Roper, Life of Sir Thomas More, in More's Utopia (Adams ed.) 10. In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for 'seditious' speeches in Parliament. Proceedings against Sir John Elliot, 3 How. St.Tr., 294, 332. In 1689, the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.' 1 Wm. & Mary, Sess. 2, c. II. See Stockdale v. Hansard, 9 Ad. & El. 1, 113—114 (1839).

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of

Rights: 'Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress * * *.' Article I, s 6, of the Constitution provides: ***373** '* * * for any Speech or Debate in either House, (the Senators and Representatives) shall not be questioned in any other Place.'

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. '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 every one, however powerful, to whom the exercise of that liberty may occasion offense.' II Works of James Wilson (Andrews ed. 1896) 38. See the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Acts (House of Commons, 1939) xiv.

The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege. The Maryland Declaration of Rights, Nov. 3, 1776, provided: ****787** 'That freedom of speech, and debates or proceedings in the Legislature, ought not to be impeached in any other court or judicature.' Art. VIII. The Massachusetts Constitution of 1780 provided 'The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever.' Part I, Art. XXI. Chief Justice Parsons gave the following gloss to this provision in Coffin v. Coffin, 1808, 4 Mass. 1, 27:

'These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the ***374** rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.'

The New Hampshire Constitution of 1784 provided: 'The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.' Part I, Art. XXX.[3]

***375** It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess.[4] For the loyalist executive and judiciary had been deposed, and the legislature was supreme in most States during and after the Revolution. 'The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.' Madison, The Federalist, No. XLVIII.

As other States joined the Union or revised their Constitutions, they took great ****788** care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability. Forty-one of the forty-eight States now have specific provisions in their Constitutions protecting the privilege.[5]

***376** Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an ever rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of ss 1 and 2 of the 1871 statute—now ss 43 and 47(3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.

We come then to the question whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity. Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to ***377** establish the limits of its privilege has been little more than a pretense since Ashby v. White, 2 Ld. Raym, 938, 3 Id. 320. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377; Marshall v. Gordon, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881; compare McGrain v. Daugherty, 273 U.S. 135, 176, 47 S.Ct. 319, 329, 71 L.Ed. 580.

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in State of Arizona v. State of California, 283 U.S. 423, 455, 51 S.Ct. 522, 526, 75 L.Ed. 1154.

****789** Investigations, whether by standing or special committees, are an established part of representative government.[6] Legislative committees have been charged with ***378** losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed.[7] Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation. Brandhove indicated that evidence previously given by him to the committee was false, and he raised serious charges concerning the work of a committee investigating a problem within legislative concern. The Committee was entitled to assert a right to call the plaintiff before it and examine him.

It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In Kilbourn v. Thompson, supra, this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House.

We have only considered the scope of the privilege as applied to the facts of the present case. As Mr. Justice Miller said in the Kilbourn case: ‘It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for ***379** which the members who take part in the act may be held legally responsible.’ 103 U.S. at page 204. We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct.

The judgment of the Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

Mr. Justice BLACK, concurring.

The Court holds that the Civil Rights statutes[1] were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power. This result is reached by reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. The Court's opinion also points out that Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377, held legislative immunity to have some limits. And today's decision indicates that there is a point at which a legislator's conduct so ****790** far exceeds the bounds of legislative power that

he may be held personally liable in a suit brought under the Civil Rights Act. I substantially agree with the Court's reasoning and its conclusion. But since this is a difficult case for me, I think it important to emphasize what we do not decide here.

It is not held that the validity of legislative action is coextensive with the personal immunity of the legislators. That is to say, the holding that the chairman and the other members of his Committee cannot be sued in this case is not a holding that their alleged persecution of Brandhove is legal conduct. Indeed, as I understand the decision, there is still much room for challenge to the ***380** Committee action. Thus for example, in any proceeding instituted by the Tenney Committee to fine or imprison Brandhove on perjury, contempt or other charges, he would certainly be able to defend himself on the ground that the resolution creating the Committee or the Committee's actions under it were unconstitutional and void.

In this connection it is not out of place to observe that the resolution creating the Committee is so broadly drawn that grave doubts as raised as to whether the Committee could constitutionally exercise all the powers purportedly bestowed on it.[2] In part, the resolution directs the Committee 'to ascertain * * * all facts relating to the activities of persons and groups known or suspected to be dominated or controlled by a foreign power, and who owe allegiance thereto because of religious, racial, political, ideological, philosophical, or other ties, including but not limited to the influence upon all such persons and groups of education, economic circumstances, social positions, fraternal and casual associations, living standards, race, religion, politics, ancestry and the activities of paid provocation * * *.' Cal. Senate Resolution 75, June 20, 1947.

Of course the Court does not in any way sanction a legislative inquisition of the type apparently authorized by this resolution.

Unfortunately, it is true that legislative assemblies, born to defend the liberty of the people, have at times violated their sacred trusts and become the instruments of oppression. Many specific instances could be cited but perhaps the most recent spectacular illustration is the use of a committee of the Argentine Congress as the ***381** instrument to strangle the independent newspaper La Prensa because of the views it espoused.[3] In light of this Argentine experience, it does not seem inappropriate to point out that the right of every person in this country to have his say, however unorthodox ****791** or unpopular he or his opinions may be, is guaranteed by the same constitutional amendment that protects the free press. Those who cherish freedom of the press here would do well to remember that this freedom cannot long survive the legislative snuffing out of freedom to believe and freedom to speak.

Mr. Justice DOUGLAS, dissenting.

I agree with the opinion of the Court as a statement of general principles governing the liability of legislative committees and members of the legislatures. But I do ***382** not agree that all abuses of legislative committees are solely for the legislative body to police.

We are dealing here with a right protected by the Constitution—the right of free speech. The charge seems strained and difficult to sustain; but it is that a legislative committee brought the weight of its authority down on respondent for exercising his right of free speech. Reprisal for speaking is as much an abridgment as a prior restraint. If a committee departs so far from its domain to deprive a citizen of a right protected by the Constitution, I can think of no reason why it should be immune. Yet that is the extent of the liability sought to be imposed on petitioners under 8 U.S.C. s 43, 8 U.S.C.A. s 43.[1]

It is speech and debate in the legislative department which our constitutional scheme makes privileged. Included, of course, are the actions of legislative committees that are authorized to conduct hearings or make investigations so as to lay the foundation for legislative action. But we are apparently holding today that the actions of those committees have no limits in the eyes of the law. May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? May they sit as a board of censors over industry, prepare their blacklists of citizens, and issue pronouncements as devastating as any bill of attainder?

No other public official has complete immunity for his actions. Even a policeman who exacts a confession by ***383** force and violence can be held criminally liable under the Civil Rights Act, as we ruled only the other day in Williams v. United

States, 341 U.S. 97, 71 S.Ct. 576. Yet now we hold that no matter the extremes to which a legislative committee may go it is not answerable to an injured party under the civil rights legislation. That result is the necessary consequence of our ruling since the test of the statute, so far as material here, is whether a constitutional right has been impaired, not whether the domain of the committee was traditional. It is one thing to give great leeway to the legislative right of speech, debate, and investigation. But when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends. It was indeed the purpose of this civil rights legislation to secure federal rights against invasion by officers and agents of the states. I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain.

All Citations

341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019

Footnotes

1 R.S. s 1980 (pt. 3), 8 U.S.C. s 47(3), 8 U.S.C.A. s 47(3):
'If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, and person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.'

2 The Court of Appeals affirmed the dismissal as to Robinson on the ground that he was not acting under color of law and that the complaint did not show him to be a member of a conspiracy. We have denied a petition to review this decision. Brandhove v. Robinson, 341 U.S. 936, 71 S.Ct. 853.

3 In two State Constitutions of 1776, the privilege was protected by general provisions preserving English law. See S.Car.Const.1776, Art. VII; N.J.Const.1776, Art. XXII. Compare N.Car.Const.1776, Part II, Art. XLV.
Three other of the original States made specific provision to protect legislative freedom immediately after the Federal Constitution was adopted. See Pa.Const.1790, Art. I, s 17; Ga.Const.1789, Art. I, s 14; Del.Const.1792, Art. II, s 11. Connecticut and Rhode Island so provided in the first constitutions enacted to replace their uncodified organic law. Conn.Const.1818, Art. III, s 10; R.I.Const.1842, Art. IV, s 5.
In New York, the Bill of Rights passed by the legislature on January 26, 1787, provided: ‘That the freedom of speech and debates, and proceedings in the senate and assembly, shall not be impeached or questioned in any court or place out of the senate or assembly.’
In Virginia, as well as in the other colonies, the assemblies had built up a strong tradition of legislative privilege long before the Revolution. See Clarke, Parliamentary Privilege in the American Colonies (1943), passim, especially 70 and 93 et seq.

4 See Jefferson, Notes on the State of Virginia (3d Am. ed. 1801) 174—175. The Notes were written in 1781. See also, a letter from Jefferson to Madison, March 15, 1789, to be published in a forthcoming volume of The Papers of Thomas Jefferson (Boyd ed.): ‘The tyranny of the legislatures is the most formidable dread at present, and will be for long years.’ As to the political currents at the time the United States Constitution and the State Constitutions were formulated, see Corwin, The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention, 30 Am.Hist.Rev. 511 (1925).

5 Ala.Const. Art. IV, s 56; Ariz.Const. Art. IV (ii), s 7; Ark.Const. Art. V, s 15; Colo.Const. Art. V, s 16; Conn.Const. Art. III, s 10; Del.Const. Art. II, s 13; Ga.Const. Art. III, s vii, par. 3; Idaho Const. Art. III, s 7; Ill.Const. Art. IV, s 14; Ind.Const. Art. IV, s 8; Kans.Const. Art. II, s 22; Ky.Const. s 43; La.Const. Art. III, s 13; Me.Const. Art. IV(iii), s 8; Md.D.R. 10, Art. III, s 18; Mass. Pt. I, Art. 21; Mich.Const. Art. V, s 8; Minn.Const. Art. IV, s 8; Mo.Const. Art. III, s 19; Mont.Const. Art. V, s 15; Nebr.Const. Art. III, s 26; N.H.Const. Pt. I, Art. 30; N.J.Const. Art. IV, s iv, par. 8; N.M.Const. Art. IV, s 13; N.Y.Const. Art. III, s 11; N.D.Const. Art. II, s 42; Ohio Const. Art. II, s 12; Okla.Const. Art. V, s 22; Ore.Const. Art. IV, s 9; Pa.Const. Art. II, s 15; R.I.Const. Art. IV, s 5; S.D.Const. Art. III, s 11; Tenn.Const. Art. II, s 13; Tex.Const. Art. III, s 21; Utah Const. Art. VI, s 8; Vt.Const. ch. I, Art. 14; Va.Const. Art. IV, s 48; Wash.Const. Art. II, s 17; W.Va.Const. Art. VI, s 17; Wis.Const., Art. IV, s 16; Wyo.Const. Art. III, s 16.

Compare Iowa Const Art. III, s 10; N.C.Const. Art. II, s 17 (right of legislator to protest action of legislature). See also, Calif.Const. Art. IV, s 11; Iowa Const. Art. III, s 11; Miss.Const. Art. IV, s 48; Nev.Const., Art. IV, s 11; S.C.Const. Art. III, s 14 (freedom from arrest). Only the Florida Constitution has no provision concerning legislative privilege.

6 See Wilson, Congressional Government (1885), 303: 'It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.

7 See Dilliard, Congressional Investigations: The Role of the Press, 18 U. of Chi.L.Rev. 585.

1 8 U.S.C. ss 43, 47(3), 8 U.S.C.A. ss 43, 47(3).

2 See Judge Edgerton dissenting in Barsky v. United States, 83 U.S.App.D.C. 127, 138, 167 F.2d 241, 252; Judge Charles E. Clark dissenting in United States v. Josephson, 2 Cir., 165 F.2d 82, 93.

3 N.Y. Times, Mar. 16, 1951, p. 1, col. 2; N.Y.Times, Mar. 17, 1951, p. 1, col. 2. The situation was graphically described in an editorial appearing in La Nacion of Buenos Aires on March 18, 1951: 'But no one could have imagined until this moment that Congress, properly invested with implicit powers of investigation, could decree interventions of this nature intended to carry out acts which, under no circumstances, come within the province of the Legislature. In the present case this alteration of functions is of unusual importance because it affects an inviolable constitutional principle. If Congress cannot dictate 'laws restrictive of the freedom of the press' (Art. 23, Argentine Constitution) which would be the only possible step within its specific function, how could it take possession of newspapers, hinder their activity and decide their fate, all these being acts whereby the exercise of that same freedom is rendered impracticable? If such a state of things is permitted and becomes generalized, then it means that the repetition of these acts whenever it is deemed suitable in view of conflicting opinions, would cause the constitutional guarantee to be utterly disregarded. * * * Last year the activities of an investigating congressional commission (The Committee on Anti-Argentine Activities), appointed for another concrete purpose, served to bring about the closure of up to 49 newspapers in one day. * * *' See generally, Editor & Publisher, Mar. 24, 1951, p. 5.

1 'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, and 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.'

Monroe v. Pape
365 U.S. 167 (1961)

81 S.Ct. 473
Supreme Court of the United States

James MONROE et al., Petitioners,

v.

Frank PAPE et al.

No. 39.
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Argued Nov. 8, 1960.
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Decided Feb. 20, 1961.

Synopsis

Action for violation of Federal Civil Rights act against city police officers and city. The United States District Court for the Northern District of Illinois, Eastern Division, entered judgment dismissing complaint and plaintiffs appealed. The United States Court of Appeals for the Seventh Circuit, 272 F.2d 365, affirmed and the Supreme Court granted certiorari. The Supreme Court, Mr. Justice Douglas, held that allegedly illegal actions of city police officers respecting unreasonable search and seizure constituted actions 'under color of' state statute within federal statute making every person who, under color of any state statute, ordinance, etc., deprives any United States citizen of his constitutional rights liable to party injured, but municipal corporation was not a person within meaning of statute.

Reversed.

Mr. Justice Frankfurter dissented in part.

Attorneys and Law Firms

****474 *168** Mr. Donald Page Moore, Chicago, Ill., for petitioners.

Mr. Sydney R. Drebin, Chicago, Ill., for respondents.

Opinion

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case presents important questions concerning the construction of R.S. s 1979, 42 U.S.C. s 1983, 42 U.S.C.A. s 1983, which reads as follows:
'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 ***169** citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

The complaint alleges that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on 'open' charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he

was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him. It is alleged that the officers had no search warrant and no arrest warrant and that they acted 'under color of the statutes, ordinances, regulations, customs and usages' of Illinois and of the City of Chicago. Federal jurisdiction was asserted under R.S. s 1979, which we have set out above, and 28 U.S.C. s 1343, ****475** 28 U.S.C.A. s 1343,[1] and 28 U.S.C. s 1331, 28 U.S.C.A. s 1331.[2]

***170** The City of Chicago moved to dismiss the complaint on the ground that it is not liable under the Civil Rights Acts nor for acts committed in performance of its governmental functions. All defendants moved to dismiss, alleging that the complaint alleged no cause of action under those Acts or under the Federal Constitution. The District Court dismissed the complaint. The Court of Appeals affirmed, 272 F.2d 365, relying on its earlier decision, Stift v. Lynch, 7 Cir., 267 F.2d 237. The case is here on a writ of certiorari which we granted because of a seeming conflict of that ruling with our prior cases. 362 U.S. 926, 80 S.Ct. 756, 4 L.Ed.2d 745.

I.

Petitioners claim that the invasion of their home and the subsequent search without a warrant and the arrest and detention of Mr. Monroe without a warrant and without arraignment constituted a deprivation of their 'rights, privileges, or immunities secured by the Constitution' within the meaning of R.S. s 1979. It has been said that when 18 U.S.C. s 241, 18 U.S.C.A. s 241, made criminal a conspiracy 'to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution,' it embraced only rights that an individual has by reason of his relation to the central government, not to state governments. United States v. Williams, 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758. Cf. United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588; Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340. But the history of the section of the Civil Rights Act presently involved does not permit such a narrow interpretation.

***171** Section 1979 came onto the books as s 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by s 5 of the Fourteenth Amendment to enforce the provisions of that Amendment.[3] Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section:
'The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill,[4] which has since become a part of the Constitution,'[5] viz., the Fourteenth Amendment.

****476** Its purpose is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.' 17 Stat. 13. Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of R.S. s 1979. See Douglas v. City of Jeannette, 319 U.S. 157, 161—162, 63 S.Ct. 877, 880, 87 L.Ed. 1324. So far petitioners are on solid ground. For the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782; Elkins v. United States, 364 U.S. 206, 213, 80 S.Ct. 1437, 1441, 4 L.Ed.2d 1669.

II.

There can be no doubt at least since Ex parte Virginia, 100 U.S. 339, 346—347, 25 L.Ed. 676, that Congress has the power to ***172** enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. See Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287—296, 33 S.Ct. 312, 314, 318, 57 L.Ed. 510. The question with which we now deal is the narrower one of whether Congress, in enacting s 1979, meant to give a remedy to parties deprived of constitutional rights, privileges

and immunities by an official's abuse of his position. Cf. Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774; Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495; United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368. We conclude that it did so intend.

It is argued that 'under color of' enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did. In this case it is said that these policemen, in breaking into petitioners' apartment, violated the Constitution[6] and laws of Illinois. It is pointed out that under Illinois law a simple remedy is offered for that violation and that, so far as it appears, the courts of Illinois are available to give petitioners that full redress which the common law affords for violence done to a person; and it is earnestly argued that no 'statute, ordinance, regulation, custom or usage' of Illinois bars that redress.

The Ku Klux Act grew out of a message sent to Congress by President Grant on March 23, 1871, reading:
'A condition of affairs now exists in some States of the Union rendering life and property insecure and ***173** the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and ****477** property, and the enforcement of law in all parts of the United States. * * *'[7]

The legislation—in particular the section with which we are now concerned—had several purposes. There are threads of many thoughts running through the debates. One who reads them in their entirety sees that the present section had three main aims.

First, it might, of course, override certains kinds of state laws. Mr. Sloss of Alabama, in opposition, spoke of that object and emphasized that it was irrelevant because there were no such laws:[8]
'The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people.'

Second, it provided a remedy where state law was inadequate. That aspect of the legislation was summed up as follows by Senator Sherman of Ohio:
'* * * it is said the reason is that any offense may be committed upon a negro by a white man, and a ***174** negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.'[9]

But the purposes were much broader. The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. The opposition to the measure complained that 'It overrides the reserved powers of the States,'[10] just as they argued that the second section of the bill 'absorb(ed) the entire jurisdiction of the State over their local and domestic affairs.'[11]

This Act of April 20, 1871, sometimes called 'the third 'force bill,'' was passed by a Congress that had the Klan 'particularly in mind.'[12] The debates are replete with references to the lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it.[13] This report was drawn on by many of the speakers.[14] It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished ***175** the powerful momentum behind this 'force bill.' Mr. Lowe of Kansas said:

'While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, ****478** darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.'[15]

Mr. Beatty of Ohio summarized in the House the case for the bill when he said:
'* * * certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. * * * (M)en were murdered, houses were burned, women were outraged, men were scouraged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.'[16]

While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan,[17] the remedy created was ***176** not a remedy against it or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law. Senator Osborn of Florida put the problem in these terms:[18]
'That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed.'

There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. Speaking of conditions in Virginia, Mr. Porter of that State said:[19]
'The outrages committed upon loyal men there are under the forms of law.'

Mr. Burchard of Illinois pointed out that the statutes of a State may show no discrimination:[20]
'If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, ***177** yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws.'
****479** Mr. Hoar of Massachusetts stated:[21]

'Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens.'

***178** Senator Pratt of Indiana spoke of the discrimination against Union sympathizers and Negroes in the actual enforcement of the laws:[22]

'Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general; that the courts are open to all; that juries, grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment.

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

It was precisely that breadth of the remedy which the opposition emphasized. Mr. Kerr of Indiana referring to the section involved in the present litigation said:

'This section gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts. The offenses committed against him may be the common violations of the municipal law of his State. It may give rise to numerous vexations and outrageous prosecutions, inspired by mere mercenary considerations, prosecuted in a spirit of plunder, aided by the crimes of perjury and subornation of perjury, more reckless and dangerous to society than the alleged ***179** offenses out of which the cause of action may have arisen. It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States. It is neither authorized nor expedient, and is not calculated to bring peace, or order, or domestic content and prosperity to the disturbed society of the South. ****480** The contrary will certainly be its effect.'[23]

Mr. Voorhees of Indiana, also speaking in opposition, gave it the same construction:[24]

'And now for a few moments let us inspect the provisions of this bill, inspired as it is by the waning and decaying fortunes of the party in power, and called for, as I have shown, by no public necessity whatever. The first and second sections are designed to transfer all criminal jurisdiction from the courts of the States to the courts of the United States. This is to be done upon the assumption that the courts of the southern States fail and refuse to do their duty in the punishment of offenders against the law.'

Senator Thurman of Ohio spoke in the same vein about the section we are now considering:[25]

'It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the ***180** Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.'

The debates were long and extensive. It is abundantly clear that one reason the legislation 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.

Much is made of the history of s 2 of the proposed legislation. As introduced s 2 was very broad:

'* * * if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law

of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, of larceny; and if one or more of the parties to said conspiracy or combination shall do ***181** any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony * * *.'

It was this provision that raised the greatest storm. It was s 2 that was rewritten ****481** so as to be in the main confined to conspiracies to interfere with a federal or state officer in the performance of his duties. 17 Stat. 13. Senator Trumbull said:[26] 'Those provisions were changed, and as the bill passed the House of Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guarantied to them by the Constitution and laws of the United States, and it did not undertake to furnish redress for wrongs done by one person upon another in any of the States of the Union in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery committed on another in a State.'

But s 1—the section with which we are here concerned—was not changed as respects any feature with which we are presently concerned.[27] The words 'under ***182** color of' law were in the legislation from the beginning to the end. The changes hailed by the opposition—indeed the history of the evolution of s 2 much relied upon now—are utterly irrelevant to the problem before us, viz., the meaning of 'under color of' law. The vindication of States' rights which was hailed in the amendments to s 2 raises no implication as to the construction to be given to 'color of any law' in s 1. The scope of s 1—under any construction—is admittedly narrower than was the scope of the original version of s 2. Opponents of the Act, however, did not fail to note that by virtue of s 1 federal courts would sit in judgment on the misdeeds of state officers.[28] Proponents of the Act, on the other hand, were aware of the extension of federal power contemplated by every section of the Act. They found justification, however, for this extension in considerations such as those advanced by Mr. Hoar:[29]
'The question is not whether a majority of the people in a majority of the States are likely to be attached to and able to secure their own liberties. The question is not whether the majority of the people in every State are not likely to desire to secure their own rights. It is, whether a majority of the people in every State are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to insure that under no temptation of party spirit, under no political excitement, under ***183** no jealousy of race or caste, will the majority either in numbers or ****482** strength in any State seek to deprive the remainder of the population of their civil rights.'

Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.

We had before us in United States v. Classic, supra, s 20 of the Criminal Code, 18 U.S.C. s 242, 18 U.S.C.A. s 242,[30] which provides a criminal punishment for anyone who 'under color of any law, statute, ordinance, regulation, or custom' subjects any inhabitant of a State to the deprivation of 'any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.' Section 242 first came into the law as s 2 of the Civil Rights Act, Act of April 9, 1866, 14 Stat. 27. After passage of the Fourteenth Amendment, this provision was re-enacted and amended by ss 17, 18, Act of May 31, 1870, 16 Stat. 140, 144.[31] The right involved in the Classic case was the right of voters in a primary to have their votes counted. The laws of Louisiana required the defendants 'to count the ballots, to record the result of the count, and ***184** to certify the result of the election.' United States v. Classic, supra, 313 U.S. 325—326, 61 S.Ct. 1043. But according to the indictment they did not perform their duty. In an opinion written by Mr. Justice (later Chief Justice) Stone, in which Mr. Justice Roberts, Mr. Justice Reed, and Mr. Justice Frankfurter joined, the Court ruled, 'Misuse of power, possessed by virtue of state law and made possible

only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.' Id., 313 U.S. 326, 61 S.Ct. 1043. There was a dissenting opinion; but the ruling as to the meaning of 'under color of' state law was not questioned.

That view of the meaning of the words 'under color of' state law, 18 U.S.C. s 242, 18 U.S.C.A. s 242, was reaffirmed in Screws v. United States, supra, 325 U.S. 108—113, 65 S.Ct. 1038—1041. The acts there complained of were committed by state officers in performance of their duties, viz., making an arrest effective. It was urged there, as it is here, that 'under color of' state law should not be construed to duplicate in federal law what was an offense under state law. Id., 325 U.S. 138—149, 157—161, 65 S.Ct. 1053—1058, 1061—1063 (dissenting opinion). It was said there, as it is here, that the ruling in the Classic case as to the meaning of 'under color of' state law was not in focus and was ill-advised. Id., 325 U.S. 146—147, 65 S.Ct. 1056—1057 (dissenting opinion). It was argued there, as it is here, that 'under color of' state law included only action taken by officials pursuant to state law. Id., 325 U.S. 141—146, 65 S.Ct. 1054—1056 (dissenting opinion). We rejected that view. Id., 325 U.S. 110—113, 114-117, 65 S.Ct. 1039—1041, 1041—1043 (concurring opinion). We stated:
'The construction given s 20 (18 U.S.C. s 242, 18 U.S.C.A. s 242) in the Classic case formulated a rule of law which has become the basis of federal enforcement in this important ****483** field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561, where we ***185** overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The Classic case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the Classic case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of s 20 (18 U.S.C. s 242, 18 U.S.C.A. s 242) to meet the exigencies of each case coming before us.' Id., 325 U.S. 112—113, 65 S.Ct. 1040—1041.

We adhered to that view in Williams v. United States, supra, 341 U.S. 99, 71 S.Ct. 578.

Mr. Shellabarger, reporting out the bill which became the Ku Klux Act, said of the provision with which we now deal:
'The model for it will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' * * * This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights * * *.'[32]

Thus, it is beyond doubt that this phrase should be accorded the same construction in both statutes—in s 1979 and in 18 U.S.C. s 242, 18 U.S.C.A. s 242.

***186** Since the Screws and Williams decisions, Congress has had several pieces of civil rights legislation before it. In 1956 one bill reached the floor of the House. This measure had at least one provision in it penalizing actions taken 'under color of law or otherwise.'[33] A vigorous minority report was filed attacking, inter alia, the words 'or otherwise.'[34] But not a word of criticism of the phrase 'under color of' state law as previously construed by the Court is to be found in that report.

Section 131(c) of the Act of September 9, 1957, 71 Stat. 634, 637, amended 42 U.S.C. s 1971, 42 U.S.C.A. s 1971, by adding a new subsection which provides that no person 'whether acting under color of law or otherwise' shall intimidate any other person in voting as he chooses for federal officials. A vigorous minority report was filed[35] attacking the wide scope of the new subsection by reason of the words 'or otherwise.' It was said in that minority report that those words went far beyond what this Court had construed 'under color of law' to mean.[36] But there was not a word of criticism directed to the prior construction given by this Court to the words 'under color of' law.

The Act of May 6, 1960, 74 Stat. 86, 42 U.S.C.A. ss 1971, 1974 et seq., uses 'under color of' law in two contexts, ****484** once when s 306 defines 'officer of election' and next when s 601(a) gives a judicial remedy on behalf of a qualified voter denied the

opportunity to register. Once again there was a Committee report containing minority views.[37] Once again no one challenged the scope given by our prior decisions to the phrase 'under color of' law.

***187** If the results of our construction of 'under color of' law were as horrendous as now claimed, if they were as disruptive of our federal scheme as now urged, if they were such an unwarranted invasion of States' rights as pretended, surely the voice of the opposition would have been heard in those Committee reports. Their silence and the new uses to which 'under color of' law have recently been given reinforce our conclusion that our prior decisions were correct on this matter of construction.

We conclude that the meaning given 'under color of' law in the Classic case and in the Screws and Williams cases was the correct one; and we adhere to it.

In the Screws case we dealt with a statute that imposed criminal penalties for acts 'wilfully' done. We construed that word in its setting to mean the doing of an act with 'a specific intent to deprive a person of a federal right.' 325 U.S. at page 103, 65 S.Ct. at page 1036. We do not think that gloss should be placed on s 1979 which we have here. The word 'wilfully' does not appear in s 1979. Moreover, s 1979 provides a civil remedy, while in the Screws case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

So far, then, the complaint states a cause of action. There remains to consider only a defense peculiar to the City of Chicago.

III.

The City of Chicago asserts that it is not liable under s 1979. We do not stop to explore the whole range of questions tendered us on this issue at oral argument and in the briefs. For we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of s 1979.

***188** When the bill that became the Act of April 20, 1871, was being debated in the Senate, Senator Sherman of Ohio proposed an amendment which would have made 'the inhabitants of the county, city, or parish' in which certain acts of violence occurred liable 'to pay full compensation' to the person damaged or his widow or legal representative.[38] The amendment was adopted by the ****485** Senate.[39] The House, however, rejected it.[40] The Conference Committee reported another version.[41] The ***189** House rejected the Conference report.[42] In a second conference the Sherman amendment was dropped and in its place s 6 of the Act of April 20, 1871, was substituted. ***190** [43] This new section, which is now R.S. s 1981, 42 U.S.C. s 1986, 42 U.S.C.A. s 1986, dropped out all provision for municipal liability and extended liability in damages to 'any person or persons, having knowledge that any' of the specified wrongs are being committed. Mr. Poland, speaking for the House Conferees about the Sherman proposal to make municipalities liable, said:

'We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that that section imposing liability upon towns and counties must go out or we should fail to agree.'[44]

The objection to the Sherman amendment stated by Mr. Poland was that 'the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere ****486** instrumentality for the administration of state law.'[45] The question of constitutional power of Congress to impose civil liability on municipalities was vigorously debated with powerful arguments advanced in the affirmative.[46]

Much reliance is placed on the Act of February 25, 1871, 16 Stat. 431, entitled 'An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof.' Section 2 of this Act provides that 'the word 'person' may extend and be applied to bodies politic and corporate.'[47] ***191** It should be noted, however, that

this definition is merely an allowable, not a mandatory, one. It is said that doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective,[48] and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level.[49] We do not reach those policy considerations. Nor do we reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.

The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them.[50] ***192** Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted. But since the complaint should not have been dismissed against the officials the judgment must be and is reversed.

Reversed.

Mr. Justice HARLAN, whom Mr. Justice STEWART joins, concurring.

Were this case here as one of first impression, I would find the 'under color of any statute' issue very close indeed. However, in Classic[1] and Screws[2] this Court considered a substantially identical statutory phrase to have a meaning which, unless we now retreat from it, requires that issue to go for the petitioners here.

****487** From my point of view, the policy of stare decisis, as it should be applied in matters of statutory construction and, to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation, require that it appear beyond doubt from the legislative history of the 1871 statute that Classic and Screws misapprehended the meaning of the controlling provision,[3] before a departure from what was decided in those cases would be justified. Since I can find no such justifying indication in that legislative history, I join the opinion of the Court. However, what has been written on both sides of the matter makes some additional observations appropriate.

***193** Those aspects of Congress' purpose which are quite clear in the earlier congressional debates, as quoted by my Brothers DOUGLAS and FRANKFURTER in turn, seem to me to be inherently ambiguous when applied to the case of an isolated abuse of state authority by an official. One can agree with the Court's opinion that:
'It is abundantly clear that one reason the legislation 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 * * *'

Without being certain that Congress meant to deal with anything other than abuses so recurrent as to amount to 'custom, or usage.' One can agree with any Brother FRANKFURTER, in dissent, that Congress had no intention of taking over the whole field of ordinary state torts and crimes, without being certain that the enacting Congress would not have 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. If attention is directed at the rare specific references to isolated abuses of state authority, one finds them neither so clear nor so disproportionately divided between favoring the positions of the majority or the dissent as to make either position seem plainly correct.[4]

Besides the inconclusiveness I find in the legislative history, it seems to me by no means evident that a position ***194** favoring departure from Classic and Screws fits better that with which the enacting Congress was concerned than does the position the Court adopted 20 years ago. There are apparent incongruities in the view of the dissent which may be more easily reconciled in terms of the earlier holding in Classic.

The dissent considers that the 'under color of' provision of s 1983 distinguishes between unconstitutional actions taken without state authority, which only the State should remedy, and unconstitutional actions authorized by the State, which the Federal

Act was to reach. If so, then the controlling difference for the enacting legislature must have been either that the state remedy was more adequate for unauthorized actions than for authorized ones or that there was, in ****488** some sense, greater harm from unconstitutional actions authorized by the full panoply of state power and approval than from unconstitutional actions not so authorized or acquiesced in by the State. I find less than compelling the evidence that either distinction was important to that Congress.

I.

If the state remedy was considered adequate when the official's unconstitutional act was unauthorized, why should it not be thought equally adequate when the unconstitutional act was authorized? For if one thing is very clear in the legislative history, it is that the Congress of 1871 was well aware that no action requiring state judicial enforcement could be taken in violation of the Fourteenth Amendment without that enforcement being declared void by this Court on direct review from the state courts. And presumably it must also have been understood that there would be Supreme Court review of the denial of a state damage remedy against an official on grounds of state authorization of the unconstitutional ***195** action. It therefore seems to me that the same state remedies would, with ultimate aid of Supreme Court review, furnish identical relief in the two situations. This is the point Senator Blair made when, having stated that the object of the Fourteenth Amendment was to prevent any discrimination by the law of any State, he argued that:
'This being forbidden by the Constitution of the United States, and all the judges, State and national, being sworn to support the Constitution of the United States, and the Supreme Court of the United States having power to supervise and correct the action of the State courts when they violated the Constitution of the United States, there could be no danger of the violation of the right of citizens under color of the laws of the States.' Cong. Globe, 42d Cong., 1st Sess., at App. 231.

Since the suggested narrow construction of s 1983 presupposes that state measures were adequate to remedy unauthorized deprivations of constitutional rights and since the identical state relief could be obtained for state-authorized acts with the aid of Supreme Court review, this narrow construction would reduce the statute to having merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court to the lower courts and providing a federal tribunal for fact findings in cases involving authorized action. Such a function could be justified on various grounds. It could, for example, be argued that the state courts would be less willing to find a constitutional violation in cases involving ‘authorized action’ and that therefore the victim of such action would bear a greater burden in that he would more likely have to carry his case to this Court, and once here, might be bound by unfavorable state court findings. But the legislative debates do not disclose congressional ***196** concern about the burdens of litigation placed upon the victims of ‘authorized’ constitutional violations contrasted to the victims of unauthorized violations. Neither did Congress indicate an interest in relieving the burden placed on this Court in reviewing such cases.

The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. This view, by no means unrealistic as a common-sense matter,[5] is, I believe, more ****489** consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings. For example, the tone is surely one of overflowing protection of constitutional rights, and there is not a hint of concern about the administrative burden on the Supreme Court, when Senator Freling-huysen says:
‘As to the civil remedies, for a violation of these privileges, we know that when the courts of a State ***197** violate the provisions of the Constitution or the law of the United States there is now relief afforded by a review in the Federal courts. And since the 14th Amendment forbids any State from making or enforcing any law abridging these privileges and immunities, as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights. As to the civil remedy no one, I think, can object.’ Id., at 501.
And Senator Carpenter reflected a similar belief that the protection granted by the statute was to be very different from the relief available on review of state proceedings:

'The prohibition in the old Constitution that no State should pass a law impairing the obligation of contracts was a negative prohibition laid upon the State. Congress was not authorized to interfere in case the State violated that provision. It is true that when private rights were affected by such a State law, and that was brought before the judiciary, either of the State or nation, it was the duty of the court to pronounce the act void; but there the matter ended. Under the present Constitution, however, in regard to those rights which are secured by the fourteenth amendment, they are not left as the right of the citizen in regard to laws impairing the obligation of contracts was left, to be disposed of by the courts as the cases should arise between man and man, but Congress is clothed with the affirmative power and jurisdiction to correct the evil.

'I think there is one of the fundamental, one of the great, the tremendous revolutions effected in our Government by that article of the Constitution. It ***198** gives Congress affirmative power to protect the rights of the citizen, whereas before no such right was given to save the citizen from the violation of any of his rights by State Legislatures, and the only remedy was a judicial one when the case arose.' Id., at 577.

In my view, these considerations put in serious doubt the conclusion that s 1983 was limited to state-authorized unconstitutional acts, on the premise that state remedies respecting them were considered less adequate than those available for unauthorized acts.

****490** II.

I think this limited interpretation of s 1983 fares no better when viewed from the other possible premise for it, namely that state-approved constitutional deprivations were considered more offensive than those not so approved. For one thing, the enacting Congress was not unaware of the fact that there was a substantial overlap between the protections granted by state constitutional provisions and those granted by the Fourteenth Amendment. Indeed one opponent of the bill, Senator Trumbull, went so far as to state in a debate with Senators Carpenter and Edmunds that his research indicated a complete overlap in every State, at least as to the protections of the Due Process Clause.[6] Thus, in one very significant sense, there was no ultimate state approval of a large portion of otherwise authorized actions depriving a person of due-process rights. I hesitate to assume that the proponents of the present statute, who regarded it as necessary even though they knew that the provisions of the Fourteenth Amendment were self-executing, would have thought the remedies unnecessary whenever there were self-executing provisions of state constitutions also forbidding what the Fourteenth Amendment forbids. The only alternative is ***199** to disregard the possibility that a state court would find the action unauthorized on grounds of the state constitution. But if the defendant official is denied the right to defend in the federal court upon the ground that a state court would find his action unauthorized in the light of the state constitution, it is difficult to contend that it is the added harmfulness of state approval that justifies a different remedy for authorized than for unauthorized actions of state officers. Moreover, if indeed the legislature meant to distinguish between authorized and unauthorized acts and yet did not mean the statute to be inapplicable whenever there was a state constitutional provision which, reasonably interpreted, gave protection similar to that of a provision of the Fourteenth Amendment, would there not have been some explanation of this exception to the general rule? The fact that there is none in the legislative history at least makes more difficult a contention that these legislators were in fact making a distinction between use and misuse of state power.

There is a further basis for doubt that it was the additional force of state approval which justified a distinction between authorized and unauthorized actions. No one suggests that there is a difference in the showing the plaintiff must make to assert a claim under s 1983 depending upon whether he is asserting a denial of rights secured by the Equal Protection Clause or a denial of rights secured by the Due Process Clause of the Fourteenth Amendment. If the same Congress which passed what is now s 1983 also provided remedies against two or more non-officials who conspire to prevent an official from granting equal protection of the laws, see 42 U.S.C. s 1985, 42 U.S.C.A. s 1985, then it would seem almost untenable to insist that this Congress would have hesitated, on the grounds of lack of full state approval of the official's act, to provide similar remedies against an official who, unauthorized, denied that equal protection of the laws on his own initiative. For ***200** there would be no likely state approval of or even acquiescence in a conspiracy to coerce a state official to deny equal protection. Indeed it is difficult to attribute to a

Congress which forbad two private citizens from hindering an official's giving of equal protection an intent to leave that official free to deny equal protection of his own accord.[7]

****491** We have not passed upon the question whether 42 U.S.C. s 1985, 42 U.S.C.A. s 1985,[8] which was passed as the second section of the Act that included s 1983, was intended to reach only the Ku Klux Klan or other substantially organized group activity, as distinguished from what its words seem to include, any conspiracy of two persons with 'the purpose of preventing or hindering the constituted authorities of any State * * * from giving or securing to all persons within such State * * * the equal protection of the laws * * *.'[9] Without now deciding the question, I think ***201** it is sufficient to note that the legislative history is not without indications that what the words of the statute seem to state was in fact the meaning assumed by Congress.[10]

****492** ***202** These difficulties in explaining the basis of a distinction between authorized and unauthorized deprivations of constitutional rights fortify my view that the legislative history does not bear the burden which stare decisis casts upon it. For this reason and for those stated in the opinion of the Court, I agree that we should not now depart from the holdings of the Classic and Screws cases.

Mr. Justice FRANKFURTER, dissenting except insofar as the Court holds that this action cannot be maintained against the City of Chicago.

Abstractly stated, this case concerns a matter of statutory construction. So stated, the problem before the Court is denuded of illuminating concreteness and thereby of its far-reaching significance for our federal system. Again abstractly stated, this matter of statutory construction is one upon which the Court has already passed. But it has done so under circumstances and in settings that negative those considerations of social policy upon which the doctrine of stare decisis, calling for the controlling application of prior statutory construction, rests.

This case presents the question of the sufficiency of petitioners' complaint in a civil action for damages brought under the Civil Rights Act, ***203** R.S. s 1979, 42 U.S.C. s 1983, 42 U.S.C.A. s 1983.[1] The complaint alleges that on October 29, 1958, at 5:45 a.m., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on 'open' charges for ten hours, during which time he was interrogated about a murder[2] and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him. It is also alleged that the actions of the officers throughout were without authority of a search warrant or an arrest warrant; that those actions constituted arbitrary and unreasonable conduct; that the ***204** officers were employees of the City of Chicago, which furnished each of them ****493** with a badge and an identification card designating him as a member of the Police Department; that the officers were agents of the city, acting in the course of their employment and engaged in the performance of their duties; and that it is the custom of the Department to arrest and confine individuals for prolonged periods on 'open' charges for interrogation, with the purpose of inducing incriminating statements, exhibiting its prisoners for identification, holding them incommunicado while police officers investigate their activities, and punishing them by imprisonment without judicial trial. On the basis of these allegations various members of the Monroe family seek damages against the individual police officers and against the City of Chicago. The District Court dismissed the complaint for failure to state a claim and the Court of Appeals for the Seventh Circuit affirmed. 272 F.2d 365.

Petitioners base their claim to relief in the federal courts on what was enacted as s 1 of the 'Ku Klux Act' of April 20, 1871, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'

17 Stat. 13. It became, with insignificant rephrasing, s 1979 of the Revised Statutes. As now set forth in 42 U.S.C. s 1983, 42 U.S.C.A. s 1983, it is, in relevant part, as follows:
'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * 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.'

***205** I.

In invoking s 1979 (the old designation will be used hereafter), petitioners contend that its protection of 'rights, privileges, or immunities secured by the Constitution' encompasses what 'due process of law' and 'the equal protection of the laws' of the Fourteenth Amendment guarantee against action by the States. In this contention they are supported both by the title of the Act of 1871 and by its legislative history. See the authoritative statement of Mr. Edmunds, reporting the bill from the Senate Committee on the Judiciary, Cong. Globe, 42d Cong., 1st Sess. 568. See also id., at 332—334, App. 83—85, 310. It is true that a related phrase, 'any right or privilege secured * * * by the Constitution or laws,' in s 241 of Title 18 U.S.C., 18 U.S.C.A. s 241, was said by a plurality of the Court in United States v. Williams, 341 U.S. 70, 71 S.Ct. 581, 95 L.Ed. 758, to comprehend only the rights arising immediately from the relationship of the individual to the central government. And see United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588.[3] But this construction was demanded by s 241, which penalizes conspiracies of private individuals acting as such, while s 1979 applies only to action taken 'under color of any ****494** statute,' etc. Different problems of statutory meaning are presented by two enactments deriving from different ***206** constitutional sources. See the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835. Compare United States v. Williams, supra, with Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495. If petitioners have alleged facts constituting a deprivation under color of state authority of a right assured them by the Fourteenth Amendment, they have brought themselves within s 1979. Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324; Hague v. C.I.O., 307 U.S. 496, 525—526, 59 S.Ct. 954, 968—969, 83 L.Ed. 1423 (Opinion of Stone, J.).[4]

To be sure, Screws v. United States, supra, requires a finding of specific intent in order to sustain a conviction under the cognate penal provisions of 18 U.S.C. s 242, 18 U.S.C.A. s 242[5]—'an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.' 325 U.S. at page 104, 65 S.Ct. at page 1037. Petitioners' complaint here alleges no such specific intent. But, for a number of reasons, this requirement of Screws should not be carried over and applied to civil actions under s 1979. First, the word 'willfully' in 18 U.S.C. s 242, 18 U.S.C.A. s 242, from which the requirement of intent was derived in Screws does not appear in s 1979. Second, s 1979, by the very fact that it is a civil provision, invites treatment different from that to be given its criminal analogue. The constitutional scruples concerning vagueness which were deemed to compel the Screws construction have less force in the context of a civil proceeding, ***207** [6] and s 1979, insofar as it creates an action for damages, must be read in light of the familiar basis of tort liability that a man is responsible for the natural consequences of his acts. Third, even in the criminal area, the specific intent demanded by Screws has proved to be an abstraction serving the purposes of a constitutional need without impressing any actual restrictions upon the nature of the crime which the jury tries. The Screws opinion itself said that 'The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution.' 325 U.S. at page 106, 65 S.Ct. at page 1037. And lower courts in applying the statute have allowed inference of the requisite specific intent from evidence, it would appear, of malevolence alone.[7] But if intent to infringe 'specific' constitutional rights comes in practice to mean no more than intent without justification to bring about the circumstances which infringe those rights, then the consequence of introducing the specific intent issue into a litigation is, in effect, to require fictional pleading, needlessly ****495** burden jurors with abstruse instructions, and lessen the degree of control which federal courts have over jury vagaries.

If the courts are to enforce s 1979, it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. Specific intent in the context of the section would cause ***208** such embarrassment without countervailing justification. Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.

II.

To show such violations, petitioners invoke primarily the Amendment's Due Process Clause.[8] The essence of their claim is that the police conduct here alleged offends those requirements of decency and fairness which, because they are 'implicit in the concept of ordered liberty,' are imposed by the Due Process Clause upon the States. Palko v. State of Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288. When we apply to their complaint that standard of a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'[9] which has been the touchstone for this Court's enforcement of due process,[10] the merit of this constitutional claim is evident. The conception expressed in Wolf v. People of State of Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782, that 'The security of one's privacy against arbitrary intrusion by the police * * * is basic to a free society,' was not an innovation of Wolf. The tenet that there exists a realm of sanctuary surrounding every individual and infrangible, save in a very limited class of circumstances, by the agents of government, had informed the decision of the King's Bench two centuries earlier in Entick v. Carrington, 2 Wils, 275, had been the basis of Otis' contemporary speech against the Writ of ***209** Assistance, see Gray's notes in Quincy's Massachusetts Reports, App. I, at 471; Tudor, Life of James Otis (1823) 63, and has in the intervening years found expression not only in the Fourth Amendment to the Constitution of the United States, but also in the fundamental law of every State.[11] ****496** Modern totalitarianisms have been a stark reminder, but did not newly teach, that the kicked-in door is the symbol of a rule of fear and violence fatal to institutions founded on respect for the integrity of man.

The essence of the liberty protected by the common law and by the American constitutions was 'the right to shut the door on officials of the state unless their entry is under proper authority of law'; particularly, 'the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual.' ***210** Frank v. State of Maryland, 359 U.S. 360, 365, 79 S.Ct. 804, 808, 3 L.Ed.2d 877.[12] Searches of the dwelling house were the special object of this universal condemnation of official intrusion.[13] Night-time search was the evil in its most obnoxious form.[14] Few reported cases have presented all of the manifold aggravating circumstances which petitioners here allege—intrusion en masse, by dark, by force, unauthorized by warrant, into an occupied private home, without even the asserted justification of belief by the intruders that the inhabitants were presently committing some criminal act within; physical abuse and the calculated degradation of insult and forced nakedness; sacking and disordering of personal effects throughout the home; arrest and detention against the background terror of threatened criminal proceedings. Wherever similar conduct has appeared, the courts have unanimously condemned police entries as lawless.[15]

***211** If the question whether due process forbids this kind of police invasion were before us in isolation, the answer would be quick. If, for example, petitioners had sought damages in the state courts of Illinois and if those courts had refused redress on the ground that the official character of the respondents clothed them with civil immunity, we would be faced with the sort of situation to which the language in the Wolf opinion was addressed: 'we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.' 338 U.S. at page 28, 69 S.Ct. at page 1361. If that issue is not reached in this case it is not because the conduct which the record here presents can be condoned. But by bringing their action in a Federal District Court petitioners cannot rest on the Fourteenth Amendment simpliciter. ****497** They invoke the protection of a specific statute by which Congress restricted federal judicial enforcement of its guarantees to particular enumerated circumstances. They must show not only that their constitutional rights have been infringed, but that they have been infringed, 'under color of (state) statute, ordinance, regulation, custom, or usage,' as that phrase is used in the relevant congressional enactment.

III.

Of course, if Congress by appropriate statutory language attempted to reach every act which could be attributed to the States under the Fourteenth Amendment's prohibition: 'No State shall * * *,' the reach of the statute would be the reach of the Amendment itself. Relevant to the enforcement of such a statute would be not only the concept of state action as this Court has developed it, see Nixon v. Condon, 286 U.S. 73, 89, 52 S.Ct. 484, 487, 76 L.Ed. 987, but also considerations of the power of Congress, under the Amendment's Enforcement Clause, to determine what ***212** is 'appropriate legislation' to protect the rights which the Fourteenth Amendment secures. Cf. United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524. Still, in this supposed case we would arrive at the question of what Congress could do only after we had determined what it was that Congress had done. So, in the case before us now, we must ask what Congress did in 1871. We must determine what Congress meant by 'under color' of enumerated state authority.[16]

Congress used that phrase not only in R.S. s 1979, but also in the criminal provisions of s 2 of the First Civil Rights Act of April 9, 1866, 14 Stat. 27, from which is derived the present 18 U.S.C. s 242, 18 U.S.C.A. s 242,[17] and in both cases used it with the same purpose.[18] ****498** During the seventy year ***213** which followed these enactments, cases in this Court in which the 'under color' provisions were invoked uniformly involved action taken either in strict pursuance of some specific command of state law[19] or within the scope of executive discretion in the administration of state laws.[20] ***214** The same is true, with two exceptions, in the lower federal courts.[21] In the first of these ****499** two cases it was held that s 1979 was not directd to instances of lawless police brutality, although the ruling was not put on 'under color' ***215** grounds.[22] In the second, an indictment charging a county tax collector with depriving one Ah Koo of a federally secured right under color of a designated California law, set forth in the indictment, was held insufficient against a demurrer. United States v. Jackson, C.C.D.Cal.1874, 26 Fed.Cas. p. 563, No. 15,459. The court wrote:
'The indictment contains no averment that Ah Koo was a foreign miner, and within the provisions of the state law. If this averment be unnecessary * * * the act of congress would then be held to apply to a case of illegal extortion by a tax collector from any person, ***216** though such exaction might be wholly unauthorized by the law under which the officer pretended to act. 'We are satisfied that it was not the design of congress to prevent or to punish such abuse of authority by state officers. The object of the act was, not to prevent illegal exactions, but to forbid the execution of state laws, which, by the act itself, are made void * * *.

'It would seem, necessarily, to follow, that the person from whom the tax was exacted must have been a person from whom, under the provisions of the state law, the officer was authorized to exact it. The statute requires that a party shall be subjected to a deprivation of right secured by the statute under color of some law, statute, order or custom; but if this exaction, although made by a tax collector, has been levied upon a person not within the provisions of the state law, the exaction cannot be said to have been made 'under color of law,' any more than a similar exaction from a Chinese miner, made by a person wholly unauthorized, and under the pretense of being a tax collector.' Id., at pages 563—564.

Throughout this period, the only indication of this Court's views on the ****500** proper interpretation of the 'under color' language is a dictum in the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835. There, in striking down other Civil Rights Act provisions which, as the Court regarded them, attempted to reach private conduct not attributable to state authority. Mr. Justice Bradley contrasted those provisions with s 2 of the Act of 1866: 'This (latter) law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified.' Id., 109 U.S. at page 16, 3 S.Ct. at page 25.

A sharp change from this uniform application of seventy years was made in 1941, but without acknowledgment or ***217** indication of awareness of the revolutionary turnabout from what had been established practice. The opinion in United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, accomplished this. The case presented an indictment under s 242 charging

certain local Commissioners of Elections with altering ballots cast in a primary held to nominate candidates for Congress. Sustaining the sufficiency of the indictment in an extensive opinion concerned principally with the question whether the right to vote in such a primary was a right secured by the Constitution,[23] Mr. Justice Stone wrote that the alteration of the ballots was 'under color' of state law. This holding was summarily announced without exposition; it had been only passingly argued.[24] Of the three authorities cited to support it, two did not involve the 'under color' statutes,[25] and the third, Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, was a case in which high-ranking municipal officials claimed authorization for their actions under municipal ordinances (here held unconstitutional) ***218** and under the general police powers of the State.[26] All three of these cases had dealt with 'State action' problems, and it is 'State action,' not the very different question of the 'under color' clause, that Mr. Justice Stone appears to have considered.[27] ****501** (I joined in this opinion without having made an independent examination of the legislative history of the relevant legislation or of the authorities drawn upon for the Classic construction. Acquiescence so founded does not preclude the responsible recognition of error disclosed by subsequent study.) When, however, four years later the Court was called on to review the conviction under s 242 of a Georgia County Sheriff who had beaten a Negro prisoner to death, the opinion of four of the six Justices who believed that the statute applied merely invoked Classic and stare decisis and did not reconsider the meaning which that case had uncritically assumed was to be attached to the language, 'under color' of state authority. Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495. The briefs in the Screws case did ***219** not examine critically the legislative history of the Civil Rights Acts.[28] The only reference to this history in the plurality opinion, insofar as it bears on the interpretation of the clause 'under color of * * * law,' is contained in a pair of sentences discounting two statements by Senators Trumbull and Sherman regarding the Civil Rights Acts of 1866 and 1870, cited by the minority.[29] The bulk of the plurality opinion's treatment of the issue consists of the argument that 'under color' had been construed in Classic and that the construction there put on the words should not be abandoned or revised. 325 U.S. at pages 109—113, 65 S.Ct. at pages 1039—1041. The case of Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774, reaffirmed Screws and applied it to circumstances of third-degree brutality practiced by a private detective who held a special police officer's card and was accompanied by a regular policeman.[30]

****502** ***220** Thus, although this Court has three times found that conduct of state officials which is forbidden by state law may be 'under color' of state law for purposes of the Civil Rights Acts, it is accurate to say that that question has never received here the consideration which its importance merits. That regard for controlling legislative history which is conventionally observed by this Court in determining the true meaning of important legislation that does not construe itself[31] has never been applied to the 'under color' provisions; particularly, there has never been canvassed the full record of the debates preceding passage of the 1871 Act with which we are concerned in this case. Neither Classic nor Screws nor Williams warrants refusal now to take account of those debates and the illumination they afford. While we may well decline to re-examine recent cases which derive from the judicial process exercised under its adequate safeguards—documenting briefs and adequate arguments on both sides as foundation for due deliberation—the relevant demands of stare decisis do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, a statutory ***221** interpretation which started as an unexamined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration. Particularly is this so when that interpretation, only recently made, was at its inception a silent reversal of the judicial history of the Civil Rights Acts for three quarters of a century.

'The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible.' Hertz v. Woodman, 218 U.S. 205, 212, 30 S.Ct. 621, 622, 54 L.Ed. 1001. It is true, of course, that the reason for the rule is more compelling in cases involving inferior law, law capable of change by Congress, than in constitutional cases, where this Court—although even in such cases a wise consciousness of the limitations of individual vision has impelled it always to give great weight to prior decisions—nevertheless bears the ultimate obligation for the development of the law as institutions develop. See, e.g., Smith v. All-wright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987. But the Court has not always declined to re-examine cases whose outcome Congress might have changed. See Mr. Justice Brandeis, dissenting, in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406—407, note 1, 52 S.Ct. 443, 447, 76 L.Ed. 815. Decisions involving statutory construction, even decisions which Congress has persuasively declined to overrule, have been overruled here. See Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084, overruling United States v. Schwimmer, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889, United States v. Macintosh, 283 U.S.

605, 51 S.Ct. 570, 75 L.Ed. 1302, and United States v. Bland, 283 U.S. 636, 51 S.Ct. 569, 75 L.Ed. 1319; see also Commissioner of Internal Revenue v. Estate of Church, 335 U.S. 632, 69 S.Ct. 322, 337, 93 L.Ed. 288, overruling May v. Heiner, 281 U.S. 238, 50 S.Ct. 286, 74 L.Ed. 826.

And with regard to the Civil Rights Acts there are reasons of particular urgency ****503** which authorize the Court—indeed, which make it the Court's responsibility—to reappraise in the hitherto skimpily considered context of R.S. s 1979 what was decided in Classic, Screws and Williams. This is not an area of commercial law in which, presumably, individuals may have arranged their affairs in ***222** reliance on the expected stability of decision. Compare National Bank of Genesee v. Whitney, 103 U.S. 99, 26 L.Ed. 443; Vail v. Territory of Arizona, 207 U.S. 201, 28 S.Ct. 107, 52 L.Ed. 169; Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17, 67 S.Ct. 1056, 91 L.Ed. 1312; United States v. South Buffalo R. Co., 333 U.S. 771, 68 S.Ct. 868, 92 L.Ed. 1077. Nor is it merely a minerun statutory question involving a narrow compass of individual rights and duties. The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law administration. In this aspect, it has significance approximating constitutional dimension. Necessarily, the construction of the Civil Rights Acts raises issues fundamental to our institutions. This imposes on this Court a corresponding obligation to exercise its power within the fair limits of its judicial discretion. 'We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable * * *.' Helvering v. Hallock, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604.

Now, while invoking the prior decisions which have given 'under color of (law)' a content that ignores the meaning fairly comported by the words of the text and confirmed by the legislative history, the Court undertakes a fresh examination of that legislative history. The decision in this case, therefore, does not rest on stare decisis, and the true construction of the statute may be thought to be as free from the restraints of that doctrine as though the matter were before us for the first time. Certainly, none of the implications which the Court seeks to draw from silences in the minority reports of congressional committees in 1956, 1957, and 1960, or from the use of 'under color' language in the very different context of the Act of May 6, 1960, ***223** 74 Stat. 86, 42 U.S.C.A. s 1974 et seq.—concerned, in relevant part, with the preservation of election records and with the implementation of the franchise—serves as an impressive bar to re-examination of the true scope of R.S. s 1979 itself in its pertinent legislative setting.[32]

****504** ***224** IV.

This case squarely presents the question whether the intrusion of a city policeman for which that policeman can show no such authority at state law as could be successfully interposed in defense to a state-law action against him, is nonetheless to be regarded as 'under color' of state authority within the meaning of R.S. s 1979. Respondents, in breaking into the Monroe apartment, violated the laws of the State of Illinois.[33] Illinois law ***225** appears to offer a civil remedy for unlawful searches;[34] petitioners do not claim that none is available. Rather they assert that they have been deprived of due process of law and of equal protection of the laws under color of state law, although from all that appears the courts of Illinois are available to give them the fullest redress which the common law affords for the violence done them, nor does any 'statute, ordinance, regulation, custom, or usage' of the State of Illinois bar that redress. Did the enactment by Congress of s 1 of the Ku Klux Act of 1871 encompass such a situation?

That section, it has been noted, was patterned on the similar criminal provision of s 2, Act of April 9, 1866. The earlier Act had as its primary object the effective nullification of the Black Codes, those statutes of the Southern legislatures which had so burdened and disqualified the Negro as to make his emancipation appear illusory.[35] The Act had been ****505** vetoed by President Johnson, whose veto message describes contemporary understanding of its second section; the section, he wrote,
'seems to be designed to apply to some existing or future law of a State or Territory which may conflict with the provisions of the bill * * *. It provides for counteracting such forbidden legislation by imposing fine and imprisonment upon the legislators who may pass such conflicting laws, or upon the officers or agents who shall put, or attempt to put, them into execution. It

means an official offense, not a common ***226** crime committed against law upon the persons or property of the black race. Such an act may deprive the black man of his property, but not of the right to hold property. It means a deprivation of the right itself, either by the State judiciary or the State Legislature.'[36]

And Senator Trumbull, then Chairman of the Senate Judiciary Committee,[37] in his remarks urging its passage over the veto, expressed the intendment of the second section as those who voted for it read it:

'If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection.'[38]

Section 2 of the 1866 Act was re-enacted in substance in 1870 as part of 'An Act to enforce the Right of Citizens * * * to vote in the several States * * *,' 16 Stat. 140, ***227** 144. The following colloquy on that occasion is particularly revealing:
'MR. SHERMAN. * * * My colleague cannot deny that we can by appropriate legislation prevent any private person from shielding himself under a State regulation, and thus denying to a person the right to vote * * *.

'MR. CASSERLY. I should like to ask the Senator from Ohio how a State can be said to abridge the right of a colored man to vote when some irresponsible person in the streets is the actor in that wrong?

'MR. SHERMAN. If the offender, who may be a loafer, the meanest man in the streets, covers himself under the protection or color of a law or regulation or constitution of a State, he may be punished for doing it.

'MR. CASSERLY. Suppose the State law authorizes the colored man to vote; what then?

****506** 'MR. SHERMAN. That is not the case with which we are dealing. * * * This bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of existing State constitutions. No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation. The whole bill shows that. * * * (T)he first and second sections of the bill * * * simply punish officers as well as persons for discrimination under color of State laws or constitutions; and it so provides all the way through.'[39]

***228** The original text of the present s 1979 contained words, left out in the Revised Statutes, which clarified the objective to which the provision was addressed:
'That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured * * *.'[40]

Representative Shellabarger, reporting the section, explained it to the House as 'in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights.'[41] Senator Edmunds, steering the measure through the Senate, found constitutional sanction for it in the Fourteenth Amendment, explaining that state action may consist in executive nonfeasance as well as malfeasance, so that any offenses against a citizen in a ***229** State are susceptible of federal protection 'unless the criminal who shall commit those offenses is punished and the person who suffers receives that redress which the principles and spirit of the laws entitle him to have.'[42] And James A. Garfield supported the bill

in the House as 'so guarded as to preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws.'[43]

Indeed, the Ku Klux Act as a whole encountered in the course of its passage strenuous constitutional objections which focused precisely upon an assertedly unauthorized extension of federal judicial power into areas of exclusive state competence.[44] A special target was s 2 of ****507** the bill as reported to the House, providing criminal penalties:
'if two or more persons shall, within the limits of any State, band, conspire, or combine together to do ***230** any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal, process (sic) or resistance of officers in discharge of official duty, arson, or larceny * * *.'[45]

In vain the proponents of this section argued its propriety, seeking to support it by argument ex necessitate from the complete failure of state judicial and executive organs to control the depredations of the Klan.[46] Even ***231** in the Reconstruction ****508** Congress, the majority party split. Many balked at legislation which they regarded as establishing a general federal jurisdiction for the protection of person and property in the States.[47] Only after a complete ***232** rewriting of the section to meet these constitutional objections could the bill be passed.[48] Yet almost none of those who had decried s 2 as undertaking impermissibly to make the national courts tribunals of concurrent jurisdiction for the punishment of state-law offenses expressed similar objections to s 1, later s 1979.[49] One of ****509** the most ***233** vehement of those who could find no constitutional sanction for federal judicial control of conduct already proscribed by state law, and who therefore opposed original s 2 as reaching beyond the limits of congressional competence, expressly supported s 1 as affording 'further redress for violations under State authority of constitutional rights.'[50]

The general understanding of the legislators unquestionably was that, as amended, the Ku Klux Act did 'not undertake to furnish redress for wrongs done by one person upon another in any of the States * * * in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery * * *.'[51] Even those who—opposing the constitutional objectors—found sufficient congressional power in the Enforcement Clause of the Fourteenth Amendment to give this kind of redress, deemed inexpedient the exercise of any such power: 'Convenience and courtesy to the States suggest a sparing use, and never so far as to supplant the State authorities except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed ***234** upon them.'[52] Extreme Radicals, those who believed that the remedy for the oppressed Unionists in the South was a general expension of federal judicial jurisdiction so that 'loyal men could have the privilege of having their causes, civil and criminal, tried in the Federal courts,' were disappointed with the Act as passed.[53]

Finally, it is significant that the opponents of the Act, exhausting ingenuity to discover constitutional objections to every provision of it, also construed s 1 as addressed only to conduct authorized by state law, and therefore within the admitted permissible reach of Fourteenth Amendment federal power. 'The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States,' one such opponent paraphrased the provision.[54] And Senator Thurman, who insisted vociferously on the absence of federal power to penalize a conspiracy of individuals to violate state law ('that is a case of mere individual violence, having no color whatsoever of authority of law, either Federal or State; and to say that you can punish men for that mere conspiracy, which is their individual act, and which is a crime against the State laws themselves, punishable by the State laws, is simply to wipe out all the State jurisdiction over crimes and transfer it bodily to the Congress'),[55] admitted without question the constitutionality of s 1[56] ('It refers to a deprivation under color ****510** of law, either statute law or 'custom or usage' which has become common law').[57]

***235** The Court now says, however, that 'It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.'' Of course, if the notion of 'unavailability' of remedy is limited to mean an absence of statutory, paper right, this is in large part true.[58] Insofar as the Court undertakes to demonstrate—as the bulk of its opinion seems to do—that s 1979 was meant to reach some instances of action not specifically authorized by the avowed, apparent, written law inscribed in the statute books of the States, the argument knocks at an open door. No one would or could, deny this, for by its express terms the statute comprehends deprivations of federal rights under color of any 'statute, ordinance, regulation, custom, or usage' of a State. (Emphasis added.) The question is, what class of cases other than those involving state statute law were meant to be reached. And, with respect to this question, the Court's conclusion is undermined by the very portions of the legislative debates which it cites. For surely the misconduct of individual municipal police officers, subject to the effective oversight of appropriate state administrative and judicial authorities, presents a situation which differs toto coelo from one in which 'Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress,'[59] or in which murder rages while a State makes ***236** 'no successful effort to bring the guilty to punishment or afford protection or redress,'[60] or in which the 'State courts * * * (are) unable to enforce the criminal laws * * * or to suppress the disorders existing,'[61] or in which, in a State's 'judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another,'[62] or 'of * * * hundreds of outrages * * * not one (is) punished,'[63] or 'the courts of the * * * States fail and refuse to do their duty in the punishment of offenders against the law,'[64] or in which a 'class of officers charged under the laws with their administration permanently and as a rule refuse to extend (their) protection.'[65] These statements indicate that Congress—made keenly aware by the post-bellum conditions in the South that States through their authorities could sanction offenses against the individual by settled practice which established state law as truly as written codes—designed s 1979 to reach, as well, official conduct which, because engaged in 'permanently and as a rule,' or 'systematically,'[66] came through acceptance ****511** by law-administering officers to constitute 'custom, or usage' having the cast of law. See Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254. They do not indicate an attempt to reach, nor does the statute by its terms include, instances of acts in defiance of state law and which no settled state practice, no systematic pattern of official action or inaction, no 'custom, or usage, of any State,' insulates from effective and adequate reparation by the State's authorities.

***237** Rather, all the evidence converges to the conclusion that Congress by s 1979 created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom, or usage' sanctioned the grievance complained of. This purpose, manifested even by the so-called 'Radical' Reconstruction Congress in 1871, accords with the presuppositions of our federal system. The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.[67]

Its commands were addressed to the States. Only when the States, through their responsible organs for the formulation and administration of local policy, sought to deny or impede access by the individual to the central government in connection with those enumerated functions assigned to it, or to deprive the individual of a certain minimal fairness in the exercise of the coercive forces of the State, or without reasonable justification to treat him differently than other persons subject to their jurisdiction, was an overriding federal sanction imposed. As between individuals, no corpus of substantive rights was guaranteed by the Fourteenth Amendment, but only 'due process of law' in the ascertainment and enforcement of rights and equality in the enjoyment of rights and safeguards that the States afford. This was the base of the distinction between federal citizenship and state ***238** citizenship drawn by the Slaughter-House Cases, 16 Wall. 36, 21 L.Ed. 394. This conception begot the 'State action' principle on which, from the time of the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, this Court has relied in its application of Fourteenth Amendment guarantees. As between individuals, that body of mutual rights and duties which constitute the civil personality of a man remains essentially the creature of the legal institutions of the States.

But, of course, in the present case petitioners argue that the wrongs done them were committed not by individuals but by the police as state officials. There are two senses in which this might be true. It might be true if petitioners alleged that the redress which state courts offer them against the respondents is different than that which those courts would offer against other individuals, guilty of the same conduct, who were not the police. This is not alleged. It might also be true merely because the respondents are the police—because they are clothed with an appearance of official authority which is in itself a factor of significance in dealings between individuals. Certainly the night-time intrusion of the man with a star and a police revolver is a different phenomenon than the night-time intrusion of a burglar. ****512** The aura of power which a show of authority carries with it has been created by state government. For this reason the national legislature, exercising its power to implement the Fourteenth Amendment, might well attribute responsibility for the intrusion to the State and legislate to protect against such intrusion. The pretense of authority alone might seem to Congress sufficient basis for creating an exception to the ordinary rule that it is to the state tribunals that individuals within a State must look for redress against other individuals within that State. The same pretense of authority might suffice to sustain congressional legislation creating the exception. See Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676. But until Congress has ***239** declared its purpose to shift the ordinary distribution of judicial power for the determination of causes between co-citizens of a State, this Court should not make the shift. Congress has not in s 1979 manifested that intention.

The unwisdom of extending federal criminal jurisdiction into areas of conduct conventionally punished by state penal law is perhaps more obvious than that of extending federal civil jurisdiction into the traditional realm of state tort law. But the latter, too, presents its problems of policy appropriately left to Congress. Suppose that a state legislature or the highest court of a State should determine that within its territorial limits no damages should be recovered in tort for pain and suffering, or for mental anguish, or that no punitive damages should be recoverable. Since the federal courts went out of the business of making 'general law,' Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, such decisions of local policy have admittedly been the exclusive province of state lawmakers. Should the civil liability for police conduct which can claim no authority under local law, which is actionable as common-law assault or trespass in the local courts, comport different rules' Should an unlawful intrusion by a policeman in Chicago entail different consequences than an unlawful intrusion by a hoodlum? These are matters of policy in its strictly legislative sense, not for determination by this Court. And if it be, as it is, a matter for congressional choice, the legislative evidence is overwhelming that s 1979 is not expressive of that choice. Indeed, its precise limitation to acts 'under color' of state statute, ordinance or other authority appears on its face designed to leave all questions of the nature and extent of liability of individuals to the laws of the several States except when a State seeks to shield those individuals under the special barrier of state authority. To extend Civil Rights Act liability beyond that point is ***240** to interfere in areas of state policymaking where Congress has not determined to interfere.

Nor will such interference be negligible. One argument urged in Screws in favor of the result which that case reached was the announced policy of self-restraint of the Department of Justice in the prosecution of cases under 18 U.S.C. s 242, 18 U.S.C.A. s 242. See 325 U.S. at pages 159—160, 65 S.Ct. at pages 1062—1063. Experience indicates that private litigants cannot be expected to show the same consideration for the autonomy of local administration which the Department purportedly shows.[68]

****513** Relevant also are the effects upon the institution of federal constitutional adjudication of sustaining under s 1979 damage actions for relief against conduct allegedly violative of federal constitutional rights, but plainly ***241** violative of state law. Permitting such actions necessitates the immediate decision of federal constitutional issues despite the admitted availability of state-law remedies which would avoid those issues.[69] This would make inroads, throughout a large area, upon the principle of federal judicial self-limitation which has become a significant instrument in the efficient functioning of the national judiciary. See Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971, and cases following. Self-limitation is not a matter of technical nicety, nor judicial timidity. It reflects the recognition that to no small degree the effectiveness of the legal order depends upon the infrequency with which it solves its problems by resorting to determinations of ultimate power. Especially is this true where the circumstances under which those ultimate determinations must be made are not conducive to the most mature deliberation and decision. If s 1979 is made a vehicle of constitutional litigation in cases where state officers have acted lawlessly at state law, difficult questions of the federal constitutionality of certain official practices—lawful perhaps in some States, unlawful in others—may be litigated between private parties without the participation of responsible state

authorities which is obviously desirable to protect legitimate state interests, but also to better guide adjudication by competent record-making and argument.

Of course, these last considerations would be irrelevant to our duty if Congress had demonstrably meant to reach by s 1979 activities like those of respondents in this case. But where it appears that Congress plainly did not have that understanding, respect for principles which this Court has long regarded as critical to the most effective functioning ***242** of our federalism should avoid extension of a statute beyond its manifest area of operation into applications which invite conflict with the administration of local policies. Such an extension 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. The text of the statute, reinforced by its history, precludes such a reading.

In concluding that police intrusion in violation of state law is not a wrong remediable under R.S. s 1979, the pressures which urge an opposite result are duly felt. The difficulties which confront ****514** private citizens who seek to vindicate in traditional common-law actions their state-created rights against lawless invasion of their privacy by local policemen are obvious,[70] and obvious is the need for more effective modes of redress. The answer to these urgings must be regard for our federal system which presupposes a wide range of regional autonomy in the kinds of protection local residents receive. If various common-law concepts make it possible for a policeman—but no more possible for a policeman than for any individual hoodlum intruder—to escape without liability when he has vandalized a home, that is an evil. But, surely, its remedy devolves, in the first instance, on the States. Of course, if the States afford less protection against the police, as police, than against the hoodlum—if under authority of state 'statute, ordinance, regulation, custom, or usage' the police are specially shielded— ***243** s 1979 provides a remedy which dismissal of petitioners' complaint in the present case does not impair. Otherwise, the protection of the people from local delinquencies and shortcomings depends, as in general it must, upon the active consciences of state executives, legislators and judges.[71] Federal intervention, which must at best be limited to securing those minimal guarantees afforded by the evolving concepts of due process and equal protection, may in the long run do the individual a disservice by deflecting responsibility from the state lawmakers, who hold the power of providing a far more comprehensive scope of protection. Local society, also, may well be the loser, by relaxing its sense of responsibility and, indeed, perhaps resenting what may appear to it to be outside interference where local authority is ample and more appropriate to supply needed remedies.

This is not to say that there may not exist today, as in 1871, needs which call for congressional legislation to protect the civil rights of individuals in the States. Strong contemporary assertions of these needs have been expressed. Report of the President's Committee on Civil Rights, To Secure These Rights (1947); Chafee, Safeguarding Fundamental Human Rights: The Tasks of States and Nation, 27 Geo.Wash.L.Rev. 519 (1959). But both the insistence of the needs and the delicacy of the issues involved in finding appropriate means for their satisfaction demonstrate that their ***244** demand is for legislative, not judicial, response. We cannot expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960.

Of an enactment like the Civil Rights Act, dealing with the safeguarding and promotion of individual freedom, it is especially relevant to be mindful that, since it is projected into the future, it is ambulatory in its scope, the statute properly absorbing the expanding reach of its purpose to the extent that the ****515** words with which that purpose is conveyed fairly bear such expansion. But this admissible expansion of meaning through the judicial process does not entirely unbind the courts and license their exercise of what is qualitatively a different thing, namely, the formulation of policy through legislation. In one of the last writings by that tough-minded libertarian, who was also no friend of narrow construction, Professor Zechariah Chafee, Jr., he admonished against putting the Civil Rights Act to dubious new uses even though, as a matter of policy, they might be desirable in the changed climate nearly a hundred years after its enactment: 'At all events, we can be sure of one thing. If federal protection be desirable, we ought to get it by something better than a criminal statute of antiquated uncertainties and based on the out-moded Privileges and Immunities Clause of the Fourteenth Amendment. * * * It is very queer to try to protect human rights in the middle of the Twentieth Century by a left-over from the days of General Grant.' Id., at 529. It is not a work for courts to melt and recast this statute. 'Under color' of law meant by authority of law in the nineteenth century. No judicial sympathy, however strong, for needs now felt can give the phrase—a phrase which occurs in a statute, not in a constitution—any different meaning in the twentieth. Compare Mr. Justice Holmes' varying approaches to construction of the same word in a statute ***245**

and in the Constitution, Towne v. Eisner, 245 U.S. 418, 38 S.Ct. 158, 62 L.Ed. 372, and Eisner v. Macomber, 252 U.S. 189, 219, 40 S.Ct. 189, 197, 64 L.Ed. 521 (dissenting).

This meaning, no doubt, poses difficulties for the case-by-case application of s 1979. Manifestly the applicability of the section in an action for damages cannot be made to turn upon the actual availability or unavailability of a state-law remedy for each individual plaintiff's situation. Prosecution to adverse judgment of a state-court damage claim cannot be made prerequisite to s 1979 relief. In the first place, such a requirement would effectively nullify s 1979 as a vehicle for recovering damages.[72] In the second place, the conclusion that police activity which violates state law is not 'under color' of state law does not turn upon the existence of a state tort remedy. Rather, it recognizes the freedom of the States to fashion their own laws of torts in their own way under no threat of federal intervention save where state law makes determinative of a plaintiff's rights the particular circumstance that defendants are acting by state authority. Section 1979 was not designed to cure and level all the possible imperfections of local common-law doctrines, but to provide for the case of the defendant who can claim that some particular dispensation of state authority immunizes him from the ordinary processes of the law.

***246** It follows that federal courts in actions at law under s 1979 would have to determine whether defendants' conduct is in violation of, or under color of, state law often with little guidance from earlier state decisions. Such a determination ****516** will sometimes be difficult, of course. But Federal District Courts sitting in diversity cases are often called upon to determine as intricate and uncertain questions of local law as whether official authority would cloak a given practice of the police from liability in a state-court suit. Certain fixed points of reference will be available. If a plaintiff can show that defendant is acting pursuant to the specific terms of a state statute or of a municipal ordinance, s 1979 will apply. See Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281. If he can show that defendant's conduct is within the range of executive discretion in the enforcement of a state statute, or municipal ordinance, s 1979 will apply. See Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423. Beyond these cases will lie the admittedly more difficult ones in which he seeks to show some "custom or usage' which has become common law.'[73]

***247** V.

My Brother HARLAN'S concurring opinion deserves separate consideration. It begins by asking what is its essential question: Why would the Forty-second Congress, which clearly provided tort relief in the federal courts for violations of constitutional rights by acts of a policeman acting pursuant to state authority, not also have provided the same relief for violations of constitutional rights by a policeman acting in violation of state authority? What, it inquires, would cause a Congress to distinguish between the two situations? Examining a first possible differentiating factor—the differing degrees of adequacy of protection of person and property already available in the state courts—it reasons that this could not have been significant in view of Congress' purpose in 1871, for that purpose was not to enact a statute having 'merely ****517** a jurisdictional function, shifting the load of federal supervision from the Supreme Court to the lower courts and providing a federal tribunal for fact findings.' ***248** Examining the other possible distinction—the difference between injuries to individuals from isolated acts of abuse of authority by state officers and injuries to individuals from acts sanctioned by the dignity of state law—it finds that this, too, could not have been important, especially to a Congress which was aware of the existence of state constitutional guarantees of protection to the individual, and which enacted the conspiracy statute which became R.S. s 1980 and is now 42 U.S.C. s 1985, 42 U.S.C.A. s 1985.

To ask why a Congress which legislated to reach a state officer enforcing an unconstitutional law or sanctioned usage did not also legislate to reach the same officer acting unconstitutionally without authority is to abstract this statute from its historical context. The legislative process of the post-bellum Congresses which enacted the several Civil Rights Acts was one of struggle and compromise in which the power of the National Government was expanded piece by piece against bitter resistance; the Radicals of 1871 had to yield ground and bargain over detail in order to keep the moderate Republicans in line.[74] This was not an endeavor for achieving legislative patterns of analytically satisfying symmetry. It was a contest of large sallies and small retreats in which as much ground was occupied, at any time, as the temporary coalescences of forces strong enough to enroll a prevailing vote could agree upon. To assume that if Congress reached one situation it would also have reached another situation involving

not dissimilar problems—assuming, arguendo, that the problems, viewed in intellectual abstraction, are not dissimilar—ignores the temper of the times which produced the Ku Klux Act. This approach would be persuasive only if the two situations, that of a ***249** state officer acting pursuant to state authority and that of a state officer acting without state authority, were so entirely similar that they would not, in 1871, have been perceived as two different situations at all. In view of the fierce debate which occupied the Forty-second Congress as to whether the Fourteenth Amendment had been intended to do more than invalidate state legislation offensive on its face,[75] this supposition must be ruled out. Contrariwise, it is historically persuasive that the Forty-second Congress, which was not thinking in neat abstract categories, designed a statute to protect federal constitutional rights from an immediate evil perceived to be grave—the evil described by the statute's sponsor, Mr. Shellabarger, 'such wrongs * * * as are done under color of State laws which abridge these rights,'[76]—but did not, by the same measure, seek to control unconstitutional action abusive of a state authority which did not, itself, 'abridge these rights.'

Moreover, even under the most rigorous analysis the two situations argumentatively deemed not dissimilar are indeed dissimilar, and dissimilar in both of the two relevant aspects. As to the adequacy of state-court protection of person and property, there seems a very sound distinction, as a class, between injuries sanctioned by state law (as to which there can never be state-court redress, if at all, unless (1) the state courts are sufficiently receptive to a federal ****518** claim to declare their own law unconstitutional, or (2) the litigant persists through a tortuous and protracted process of appeals, after a state trial court has found the facts, through the state-court system to this Court) and injuries not sanctioned by state law. To make this line of distinction determine the incidence of Civil Rights legislation serves to cover the bulk of cases where ***250** federal judicial protection would be needed. To be sure, this leaves certain cases unprotected, namely, the few instances of federal constitutional violations not authorized by state statute, custom or usage and which concern interests wholly unrecognized by state statute or common law. But the cost of ignoring the distinction in order to cover those cases—the cost, that is, of providing a federal judicial remedy for every constitutional violation—involves pre-emption by the National Government, in the larger class of cases in which rights secured by the Fourteenth Amendment relate to interests of person and property having a state-law origin, of matters of intimate concern to state and local governments. One of the most persistently recurring motifs in the legislative history of the Ku Klux Act is precisely a reluctance to invade these regions of state and local concern except insofar as absolutely necessary for effective assurance of the Fourteenth Amendment's guarantees. Therefore, the line of distinction between state-authorized and unauthorized actions, as a line of compromise among positions concerning which the legislative evidence is clear that Congress wanted to, and did, compromise, is the most probable for the Act's draftsmen to have selected.

To attribute significance to this line of distinction is not to reduce the Ku Kluz Act to having 'merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court' to an original federal tribunal. First, there are certain classes of cases where s 1979, construed as reaching only unconstitutional conduct authorized by state law, will accord 'substantive' relief that would not have been available through the means of state-law, state-court litigation subject to the commands of the Supremacy Clause and to Supreme Court review. This would be the case, for example, if a Negro were to bring an action for damages against a state election official who had denied him the right to vote pursuant to discriminatory ***251** state franchise provisions[77] in a State which did not recognize a common-law action for deprivation of the right to vote. Similarly, one whose home had been searched by state police acting under a state statute, regulation, custom or usage which authorized an unconstitutional intrusion could recover by a s 1979 action a measure of relief determined, as a 'substantive' matter, by federal law, whereas Supreme-Court-reviewed state-court suit might have availed him only damages for technical trespass. And, second, with reference to the more numerous classes of cases in which the redress which a federal trial court might give would be approximately the same, 'substantively,' as that which could be recovered by state-court suit, the theory that the Reconstruction Congress could not have meant s 1979 principally as a 'jurisdictional' provision granting access to an original federal forum in lieu of the slower, more costly, more hazardous route of federal appeal from fact-finding state courts, forgets how important providing a federal trial court was among the several purposes of the Ku Klux Act.[78] One may agree that in one sense s 1979 is not 'merely' jurisdictional—not jurisdictional in the sense, for example, that s 3 of the 1866 Civil Rights Act was ****519** jurisdictional.[79] Section 1979 does ***252** create a 'substantive' right to relief. But this does not negative the fact that a powerful impulse behind the creation of this 'substantive' right was the purpose that it be available in, and be shaped through, original federal tribunals.

In truth, to deprecate the purposes of this 1871 statute in terms of analysis which refers to 'merely * * * jurisdictional' effects, to 'shifting the load of federal supervision,' and to the 'administrative burden on the Supreme Court,' is to attribute twentieth century conceptions of the federal judicial system to the Reconstruction Congress. If today Congress were to devise a comprehensive scheme for the most effective protection of federal constitutional rights, it might conceivably think in terms of defining those classes of cases in which Supreme Court review of state-court decision was most appropriate, and those in which original federal jurisdiction was most appropriate, fitting all cases into one or the other category. The Congress of 1871 certainly did not think in such terms. Until 1875 there was no original 'federal question' jurisdiction in the federal courts,[80] and the ordinary mode of protection of federal constitutional rights was Supreme Court review.[81] In light of the then prevailing notions of the appropriate relative spheres of jurisdiction of state and ***253** federal courts of first impression, any allowance of Federal District and Circuit Court competence to adjudicate causes between co-citizens of a State was a very special case, a rarity.[82] To ask why, when such a special case was created to redress deprivations of federal rights under authority of state laws which abridged those rights, a special case was not also created to cover other deprivations of federal rights whose somewhat similar nature might have made the same redress appropriate, disregards the dominant jurisdictional thought of the day and neglects consideration of the fact that redress in a federal trial court was then to be very sparingly afforded. To extend original federal jurisdiction only in the class of cases in which, constitutional violation being sanctioned by state law, state judges would be less likely than federal judges ****520** to be sympathetic to a plaintiff's claim, is a purpose quite consistent with the 'overflowing protection of constitutional rights' which, assuredly, s 1979 manifests.[83]

***254** Finally, it seems not unreasonable 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 ***255** 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? If it be admitted that there is a significant difference between the situation of the individual injured by another individual and who, although the latter is an agent of the State, can claim from the State's judicial or administrative processes the same protection and redress against him as would be available against any other individual, and the situation of one who, injured under the sanction ****521** of a state law which shields the offender, is left alone and helpless in the face of the asserted dignity of the State, then certainly, it was the latter of these two situations—that of the unprotected Southern Negroes and Unionists—about which Congress was concerned in 1871.[84]

***256** Again, an analysis which supposes that Congress, by ss 1 and 2[85] of the Ku Klux Act, was attempting to provide comprehensive coverage of a single problem and, therefore, may not be supposed to have left any aspect of the problem unprovided for, ignores that these two sections were in fact designed to cope with two wholly different problems—two wholly diverse evils. Section 2 was newly drafted in 1871, not, like s 1, taken over from the 1866 Act. It was both civil and criminal, not, like s 1, merely civil. It aimed exclusively at conspiracies, as s 1 did not. And, most important, it sought to protect only the federal right of equal protection, not, like s 1, all Fourteenth Amendment rights.[86] Because of its limited scope in this latter respect, those who drafted it and voted for it thought that it could constitutionally be made to reach instances of action having more tenuous connection with the lawfully asserted authority of the State than could a statute which also reached due process violations.[87] For the same reason, it does not reach ****522** isolated ***257** instances of misuse of state authority, but only such as possess the character of 'purposeful discrimination'[88] which amounts to a denial of equal protection. The evil that s 2 meant to stamp out was the evil of conspiracy—more particularly, the evil of the Klan, 'a conspiracy, so far-flung and embracing such numbers, with a purpose to dominate and set at naught the 'carpetbag' and 'scalawag' governments of the day,' that it appeared 'able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication.' Collins v. Hardyman, 341 U.S. 651, 662, 71 S.Ct. 937, 942, 95 L.Ed. 1253.[89] The enormity and the power of this organization

were what made it dangerous.[90] Section 1 aimed at another evil, the evil not of combinations dedicated to purposeful and systematic discrimination, but of violation of any rights, privileges, or immunities secured by the Constitution through the authority, enhanced by the majesty and dignity, of the States. Here it was precisely this authorization, this assurance that behind a constitutional violation lay the whole power of the State, that was the danger. One can agree that these two statutory sections may overlap unevenly rather than ***258** dovetail, but surely it is more plausible to regard this uneven overlap as a result of the diverse origins and purposes of the sections than to derive from it the justification for a construction of s 1979 which distorts the section by stretching it to cover a class of cases presenting neither the evil with which s 1, nor the evil with which s 2, of the Ku Klux Act was designed to cope.

VI.

The present case comes here from a judgment sustaining a motion to dismiss petitioners' complaint. That complaint, insofar as it describes the police intrusion, makes no allegation that that intrusion was authorized by state law other than the conclusory and unspecific claim that 'During all times herein mentioned the individual defendants and each of them were acting under color of the statutes, ordinances, regulations, customs and usages of the State of Illinois, of the County of Cook and of the defendant City of Chicago.' In the face of Illinois decisions holding such intrusions unlawful and in the absence of more precise factual averments to support its conclusion, such a complaint fails to state a claim under s 1979.

However, the complaint does allege, as to the ten-hour detention of Mr. Monroe, that 'it was, and it is now, the custom or usage of the Police Department of the City of Chicago to arrest and confine individuals in the police stations and jail cells of the said department for long periods of time on 'open' charges.' These confinements, it is alleged, are for the purpose of interrogating and investigating the individuals arrested, in the aim of inducing incriminating statements, permitting possible identification of suspects in lineups, holding suspects incommunicado while police conduct field investigations of their associates and background, and punishing the arrested persons without trial. Such averments do present ***259** facts which, admitted as true for purposes of a motion to dismiss, seem to sustain petitioners' claim that Mr. Monroe's detention—as contrasted ****523** with the night-time intrusion into the Monroe apartment—was 'under color' of state authority. Under the few relevant Illinois decisions it is impossible to say with certainty that a detention incommunicado for ten hours is unlawful per se,[91] or that the courts of that State would hold that the lawless circumstances surrounding Mr. Monroe's arrest made his subsequent confinement illegal. On this record, then, petitioners' complaint suffices to raise the narrow issue of whether the detention incommunicado, considered alone, violates due process.[92]

Since the majority's disposition of the case causes the Court not to reach that constitutional issue, it is neither necessary nor appropriate to discuss it here.

All Citations

365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492

Footnotes

1 This section provides in material part:
'The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
'(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.'

2 Subsection (a) provides:
'The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.'
In their complaint, petitioners also invoked R.S. ss 1980, 1981, 42 U.S.C. ss 1985, 1986, 42 U.S.C.A. ss 1985, 1986. Before this Court, however, petitioners have limited their claim to recovery to the liability imposed by s 1979. Accordingly, only that section is before us.

3 See Cong.Globe, 42d Cong., 1st Sess., App. 68, 80, 83—85.

4 Act of April 9, 1866, 14 Stat. 27.

5 Supra, note 3, 568.

6 Illinois Const., Art. II, s 6, S.H.A.Const., provides:
'The right of the people to be secure in their persons, houses, paper and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.' Respondents also point to Ill.Rev.Stat., c. 38, ss 252, 449.1; Chicago, Illinois, Municipal Code, s 11—40.

7 Cong.Globe, 42d Cong., 1st Sess., p. 244.

8 Id., App. 268.

9 Id., p. 345.

10 Id., p. 365. The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of s 1: '(I)f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, (he is liable) * * *.' Ibid. (Italics added.)

11 Id., p. 366.

12 Randall, The Civil War and Reconstruction (1937), p. 857.

13 S.Rep. No. 1, 42d Cong., 1st Sess.

14 See, e.g., Cong.Globe, 42d Cong., 1st Sess., App. 166—167.

15 Id., p. 374.

16 Id., p. 428.

17 As Randall, op. cit., supra, note 12, p. 855, says in discussing the Ku Klux Klan: 'A friendly view of the order might represent it as an agency of social control in the South. Yet it never attained the dignity of the vigilance committees of the western states nor of the committees of safety of Revolutionary times.'

18 Cong.Globe, 42d Cong., 1st Sess. 653.

19 Id., App. 277.

20 Id., App. 315.

21 Id., p. 334.

22 Id., p. 505.

23 Id., App., p. 50. Mr. Golladay of Tennessee expressed the same concern:
'Is the great State of New York invaded every time a murder is committed within her bounds? Was the great State of Pennsylvania invaded when rioters in the city of Philadelphia burned a public building? Was the great State of Massachusetts invaded when Webster, one of her first scholars, within the walls of Harvard murdered Parkman, or later, when evil-disposed persons violated her laws in Lowell? Did they require the Army and Navy and martial law? And, sir, because a midnight murderer is sometimes found in the South it should not be regarded as an invasion.' Id., App. 160.

24 Id., App. 179.

25 Id., App. 216.

26 Id., p. 579.

27 Section 1 in the bill as originally introduced read as follows:
'That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,' and the other remedial laws of the United States which are in their nature applicable in such cases.'

28 See text at note 23, supra; see note 10, supra.

29 Cong. Globe, 42d Cong., 1st Sess., pp. 334—335.

30 Then 18 U.S.C. s 52.

31 For a full history of the evolution of 18 U.S.C. s 242, 18 U.S.C.A. s 242, see Screws v. United States, 325 U.S. 91, 98—100, 65 S.Ct. 1031, 1033—1034, 89 L.Ed. 1495; United States v. Classic, 313 U.S. 299, 327, note 10, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368; cf. Hague v. Committee for Industrial Organization, 307 U.S. 496, 509—510, 59 S.Ct. 954, 961, 83 L.Ed. 1423.

32 Cong. Globe, 42d Cong., 1st Sess., App. 68.

33 H.R.Rep. No. 2187, 84th Cong., 2d Sess., p. 16.

34 Id., p. 26.

35 H.R.Rep. No. 291, 85th Cong., 1st Sess., pp. 24—60, U.S.Code Congressional and Administrative News 1957, p. 1966.

36 Id., pp. 57—58.

37 H.R.Rep. No. 956, 86th Cong., 1st Sess., pp. 32—42, U.S.Code Congressional and Administrative News 1960, p. 1939.

38 Cong., Globe, 42d Cong., 1st Sess., p. 663. The proposed amendment read:
'That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.'

39 Id., 704—705.

40 Id., 725.

41 'That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment.' Id., 749.

42 Cong. Globe, 42d Cong., 1st Sess. 800—801.

43 Id., 804.

44 Id., 804.

45 Idid.

46 See especially the comments of Senator Sherman. Id., 820—821.

47 This Act has been described as an instance where 'Congress supplies its own dictionary.' Frankfurter, Some Reflections on the Reading of Statutes, 47 Col.L.Rev. 527, 536. The present code provision defining 'person' (1 U.S.C. s 1, 1 U.S.C.A. s 1) does not in terms apply to bodies politic. See Reviser's Note, Vol. I, Rev.U.S.Stats.1872, p. 19.

48 See note, 100 U. of Pa.L.Rev. 1182, 1206—1212.

49 See Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn.L.Rev. 493, 514. Cf. Fuller & Casner, Municipal Tort Liability in Operation, 54 Harv.L.Rev. 437, 459.

50 This has been the view of the lower federal courts. Charlton v. City of Hialeah, 5 Cir., 188 F.2d 421, 423; Hewitt v. City of Jacksonville, 5 Cir., 188 F.2d 423, 424; Cobb v. City of Malden, 1 Cir., 202 F.2d 701, 703; Agnew v. City of Compton, 9 Cir., 239 F.2d 226, 230; Cuiksa v. City of Mansfield, 6 Cir., 250 F.2d 700, 703—704. In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U.S.C. s 1983, 42 U.S.C.A. s 1983, were alleged. See e.g., Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 882, 87 L.Ed. 1324; Holmes v. City of Atlanta, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a 'person' within the meaning of s 1983, no inference to the contrary can any longer be drawn from those cases.

1 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368.

2 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495.

3 The provision is now found in 42 U.S.C. s 1983, 42 U.S.C.A. s 1983: '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 Compare Cong. Globe, 42d Cong., 1st Sess. 504 (Senator Pratt), and id., at App. 50 (Rep. Kerr), with Cong. Globe, 41st Cong., 2d Sess. 3663 (Senator Sherman), Cong. Globe, 42d Cong., 1st Sess. 697 (Senator Edmunds), id., at App. 68 (Rep. Shellabarger), and Cong. Globe, 39th Cong., 1st Sess. 1758 (Senator Trumbull).

5 There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

6 Id., at 577.

7 Compare the statement of Representative Burchard:
'If the refusal of a State officer, acting for the State, to accord equality of civil rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable.' Cong. Globe, 42d Cong., 1st Sess., App. 315.

8 Section 2 as finally adopted was substantially as now provided in 42 U.S.C. s 1985, 42 U.S.C.A. s 1985: 'If two or more persons in any State * * * conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State * * * from giving or securing to all persons within such State * * * the equal protection of the laws; * * * (and) if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.'

9 I do not think that this Court's decision in Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253, can properly be viewed as determining the scope of the provision of s 1985 which refers to conspiring 'for the purpose of preventing * * * the constituted authorities of any State * * * from giving * * * the equal protection of the laws * * *.' Not only did the Court specifically disclaim any consideration of this provision, but it proceeded to emphasize that the petitioners therein had only been subjected to a private discrimination since 'There is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it.' 341 U.S. at page 661, 71 S.Ct. at page 942. The holding that the equal protection of the law is unaffected by discriminatorily motivated violations of state law so long as the instrumentalities of law enforcement remain free, able, and willing to remedy these violations is clearly based upon premises which cannot control the quite dissimilar case of a conspiratorial attempt to affect the fairness of these instrumentalities, 'the constituted authorities of any State.'

10 Representative Poland, who had doubted the constitutionality of the earlier forms of s 2, had no such doubts about its present form. His reading of the provision is clear from his defense of it:

'But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States.' Id., at 514.

An opponent of the provision was, if anything, even clearer in expressing his understanding of the coverage of the provision:

'* * * It does not require that the combination shall be one that the State cannot put down; it does not require that it shall amount to anything like insurrection. If three persons combine for the purpose of preventing or hindering the constituted authorities of any State from extending to all persons the equal protection of the laws, although those persons may be taken by the first sheriff who can catch them or the first constable, although every citizen in the country may be ready to aid as a posse, yet this statute applies. It is no case of domestic violence, no case of insurrection, and no case, therefore, for the interference of the Federal Government, much less its interference where there is no call made upon it by the Governor or the Legislature of the State.' Id., at App. 218 (Senator Thurman): see also id., at 514 (Rep. Farnsworth).

1 The complaint is in nine counts, and seeks to assert a claim in favor of Mr. Monroe, Mrs. Monroe, and their children, respectively, under each of R.S. ss 1979, 1980 and 1981, 42 U.S.C. ss 1983, 1985 and 1986, 42 U.S.C.A. ss 1983, 1985, 1986. Petitioners have abandoned in this Court their claims under ss 1980 and 1981, and we are not now asked to determine the applicability of those sections to the facts alleged.

2 The murder was asserted by the examining officers to have been committed two days before, on October 27.

3 Drawing upon the reasoning of the Slaughter-House Cases, 16 Wall. 36, 21 L.Ed. 394, this decision determined that only those rights or privileges were secured by the Constitution and laws which were inherent in the status of the individual as a citizen of the National Government, see Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, or which were necessary to the integrity of the federal governmental institution, see Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150; compare Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429, with United States v. Powell, 212 U.S. 564, 29 S.Ct. 690, 53 L.Ed. 653, or which were created by Congress in the legitimate exercise of its Article I powers, see United States v. Waddell, 112 U.S. 76, 5 S.Ct. 35, 28 L.Ed. 673.

4 It was brought to the attention of Congress in 1871 that 'rights, privileges, or immunities' was a more extensive phrase than 'privileges or immunities' as used in the Fourteenth Amendment prohibiting a State from abridging 'the privileges or immunities of citizens of the United States.' Cong. Globe, 42d Cong., 1st Sess., App. 49—50.

5 'Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * shall be fined not more than $1,000 or imprisoned not more than one year, or both.'

6 Civil liability has always been drawn from such indefinite standards as reasonable care, a man of ordinary prudence, foreseeability, etc. And see Baltimore & Ohio R. Co. v. Groeger, 266 U.S. 521, 45 S.Ct. 169, 69 L.Ed. 419; Miller v. Strahl, 239 U.S. 426, 36 S.Ct. 147, 60 L.Ed. 364.

7 See Koehler v. United States, 5 Cir., 189 F.2d 711; Clark v. United States, 5 Cir., 193 F.2d 294; Crews v. United States, 5 Cir., 160 F.2d 746. These cases are not cited by way of approval.

8 Petitioners also rely on the Equal Protection Clause. The disposition of the litigation by the majority here makes it unnecessary to discuss this aspect of the case.

9 Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674.

10 See Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97; Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158; Palko v. State of Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288; Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595; Gibbs v. Burke, 337 U.S. 773, 69 S.Ct. 1247, 93 L.Ed. 1686; Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183.

11 Ala.Const. Art. I, s 5; Alaska Const. Art. I s 14; Ariz.Const. Art. II, s 8, A.R.S.; Ark.Const. Art. II, s 15; Cal.Const. Art. I, s 19; Colo.Const. Art. II, s 7; Conn.Const. Art. I, s 8, C.G.S.A.; Del.Const. Art. I, s 6, Del.C.Ann.; Fla.Const. Declaration of Rights, s 22, F.S.A.; Ga.Const. Art. I, s 2—116; Art. 1, s 1, par. 16; Hawaii Const. Art. I, s 5; Idaho Const. Art. I, s 17; Ill.Const. Art. II, s 6, S.H.A.; Ind.Const. Art. I, s 11; Iowa Const. Art. I, s 8, I.C.A.; Kan.Const. Bill of Rights, s 15; Ky.Const. Bill of Rights, s 10; La.Const. Art. 1, s 7, LSA; Me.Const. Art. I, s 5; Md.Const. Declaration of Rights, Art. 26; Mass.Const. Pt. I, Art. XIV, M.G.L.A.; Mich.Const. Art. II, s

10; Minn.Const. Art. I, s 10, M.S.A.; Miss.Const. Art. 3, s 23; Mo.Const. Art. I, s 15, V.A.M.S.; Mont.Const. Art. III, s 7; Neb.Const. Art. I, s 7; Nev.Const. Art. I. s 18; N.H.Const. Pt. I, Art. 19; N.J.Const.1947, Art. I, par. 7; N.M.Const. Art. II, s 10; N.Y.Const. Art. I, s 12, and Civil Rights Law, McKinney's Consol.Laws, c. 6, s 8; N.C.Const. Art. I, s 15; N.D.Const. Art. I, s 18; Ohio Const. Art. I, s 14; Okla.Const. Art. II, s 30; Ore.Const. Art. I, s 9; Pa.Const. Art. I, s 8, P.S.; R.I.Const. Art I, s 6; S.C.Const. Art. I, s 16; S.D.Const. Art. VI, s 11; Tenn.Const. Art. I, s 7; Tex.Const. Art. I, s 9. Vernon's Ann.St.; Utah Const. Art. I, s 14; Vt.Const. C.I., Art. 11, V.S.A.; Va.Const. Art. I, s 10; Wash.Const. Art. I, s 7; W.Va.Const. Art. III, s 6; Wis.Const. Art. I, s 11, W.S.A.; Wyo.Const. Art. I, s 4.

12 See Huckle v. Money, 2 Wils. 205; Wilkes v. Wood, 19 How.St.Tr. 1153; City of Bessemer v. Eidge, 162 Ala. 201, 50 So. 270; 1 Cooley's Constitutional Limitations (8th ed.1927) 610—615; Fraenkel, Concerning Searches and Seizures, 34 Harv.L.Rev. 361 (1921), containing a collection of authorities.

13 See, e.g., Thurman v. State, 116 Fla. 426, 156 So. 484; compare Simpson v. State, 152 Tex.Cr.R. 481, 215 S.W.2d 617, with McClannan v. Chaplain, 136 Va. 1, 15—17, 116 S.E. 495. Note the common legislative proscription upon the search of private homes by officers otherwise authorized to make entries for the enforcement of prohibition laws and other regulatory statutes. E.g., National Prohibition Act, tit. II, s 25, 41 Stat. 305, 315, 27 U.S.C.A. s 39; and see Cornelius, Search and Seizure (2d ed. 1930), ss 135—144.

14 See 2 Hale, Pleas of the Crown (Wilson ed. 1800) 150.

15 See, e.g., People v. Cahan, 1955, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513; Sarafini v. City and County of San Francisco, 1956, 143 Cal.App.2d 570, 300 P.2d 44; Ware v. Dunn, 1947, 80 Cal.App.2d 936, 183 P.2d 128; Walker v. Whittle, 1951, 83 Ga.App. 445, 64 S.E.2d 87; People v. Dalpe, 1939, 371 Ill. 607, 21 N.E.2d 756; Hart v. State, 1924, 195 Ind. 384, 145 N.E. 492; Johnson v. Commonwealth, Ky.1956, 296 S.W.2d 210; Deaderick v. Smith, 1950, 33 Tenn.App. 151, 230 S.W.2d 406.

16 The various analyses which have enabled this Court to find state action in situations other than that presented by Barney v. City of New York, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737, are plainly not appropriate to consideration of the question whether in a given instance official conduct is ‘under color’ of state law. Nashville, C. & St. L.R. Co. v. Browning, 310 U.S. 362, 60 S.Ct. 968, 84 L.Ed. 1254, and Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265, came here on certiorari from state court proceedings. Coulter v. Louisville & Nashville R. Co., 196 U.S. 599, 25 S.Ct. 342, 49 L.Ed. 615, and Raymond v. Chicago Union Traction Co., 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78, held that accepted administrative usage in the exercise of a power specifically conferred by state legislation and wholly dependent upon that legislation for its coercive effects might constitute such action of a State as to present a cognizable federal question. But see City of Memphis v. Cumberland Tel. & Tel. Co., 218 U.S. 624, 31 S.Ct. 115, 54 L.Ed. 1185. Similarly, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510, held that the existence in a state constitution of provisions coincident with those of the Federal Constitution did not ipso facto immunize state officials from the original jurisdiction of the federal courts. From none of these cases is implication to be drawn pertinent to the interpretation of s 1979.

17 See note 5, supra.

18 Mr. Shellabarger, Chairman of the House Select Committee which authored the Act of April 20, 1871, whose first section is now s 1979, reported to the House that that section was modeled upon the second section of the Act of April 9, 1866, 14 Stat. 27, and that the two sections were intended to cover the same cases, with qualifications not relevant here. Cong.Globe, 42d Cong., 1st Sess., App. 68. See also id., at 461. The 1866 provision had been re-enacted, substantially and in form, by the seventeenth and eighteenth sections of the Act of May 31, 1870, 16 Stat. 140, 144, and the 1874 revision of the provision was in turn patterned on the present s 1979. See Screws v. United States, 325 U.S. 91, 99—100, 65 S.Ct. 1031, 1034—1035, 89 L.Ed. 1495. The sections have consistently been read as coextensive in their reach of acts ‘under color’ of state authority. Picking v. Pennsylvania R. Co., 3 Cir., 151 F.2d 240, 248; Burt v. City of New York, 2 Cir., 156 F.2d 791, 792; McShane v. Moldovan, 6 Cir., 172 F.2d 1016, 1020; Geach v. Moynahan, 7 Cir., 207 F.2d 714, 717.

As enacted in 1871, the provision which is now s 1979 reached acts taken ‘under color of any law, statute, ordinance, regulation, custom, or usage of any State * * *.’ 17 Stat. 13. (Emphasis added.) In the Revised Statutes of 1874 and 1875 ‘law’ was omitted from the section, although ‘law’ was retained in the parallel criminal provision, R.S. s 5510, as amended, 18 U.S.C. s 242, 18 U.S.C.A. s 242, and in the jurisdictional provisions, R.S. ss 563(12) and 629(16). The deletion in s 1979 appears in the Reviser's Draft (1872) without explanation. 1 Revision of U.S. Statutes, Draft (1872) 947. No alteration in statutory coverage is permissibly to be based upon the change.

The jurisdictional provisions may now be found in 28 U.S.C. s 1343, 28 U.S.C.A. s 1343.

19 Carter v. Greenhow, 114 U.S. 317, 330, 5 S.Ct. 928, 962, 29 L.Ed. 202, 207; Bowman v. Chicago & N.W. Ry. Co., 115 U.S. 611, 6 S.Ct. 192, 29 L.Ed. 502; Giles v. Harris, 189 U.S. 475, 23 S.Ct. 639, 47 L.Ed. 909; Devine v. City of Los Angeles, 202 U.S. 313, 26 S.Ct. 652, 50 L.Ed. 1046; Myers v. Anderson 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349; Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 882, 87 L.Ed. 1324. One case not involving a state constitution, statute or ordinance was an instance of state judicial action. Green v. Elbert, 137 U.S. 615, 11 S.Ct. 188, 34 L.Ed. 792; and see Anglo-American Provision Co. v. Davis Prov. Co., No. 2, 191 U.S. 376, 24 S.Ct. 93, 48 L.Ed. 228.

20 Holt v. Indiana Mfg. Co., 176 U.S. 68, 20 S.Ct. 272, 44 L.Ed. 374; Moyer v. Peabody, 212 U.S. 78, 29 S.Ct. 235, 53 L.Ed. 410; Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; cf. Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987.

21 Northwestern Fertilizing Co. v. Hyde Park, C.C.N.D.Ill.1873, 18 Fed.Cas. p. 393, No. 10,336; Baltimore & Ohio R. Co. v. Allen, C.C.W.D.Va.1883, 17 F. 171; Tuchman v. Welch, C.C., 42 F. 548, and M. Schandler Bottling Co. v. Welch, C.C.D.Kan.1890, 42 F. 561; Hemsley v. Myers, C.C.D.Kan.1891, 45 F. 283; Davenport v. Board of Trustees of Cloverport High School, D.C.D.Ky.1896, 72 F. 689; Fraser v. McConway & Torley Co., C.C.D.Pa.1897, 82 F. 257; Crystal Springs Land & Water Co. v. City of Los Angeles, C.C.S.D.Cal.1896, 76 F. 148, affirmed 177 U.S. 169, 20 S.Ct. 573. 44 L.Ed. 720 (see California Oil & Gas Co. of Arizona v. Miller, C.C.S.D.Cal.1899, 96 F. 12); Aultman & Taylor Co. v. Brumfield, C.C.N.D.Ohio 1900, 102 F. 7, appeal dismissed 22 S.Ct. 938, 46 L.Ed. 1265; Wadleigh v. Newhall, C.C.N.D.Cal.1905, 136 F. 941; Farson v. City of Chicago, C.C.N.D.Ill.1905, 138 F. 184; Brickhouse v. Brooks, C.C.E.D.Va.1908, 165 F. 534; Simpson v. Geary, D.C.D.Ariz.1913, 204 F. 507; Raich v. Truax, D.C.D.Ariz.1915, 219 F. 273, affirmed 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131; Marcus Brown Holding Co. v. Pollak, D.C.S.D.N.Y.1920, 272 F. 137; West v. Bliley, D.C.E.D.Va.1929, 33 F.2d 177, affirmed 4 Cir., 1930, 42 F.2d 101; Trudeau v. Barnes, 5 Cir., 1933, 65 F.2d 563; Jones v. Oklahoma City, 10 Cir., 1935, 78 F.2d 860; Mitchell v. Greenough, 9 Cir., 1938, 100 F.2d 184; Blackman v. Stone, 7 Cir., 1939, 101 F.2d 500; City of Manchester v. Leiby, 1 Cir., 1941, 117 F.2d 661; Hannan v. City of Haverhill, 1 Cir., 1941, 120 F.2d 87; Hume v. Mahan, D.C.E.D.Ky.1932, 1 F.Supp. 142, reversed 287 U.S. 575, 53 S.Ct. 223, 77 L.Ed. 505; Premier-Pabst Sales Co. v. McNutt, D.C.S.D.Ind.1935, 17 F.Supp. 708; Gobitis v. Minersville School Dist., D.C.E.D.Pa.1937, 21 F.Supp. 581; D.C.1938, 24 F.Supp. 271, affirmed 3 Cir., 1939, 108 F.2d 683, reversed 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375; Connor v. Rivers, D.C.N.D.Ga.1938, 25 F.Supp. 937, affirmed, 305 U.S. 576, 59 S.Ct. 359, 83 L.Ed. 363; Ghadiali v. Delaware State Medical Society, D.C.D.Del.1939, 28 F.Supp. 841; Mills v. Board of Education, D.C.D.Md.1939, 30 ,.f.Supp. 245; Bluford v. Canada, D.C.W.D.Mo.1940, 32 F.Supp. 707, appeal dismissed 8 Cir., 1941, 119 F.2d 779; Kennedy v. City of Moscow, D.C.D.Idaho 1941, 39 F.Supp. 26. In these cases R.S. s 1979 or the parallel jurisdictional provisions were invoked. Note that in the Jones and Farson cases, supra, defendant's conduct was specifically authorized by local ordinance, although plaintiffs asserted the invalidity of those ordinances under state as well as under federal law. In both cases relief was denied on the ground that no state action was shown, within the rule of Barney v. City of New York, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737. To this group of cases involving acts authorized by state law must be added Miller v. Rivers, D.C.M.D.Ga.1940, 31 F.Supp. 540, reversed as moot 5 Cir., 1940, 112 F.2d 439, in which a state governor had several times authorized action in violation of state court restraining orders, finally declaring martial law in the face of the state judicial decrees. Two reported criminal prosecutions under s 242 also involved conduct sanctioned by state law. United States v. Buntin, C.C.S.D.Ohio 1882, 10 F. 730; United States v. Stone, D.C.D.Md.1911, 188 F. 836. Cf. United States v. Horton, D.C.D.Ala.1867, 26 Fed.Cas., p. 375, No. 15,392, semble.

22 Brawner v. Irvin, C.C.N.D.Ga.1909, 169 F. 964. In one case decided in 1940 just prior to United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, a Federal District Court did distinctly decide that similar police misconduct unauthorized by state law, was ‘under color’ of state law. United States v. Sutherland, D.C.N.D.Ga.1940, 37 F.Supp. 344. An unreported 1940 case, United States v. Cowan, D.C.E.D.La., is said to have reached a similar result. See 1941 Atty.Gen.Rep. 98; Brief for the United States, United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, p. 45, n. 25. In neither of these two cases does there appear to have been any examination of the legislative history of the ‘under color’ statutes, nor is any reasoning offered to support the conclusion of the courts.

23 The court below had dismissed the indictment on the ground that the right was not so secured and had not discussed the ‘under color’ issue. 35 F.Supp. 66.

24 The Government's brief contended that, inasmuch as the Civil Rights statutes were passed to enforce the Fourteenth Amendment, they should be read as coextensive with it: ‘under color’ of state law should be coincident with ‘State action’ as this Court had developed the ‘State action’ concept. Classic's brief argued the point as though it were urging a ‘State action’ contention.

25 Ex parte Commonwealth of Virginia, 100 U.S. 339, 25 L.Ed. 676, arose under federal legislation penalizing ‘any officer or other person charged with any duty in the selection or summoning of jurors' who discriminated on grounds of race, color, or previous condition of servitude in the choosing of juries. The issue was whether this provision could constitutionally be applied to a state judge who discriminated in the administration of a state statute fair on its face. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510, posed the question whether the enforcement of an allegedly confiscatory municipal regulatory ordinance was state action for purposes of Federal District Court ‘arising under’ jurisdiction.

26 The Mayor and other officials of Jersey City were charged with a concerted program of discriminatory law enforcement intended to drive union organizers out of the city. The acts upon which amenability to suit under s 1979 was predicated were (1) the enforcement of a municipal ordinance which this Court held unconstitutional on its face; (2) the enforcement of a second ordinance in a manner which willfully discriminated against union organizers; and (3) ‘acts not under the authority of any ordinance or statute but committed under color of municipal office and as part of a deliberate municipal policy.’ 101 F.2d 774, 790. The Court of Appeals for the Third Circuit held that, on these facts, all three classes of conduct, viewed together, constituted ‘State action.’ This Court affirmed and modified the decree without considering the point.

27 That the Court had not in the Classic case isolated the 'under color' issue from the question of 'State action' is indicated by the opinions in Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497. The latter case arose under s 1979, yet although the 'State action' principle had been the basis for the decision below and was prominently treated in two opinions here, no reference was made to the 'under color' phrase.

28 The brief for petitioners Screws et al. contains no citation to legislative history. The brief for the United States, after several citations intended to demonstrate that the purpose of the Civil Rights Acts was to enforce the Fourteenth Amendment and to protect the rights which it secures (these citations, employed to the same purpose, may be found in the plurality opinion, 325 U.S. at pages 98—99, 65 S.Ct. at pages 1033—1034), sets forth only one other bit of legislative material: a statement made in debate by Senator Davis of Kentucky, an opponent of the Act of 1866, to the effect that the Act would repeal the penal laws of all the States. See Cong. Globe, 39th Cong., 1st Sess. 598.

29 See 325 U.S. at page 111, 65 S.Ct. at page 1040 (plurality); id., 325 U.S. at pages 142—144, 65 S.Ct. at pages 1054—1055 (dissent). These two statements are set forth in text at notes 38 and 39, infra. The plurality opinion also contains references to other aspects of the legislative history in another context, id., 325 U.S. at pages 98—100, 65 S.Ct. at pages 1033—1034; see note 28, supra. In his separate opinion, Mr. Justice Rutledge twice adverts to legislative materials, once with regard to matters not relevant here, id., 325 U.S. at page 120, notes 13, 14, 65 S.Ct. at page 1044, and once, pertinently, with particular reference to the position of opponents of the 1866 Act that the legislation would invade the province of the States (setting forth Senator Davis' statement, see note 28, supra), id., 325 U.S. at page 132, note 33, 65 S.Ct. at page 1050. Mr. Justice Murphy, also writing separately, does not discuss the 'under color' issue.

30 Neither the Court's opinion nor the briefs in Williams contain any citation to the legislative history of the Civil Rights Acts. It is true that between Screws and Williams Congress in 1948 re-enacted s 242 without material change. If that section were before the Court in the present case, the implications of that re-enactment might have to be appraised. Yet whatever tenuous thread of legislative approbation of Screws might be drawn from the kind of bulk-sale congressional action which was involved in its enactment of a whole criminal code by way of the new Title 18 U.S.C., 18 U.S.C.A., in 1948, any attempt to tangle in that same thread s 1979—a statute which has not been touched by Congress in three quarters of a century—would exceed the bounds of fictionally implied legislative adoption.

31 E.g., United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884; United States v. C.I.O., 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849; United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989; Phillips Petroleum Co. v. State of Wisconsin, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035; Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911; Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972.

32 The Act of September 9, 1957, 71 Stat. 634, 637, 42 U.S.C.A. s 1971, provides that 'No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote' at any election held solely or in part for the purpose of selecting or electing candidates for designated federal offices. Such an enactment, of course, can in no conceivable manner be considered congressional 'adoption' or approbation of this Court's constructions of the 'under color' clause in Classic, Screws and Williams, for the sufficient reason (among others) that the statute employs the clause only to go beyond it—manifesting a purpose, through the expression 'under color of law or otherwise,' to reach all individual conduct of the class described, whether or not 'under color' of law, and whatever 'under color' of law may mean. See H.R.Rep. No. 291, 85th Cong., 1st Sess. 12. The provisions of H.R. 627, 84th Cong., 2d Sess., as reported from the House Committee on the Judiciary and made the subject of H.R.Rep. No. 2187, 84th Cong., 2d Sess., are similar. See especially id., at 9—11.

The Civil Rights Act of 1960, 74 Stat. 86, 88—89, 90, does twice use the clause 'under color of (law),' but in contexts wholly different from that of R.S. s 1979. Section 301 of the 1960 Act requires every 'officer of election' to retain and preserve during a specified period all records and papers which come into his possession relating to acts requisite to voting at an election wherein candidates for designated federal offices are voted for. Section 306 (which comprises the only use of 'under color' language in the House bill that was the subject of H.R.Rep. No. 956, 86th Cong., 1st Sess.) defines an 'officer of election' as 'any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting' in any election at which votes are cast for candidates for those deisgnated federal offices. These provisions, like those of the 1957 Act, are of very limited scope, reaching only certain donduct affecting federal elections. Section 601 of the 1960 Act provides that in any proceeding instituted by the Attorney General for preventive relief against the deprivation, on account of race or color, of certain voting rights, see R.S. s 2004, as amended by the Act of September 9, 1957, 71 Stat. 634, 637, 42 U.S.C. s 1971, 42 U.S.C.A. s 1971, the court shall, on proper request, make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such a pattern or practice, any person of that race or color resident within the affected area is entitled, during a specified period, to an order declaring him qualified to vote, 'upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise

to qualify to vote, or (b) found not qualified to vote by any person acting under color of law.' Whatever meaning 'under color of law' may have as so employed, Congress' use of the phrase in this narrowly limited context—applying to a situation in which voting rights have been infringed on grounds of race or color pursuant to a pattern or practice—cannot reasonably be taken as indicative of congressional attitude toward one or another possible construction of 'under color' in the sweeping context of R.S. s 1979.

All this is said quite apart from the consideration of how little weight may properly be given to inferences drawn from the silence of minority reports of congressional committees, especially committees sitting almost a century after the enactment of the legislation in question.

33 People v. Grod, 385 Ill. 584, 53 N.E.2d 591; People v. Dalpe, 371 Ill. 607, 21 N.E.2d 756; People v. Brocamp, 307 Ill. 448, 138 N.E. 728. See Ill.Rev.Stat., c. 38, ss 691—699 (1959); Ill.Const., Art. II, s 6.

34 See Bucher v. Krause, 7 Cir., 200 F.2d 576.

35 See Cong.Globe, 39th Cong., 1st Sess. 474, 602, 1117—1118; 1123—1124, 1151, 1159—1160, 1758—1759. See 1 Fleming, Documentary History of Reconstruction (Reprint 1950) 273—311; 2 Commager, Documents of American History (6th ed. 1958) 2—7, for typical Black Code provisions. A more dispassionate appraisal of the Codes than was possible during the turbulence of Reconstruction is found in Randall, The Civil War and Reconstruction (1937) 724—730.

36 Cong.Globe, 39th Cong., 1st Sess. 1680. See also id., at 1266. Light is thrown upon this distinction between the deprivation of a right and its violation—deprivation being competent to the law-making and law-enforcing organs of a State—by comparison of the language of s 1979, establishing liability for the 'deprivation of any rights, privileges, or immunities secured by the Constitution * * *,' 17 Stat. 13, with the provisions of the criminal conspiracy section of the 1870 Act, penalizing conspiracies to intimidate any person in order to 'hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution.' 16 Stat. 140, 141. Cf. Civil Rights Cases, 109 U.S. 3, 17—18, 3 S.Ct. 18, 25—26, 27 L.Ed. 835.

37 Senator Trumbull had introduced the bill. Cong.Globe, 39th Cong., 1st Sess. 129.

38 Cong.Globe, 39th Cong., 1st Sess. 1758.

39 Cong.Globe, 41st Cong., 2d Sess., 3663. Mr. Sherman's remarks were addressed not specifically to the section which paralleled the 1866 'under color' language, but to the whole of the pending Senate amendment, a substitute for the House bill. Compare id., at 3561 with id., at 3503. It was from the Senate amendment, containing an 'under color' provision modeled on s 2 of the Act of 1866, that the 1870 Act, as finally enacted, immediately derived.

40 17 Stat. 13. (Emphasis added.)

41 Cong.Globe, 42d Cong., 1st Sess., App. 68. Mr. Shellabarger was the Chairman of the House Select Committee which drafted the Ku Klux Act. In reporting it out of committee, he described its first section, now s 1979, as modeled on the second section of the First Civil Rights Act of 1866. Ibid. In debate on the 1866 Act Shellabarger had said that the earlier provision was meant 'not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States, but its whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act.' Cong.Globe, 39th Cong., 1st Sess. 1294.

42 Cong.Globe, 42d Cong., 1st Sess. 697.

43 Id., at 808.

44 The claim was several times repeated in debate that the bill operated to absorb 'the entire jurisdiction of the States over their local and domestic affirs,' id., at 366, or that it would bring 'private grievances to the Federal courts.' Id., at 395. With very few exceptions (Ibid., Id., at 361, 429, App. 91) these criticisms were not directed to the Act's first section, now s 1979. See, also, Id., at 416, 510, 660, App. 160, 179, 241—243, 258. One opposition speaker did object specifically to s 1 as providing a federal forum for the deprivation of a suitor's rights although 'The offenses committed against him may be the common violations of the municipal law of his State. Id., at App. 50. And one supporter of the measure, who argued that the Fourteenth Amendment gave Congress power to enact a general criminal law, if necessary, for the protection of citizens under the Privileges and Immunities, Due Process, and Equal Protection Clauses, said of s 2 of the Act of 1866, the model for s 1 of the 1871 Act, that it punished acts which would otherwise be 'mere misdemeanors' at state law. Id., at 504. But these two remarks are the only assertions, throughout hundreds of pages of debate, that s 1 might reach conduct which state law proscribed. Proponents of the bill, addressing themselves to the charge of federal overreaching, insisted that they could support the measure only because they understood that it did not presume to enter upon that realm of protection of rights traditionally reserved to the States. Id., at 800. See notes 47—50, infra. And see the statement of Senator Edmunds, id., at 697—698: '(The bill) does not undertake to interpose itself out of the regular order of the administration of law. It does not attempt to deprive any State of the honor which is due to the punishment of crime.'

45 Id., at 317. Any act to effect the object of the conspiracy rendered all the conspirators guilty of a felony.

46 The impetus for the enactment of the Ku Klux Act was President Grant's message to Congress asserting that a condition then existed in some States which rendered life and property insecure and which was beyond the power of state authorities to control. See id., at App. 226. Throughout the debates on the bill the note was repeated: there was a need for federal action to supplant state administration

which was failing to provide effective protection for private rights. Id., at 345, 368, 374, 428, 444, 457—459, 460, 476, 505—506, 653, App. 78, 167, 185, 248—249, 252. Constitutional authority for such federal action was sought in the logic that 'States' were ordered by the Fourteenth Amendment not to 'deny' equal protection of the laws; that a 'State' in effect denied such protection not only when its legislation was on its face unequal, but whenever its judicial or executive authorities by a consistent course of practice, 'permanently and as a rule' refused to enforce its laws for the protection of some class of persons. Id., at 334. See id., at 416, 482, 505—506, 606—608, 697, App. 251—252, 315. But what was deemed the prerequisite to validity of congressional action in implementation of the Amendment under this theory was no less than a State's permitting 'the rights of citizens to be systematically trampled upon without color of law,' id., at 375; 'A systematic failure to make arrests, to put on trial, to convict, or to punish offenders.' Id., at 459. The National Government was thought powerless to intervene to regulate 'A mere assault and battery, or arson, or murder * * *. The law is believed to be sufficient to cover such cases, and the officers of justice amply able to arrest and punish the offenders.' Id., at 457. See also Mr. Perry's assertion, id., at App. 79, that the wrongs which Congress may remedy 'are not injuries inflicted by mere individuals or upon ordinary rights of individuals,' but injuries inflicted 'under color of State authority or by conspiracies and unlawful combinations with at least the tacit acquiescence of the State authorities.' Wrongs susceptible of adequate redress before the state courts evidently did not concern Congress, and Congress in 1871 did not attempt to reach those wrongs.

47 General Garfield, id., at App. 154: 'In so far as this section punishes persons who under color of any State law shall deny or refuse to others the equal protection of the laws, I give it my cheerful support; but when we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority.' (This objection is taken specifically to s 3 of the Act, authorizing federal executive intervention under certain circumstances.) See also, e.g., id., at App. 113—116: Mr. Farnsworth, who had no objection to s 1, now s 1979, vigorously opposed s 2 as extending to encompass individual action. Farnsworth regarded the Fourteenth Amendment as directed exclusively to the discriminations of state legislation, and his approval of s 1 indicates his understanding that it referred to conduct authorized by such legislation. Garfield seems to have agreed that s 1 did not reach even systematic maladministration of state law fair on its face. See id., at App. 153.

48 Mr. Shellabarger proposed the amendment to s 2, id., at 477, to meet the constitutional objections which the original form of that section had evoked. See id., at 478, App. 187—190, 313. Numerous members of the majority party thereupon withdrew their opposition to the bill. See id., at 514, App. 187—190, 231, 313—315. The form of the second section as it was finally enacted is, in relevant part, substantially that of R.S. s 1980, 42 U.S.C. s 1985, 42 U.S.C.A. s 1985: 'If two or more persons in any State * * * conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State * * * from giving or securing to all persons within such State * * * the equal protection of the laws; (and) if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.' See 17 Stat. 13. Mr. Shellabarger emphasized that the purpose of the change was to make the gist of the offense a deprivation of equality of rights, not a deprivation of rights alone. Cong. Globe, 42d Cong., 1st Sess. 478.

49 Representative Poland had argued the unconstitutionality of the original s 2 on the ground that it sought to extend federal protection to private persons and property, whereas the Fourteenth Amendment guaranteed only equal protection, leaving the States free to protect or not to protect whatever interests they chose so long as the protection afforded was non-discriminatory. The amendment of s 2 met this objection, and Mr. Poland supported the bill, finding no cause for concern in the language of s 1. Id., at 514. For other congressmen who opposed the initial form of s 2 but found no constitutional impediment to enactment of s 1, see id., at 578—579 (Trumbull), App. 86 (Storm), 150—154 (Garfield), 187—190 (Willard). Farnsworth objected to even the amended form of s 2, but voiced no adverse criticism of s 1. Id., at 513. Slater, also opposing s 2, argued that if Congress could assert general criminal jurisdiction in the States (as he contended that section did), it could also assert general civil jurisdiction in protection of persons and property. Apparently he did not regard s 1 as threatening such an assertion. Id., at App. 304.

There was in fact relatively little opposition to s 1. See id., at 568. Many vociferous opponents of the Act did not assail that section. E.g., id., at 419, App. 112, 134—139, 300—303. What objections there were did not suggest that the section usurped state power by assuming a concurrent authority to redress state-law violations, but, quite the opposite, attacked the section for penalizing state judges, legislators and administrative officials acting in full obedience to state law, 'under a solemn, official oath, though as pure in duty as a saint.' Id., at 365.

50 Id., at App. 315. See id., at App. 313—315.

51 Id., at 579.

52 Id., at 368 (Sheldon). See also id., at 501 (Frelinghuysen).

53 Id., at App. 277 (Porter).

54 Id., at App. 268 (Sloss).

55 Id., at App. 218.

56 Id., at App. 216.

57 Id., at App. 217. One significant objection made to s 1 reveals its opponents' comprehension of its scope. It was objected that the section was unnecessary inasmuch as under Amendment Fourteen and the Supremacy Clause there was no longer any danger of 'violation of the rights of citizens under color of the laws of the States.' Id., at App. 231 (Blair). The appellate jurisdiction of the Supreme Court of the United States under s 25 of the Judiciary Act of 1789, providing for review on writ of error of state court judgments sustaining state authority against federal constitutional challenge or striking down asserted federal authority, was regarded as offering sufficient protection against the deprivations of rights covered by s 1. Id., at App. 86 (Storm).

58 See note 46, supra.

59 Cong. Globe, 42d Cong., 1st Sess. 374.

60 Id., at 428.

61 Id., at 653.

62 Id., at App. 315.

63 Id., at 505.

64 Id., at App. 179.

65 Id., at 334.

66 See note 46, supra.

67 'The Fourteenth Amendment, itself a historical product, did not destroy history for the States * * *.' Jackman v. Rosenbaum Co., 260 U.S. 22, 31, 43 S.Ct. 9, 67 L.Ed. 107.

68 In the last twenty years the lower federal courts have encountered a volume of litigation seeking Civil Rights Act redress for a variety of wrongs ranging from arbitrary refusal by housing department officials to issue architect's certificates, Burt v. City of New York, 2 Cir., 156 F.2d 791, to allegedly malicious charges made by a state grand jury. Lyons v. Baker, 5 Cir., 180 F.2d 893. Plaintiffs have sought redress against the signers of a mandamus petition, parties to a state mandamus proceeding to compel city commissioners to hold a local referendum, Lyons v. Dehon, 5 Cir., 188 F.2d 534, against state officials administering a local WPA project for refusing to employ the plaintiff and instituting insanity proceedings against him, Love v. Chandler, 8 Cir., 124 F.2d 785, against adversaries and judge in a state civil judicial proceeding where egregious error resulting in holding against plaintiffs was alleged, Bottone v. Lindsley, 10 Cir., 170 F.2d 705; Campo v. Niemeyer, 7 Cir., 182 F.2d 115; cf. Moffett v. Commerce Trust Co., 8 Cir., 187 F.2d 242. Most courts have refused to convert what would otherwise be ordinary state-law claims for false imprisonment or malicious prosecution or assault and battery into civil rights cases on the basis of conclusory allegations of constitutional violation. Lyons v. Weltmer, 4 Cir., 174 F.2d 473; McGuire v. Todd, 5 Cir., 198 F.2d 60; Curry v. Ragan, 5 Cir., 257 F.2d 449; Deloach v. Rogers, 5 Cir., 268 F.2d 928; Agnew v. City of Compton, 9 Cir., 239 F.2d 226.

69 See, e.g., Valle v. Stengel, 3 Cir., 176 F.2d 697, a case which decides a number of novel and difficult questions of federal constitutional law. The alleged conduct of defendant sheriff which was held actionable under s 1979 was in violation of state law.

70 See Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn.L.Rev. 493 (1955); Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan, 43 Cal.L.Rev. 565 (1955); cf. Edwards, Criminal Liability for Unreasonable Searches and Seizures, 41 Va.L.Rev. 621 (1955). And see, e.g., State for Use of Brooks v. Wynn, 213 Miss. 306, 56 So.2d 824.

71 The common law seems still to retain sufficient flexibility to fashion adequate remedies for lawless intrusions. Compare with the cases cited in Wolf v. People of State of Colorado, 338 U.S. 25, 30, 69 S.Ct. 1359, 1362, 93 L.Ed. 1782, n. 1; Bull v. Armstrong, 1950, 254 Ala. 390, 48 So.2d 467; Sarafini v. City and County of San Francisco, 1956, 143 Cal.App.2d 570, 300 P.2d 44; Ware v. Dunn. 1947, 80 Cal.App.2d 936, 183 P.2d 128; Walker v. Whittle, 1951, 83 Ga.App. 445, 64 S.E.2d 87; Johnson v. Atlantic Coast Line R. Co., 1927, 142 S.C. 125, 140 S.E. 443; Deaderick v. Smith, 1950, 33 Tenn.App. 151, 230 S.W.2d 406.

72 This is so not only because of the practical impediment to Civil Rights Act relief which would be posed by a two-suit requirement, but because the efficient process of judicial administration might well require that a plaintiff present his federal constitutional contention to the state courts along with his state-law contentions, that he there assert the federal unconstitutionality of maintaining the defense of state authorization to a state-law tort action. Cf. Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832. Of course, once that federal contention is properly presented to the state courts, plaintiff has open for review here an adverse state-court judgment; but if plaintiff were successful in this Court, the effect of our disposition would be to return plaintiff to the state courts for a state-law measure of relief.

73 See note 57, supra. Cf. Civil Rights Cases, 109 U.S. 3, 16, 3 S.Ct. 18, 24, 27 L.Ed. 835. And see Nashville, C. & St. L.R. Co. v. Browning, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254: 'Here * * * all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of

jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. * * * Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text.'

Where the jurisdiction of a Federal District Court is invoked to vindicate a claim under s 1979 and where that court finds that defendants' conduct is not under color of state law, difficult questions may also arise as to whether the court should nevertheless determine the respective rights of the parties at state law, under the doctrine of Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148, and Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939. But see California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1323; Massachusetts Universalist Convention v. Hildreth & Rogers Co., 1 Cir., 183 F.2d 497; Robinson v. Stanley Home Prods., Inc., 1 Cir., 272 F.2d 601. Petitioners in this case have never throughout the litigation below raised the issue of the possible application of the Hurn rule to these circumstances, nor is that issue among the questions presented in their petition for certiorari here. Under our Rule 23, subd. 1(c), 28 U.S.C.A., it is not now, therefore, before the Court, and there is no intention here to intimate any opinion on the novel problem of federal jurisdiction of state-law claims 'pendent' to such a case as this. Suffice it to say that whatever application Hurn may have to these situations, its application will entail a very different level of federal judicial involvement with the adjudication of rights between individuals in a State than would the interpretation of s 1979 which petitioners urge. Whatever incursion into areas of conventionally exclusive statecourt competence jurisdiction 'pendent' to a s 1979 claim might entail would touch considerations not peculiar to s 1979, but rather which concern the Hurn doctrine.

74 See the history of s 2 of the Ku Klux Act described, supra, at notes 44—50. For an excellent picture of the background of this legislative struggle, see McKitrick, Andrew Johnson and Reconstruction (1960).

75 See, e.g., Cong. Globe, 42d Cong., 1st Sess. 482, 505—506, 697, App. 81—86, 315.

76 Id., at App. 68.

77 See, e.g., Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281.

78 See, e.g., the pages of debate cited in note 46, supra.

79 That section gave the District and Circuit Courts of the United States concurrent jurisdiction of all causes, civil and criminal, 'affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section' of the 1866 Act. It further provided: 'The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause * * *.' Act of April 9, 1866, s 3, 14 Stat. 27.

80 Except, of course, during the time between the Act of February 13, 1801, s 11, 2 Stat. 92, and its repeal by the Act of March 8, 1802, s 1, 2 Stat. 132. 'Federal question' jurisdiction was conferred by the Act of March 3, 1875, s 1, 18 Stat. 470.

81 Recognition of this situation underlies the comments of Messrs. Blair and Storm, see note 57, supra, and the debate among Senators Edmunds, Trumbull and Carpenter referred to in the concurring opinion. See especially Cong.Globe, 42d Cong., 1st Sess. 576—578.

82 This is why Mr. Carpenter speaks of the Fourteenth Amendment's Enforcement Clause as working 'one of the fundamental, one of the great, the tremendous revolutions effected in our Government by that article of the Constitution.' Id., at 577.

83 See the remarks of Mr. Dawes, a member of the Committee with reported the Ku Klux bill, id., at 476:

'The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution.'

And see, e.g., the remaks of Mr. Coburn, id., at 459—460:

'Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive any hear with impartial attention the complaints of those who are denied redress elsewhere. Here may come the weak and poor and downtrodden, with assurance that they shall be hard. Here may come the man smitten with many stripes and ask for redress. Here may come the nation, in her majesty, and demand the trial and punishment of offenders, when all, all other tribunals are closed * * *.

'Can these means be made effectual? Can we thus suppress these wrongs? I will say we can but try. The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. The marshal, clothed with more

power than the sheriff, can make arrests with certainty, and, with the aid of the General Government, can seize offenders in spite of any banded and combined resistance such as may be expected. Thus, at least, these men, who disregard all law, can be brought to trial. Here we stop. The court is to do the rest, acting under all its solemn obligations of duty to country and God. Can we trust it, or are we afraid of our own institutions? Does the grim shadow of the State step into the national court, like a goblin, and terrify us? Does this harmless and helpless ghost drive us from that tribunal—the State that mocks at justice, the State that licenses outlawry, the State that stands dumb when the lash and the torch and the pistol are lifted every night over the quiet citizen? We believe that we can trust our United States courts, and we propose to do so.'

84 It is suggested that Congress knew there existed state constitutional guarantees of which state legislation might fall afoul, and that nevertheless there is found in the debates no 'explanation of (the) exception to the general rule' which would obtain if s 1979 were applied to conduct authorized by state statute, ordinance, regulation, custom or usage, but violative of a state constitution. To regard such an application as an 'exception' is to misconceive the incidence of s 1979 by regarding its operation from the wrong perspective. The question whether official action does or does not come within the statute depends not upon what state law the action does or does not violate, but upon what state law does or does not authorize the action. The state authorization against which Congress aimed s 1979 was authorization by the living , functioning law of the State, not authorization in strict conformity with what may have become no more than an unheeded pattern of words upon the closed pages of a State's books of legal learning. It meant to reach those 'Deeply embedded traditional ways of carrying out state policy (which) * * * are often tougher and truer law than the dead words of the written text,' see note 73, supra, and it would by its terms have reached the case supposed by my Brother Harlan not as a matter of exception in need of explanation, but by its natural logic.

85 Section 2 of the Ku Klux Act attached civil and criminal liability to conspiracy 'for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws * * *.' 17 Stat. 13. The civil provisions of this section were carried forward, as amended, in R.S. s 1980, and are now found in 42 U.S.C. s 1985, 42 U.S.C.A. s 1985. The criminal provisions, carried forward in R.S. s 5519, were declared unconstitutional in United States v. Harris, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290, and Baldwin v. Franks, 120 U.S. 678, 7 S.Ct. 763, 32 L.Ed. 766.

86 See Cong.Globe, 42d Cong., 1st Sess. 478, App. 315.

87 The Fourteenth Amendment provides that no State shall 'deprive' any person of life, liberty, or property without due process of law, and that no State shall 'deny' to any person within its jurisdiction the equal protection of the laws. It is clear that the Forty-second Congress believed that 'denial' could be worked by non-action, while 'deprivation' required ill-action; thus, that the scope of federal enforcing power under the Equal Protection Clause reached further, in respect of situations in which there was no assertion of legitimate state authority, than did the equivalent scope of power under the Due Process and Privileges and Immunities Clauses. See, id., at 459, 482, 505—506, 514, 607—608, 697, App. 251, 315. This appears to be why s 2 was acceptable in its amended, while not in its original, form.

88 Snowden v. Hughes, 321 U.S. 1, 9, 64 S.Ct. 397, 401, 88 L.Ed. 497; see also Lisenba v. People of State of California, 314 U.S. 219, 226, 62 S.Ct. 280, 285, 86 L.Ed. 166.

89 I agree that this is not the appropriate occasion to pass upon the construction of s 1985.

90 For an appreciation of the nature and character of the Ku Klux Klan as it appeared to Congress in 1871, see S.Rep. No. 1, 42d Cong., 1st Sess., and the voluminous report of the Joint Select Committee to inquire into the Condition of Affairs in the late Insurrectionary States, published as S.Rep. No. 41, pts. 1—13, and H.R.Rep. No. 22, pts. 1—13, 42d Cong., 2d Sess.

91 Compare People v. Frugoli, 1929, 334 Ill. 324, 166 N.E. 129, and Fulford v. O'Connor, 1954, 3 Ill.2d 490, 121 N.E.2d 767, with People v. Kelly, 1949, 404 Ill. 281, 89 N.E.2d 27.

92 In considering the detention of Mr. Monroe as isolable from the invasion of the Monroe home for purposes of applying s 1979, one does not ignore that in its treatment of coerced-confession cases and deprivation-of-counsel cases coming here from state courts, this Court has looked to the whole sequence of activity by state authorities pertinent to the prosecution of a criminal defendant. Malinski v. People of State of New York, 324 U.S. 401, 412, 65 S.Ct. 781, 786, 89 L.Ed. 1029 (concurring opinion joined in, and made a majority view, 324 U.S. at page 438, 65 S.Ct. at page 798); Watts v. State, of Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801; Turner v. Com. of Pennsylvania, 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1910; Harris v. State of South Carolina, 338 U.S. 68, 69 S.Ct. 1354, 93 L.Ed. 1815; Gibbs v. Burke, 337 U.S. 773, 69 S.Ct. 1247, 93 L.Ed. 1686. But these cases differ from the one at bar precisely in the fact that they do come here after the sustaining of a criminal conviction by the highest court of a State competent to act in the matter. In all such cases the processes of law administration of a State have rendered the final judgment of state law, and the federal question presented is whether the conviction has, in light of the totality of the events leading to that conviction, violated due process. The question in the instant case is the much narrower one whether petitioners have alleged conduct 'under color' of state authority

which deprives them of a Fourteenth Amendment right, and thus brought respondents' conduct within the specific requirements of the statute for initiating litigation in a Federal District Court.

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Pierson v. Ray

386 U.S. 547 (1967)

87 S.Ct. 1213
Supreme Court of the United States

Robert L. PIERSON et al., Petitioners,
v.
J. L. RAY et al.
J. L. RAY et al., Petitioners,
v.
Robert L. PIERSON et al.

Nos. 79, 94.
|
Argued Jan. 11, 1967.
|
Decided April 11, 1967.

Synopsis

Action against city officers and a municipal police justice for false arrest and imprisonment and for damages for deprivation of civil rights. The United States District Court for the Southern District of Mississippi entered judgment on a jury verdict for defendants and plaintiffs appealed. The Court of Appeals for the Fifth Circuit, 352 F.2d 213, affirmed in part and reversed in part and remanded, and petitions for certiorari were granted. The Supreme Court, Mr. Chief Justice Warren, held that the Civil Rights Act making liable 'any person' who under color of law deprives another person of his civil rights did not abolish immunity of judges for acts within their judicial role, and therefore a local judge could not be held liable for damages under the Civil Rights Act for an unconstitutional conviction; and that defense of good faith and probable cause available to officers in common-law action for false arrest and imprisonment was also available to them in action under the Civil Rights Act for deprivation of such rights.

Judgment of Court of Appeals affirmed in part and reversed in part and cases remanded for proceedings in accordance with opinion.

Mr. Justice Douglas dissented.

Attorneys and Law Firms

****1215** ***548** Carl Rachlin, New York City, for Robert L. Pierson and others.

Elizabeth W. Grayson, Jackson, Miss., for J. L. Ray and others.

Opinion

Mr. Chief Justice WARREN delivered the opinion of Court.

These cases present issues involving the liability of local police officers and judges under s 1 of the Civil Rights Act of 1871, 17 Stat. 13, now 42 U.S.C. s 1983.[1] Petitioners ***549** in No. 79 were members of a group of 15 white and Negro Episcopal clergymen who attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961. They were arrested by respondents Ray, Griffith, and Nichols, policemen of the City of Jackson, and charged with violating s 2087.5 of the Mississippi Code, which makes guilty of a misdemeanor anyone who congregates with others in a public place under

circumstances such that a breach of the peace may be occasioned thereby, and refuses to move on when ordered to do so by a police officer.[2] Petitioners[3] waived a jury trial and were convicted of the offense by respondent Spencer, a municipal police justice. They were each given the maximum sentence of four months in jail and ***550** a fine of $200. On appeal petitioner Jones was accorded a trial de novo in the County Court, and after the city produced its evidence the court granted his motion for a directed verdict. The cases against the other petitioners were then dropped.

Having been vindicated in the County Court, petitioners brought this action for damages in the United States District Court for the Southern District of Mississippi, Jackson Division, alleging that respondents had violated s 1983, supra, and that respondents were liable at common law for false arrest and imprisonment. A jury returned verdicts for respondents ****1216** on both counts. On appeal, the Court of Appeals for the Fifth Circuit held that respondent Spencer was immune from liability under both s 1983 and the common law of Mississippi for acts committed within his judicial jurisdiction. 352 F.2d 213. As to the police officers, the court noted that s 2087.5 of the Mississippi Code was held unconstitutional as applied to similar facts in Thomas v. Mississippi, 380 U.S. 524, 85 S.Ct. 1327, 14 L.Ed.2d 265 (1965).[4] Although Thomas was decided years after the arrest involved in this trial, the court held that the policemen would be liable in a suit under s 1983 for an unconstitutional arrest even if they acted in good faith and with probable cause in making an arrest under a state statute not yet held invalid. The court believed that this stern result was required by ***551** Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Under the count based on the common law of Mississippi, however, it held that the policemen would not be liable if they had probable cause to believe that the statute had been violated, because Mississippi law does not require police officers to predict at their peril which state laws are constitutional and which are not. Apparently dismissing the common-law claim,[5] the Court of Appeals reversed and remanded for a new trial on the s 1983 claim against the police officers because defense counsel had been allowed to cross-examine the ministers on various irrelevant and prejudicial matters, particularly including an alleged convergence of their views on racial justice with those of the Communist Party. At the new trial, however, the court held that the ministers could not recover if it were proved that they went to Mississippi anticipating that they would be illegally arrested because such action would constitute consent to the arrest under the principle of volenti non fit injuria, he who consents to a wrong cannot be injured. We granted certiorari in No. 79 to consider whether a local judge is liable for damages under s 1983 for an unconstitutional conviction and whether the ministers should be denied recovery against the police officers if they acted with the anticipation that they would be illegally arrested. We also granted the police officers' petition in No. 94 to determine if the Court of Appeals correctly held that they could not assert the defense of ***552** good faith and probable cause to an action under s 1983 for unconstitutional arrest.[6]

The evidence at the federal trial showed that petitioners and other Negro ****1217** and white Episcopal clergymen undertook a 'prayer pilgrimage' in 1961 from New Orleans to Detroit. The purpose of the pilgrimage was to visit church institutions and other places in the North and South to promote racial equality and integration, and, finally, to report to a church convention in Detroit. Letters from the leader of the group to its members indicate that the clergymen intended from the beginning to go to Jackson and attempt to use segregated facilities at the bus terminal there, and that they fully expected to be arrested for doing so. The group made plans based on the assumption that they would be arrested if they attempted peacefully to exercise their right as interstate travelers to use the waiting rooms and other facilities at the bus terminal, and the letters discussed arrangements for bail and other matters relevant to arrests.

The ministers stayed one night in Jackson, and went to the bus terminal the next morning to depart for Chattanooga, Tennessee. They entered the waiting room, disobeying a sign at the entrance that announced 'White Waiting Room Only—By Order of the Police Department.' They then turned to enter the small terminal restaurant but were stopped by two Jackson police officers, respondents Griffith and Nichols, who had been awaiting their arrival and who ordered them to 'move on.' The ministers replied that they wanted to eat ***553** and refused to move on. Respondent Ray, then a police captain and now the deputy chief of police, arrived a few minutes later. The ministers were placed under arrest and taken to the jail.

All witnesses including the police officers agreed that the ministers entered the waiting room peacefully and engaged in no boisterous or objectionable conduct while in the 'White Only' area. There was conflicting testimony on the number of bystanders

present and their behavior. Petitioners testified that there was no crowd at the station, that no one followed them into the waiting room, and that no one uttered threatening words or made threatening gestures. The police testified that some 25 to 30 persons followed the ministers into the terminal, that persons in the crowd were in a very dissatisfied and ugly mood, and that they were mumbling and making unspecified threatening gestures. The police did not describe any specific threatening incidents, and testified that they took no action against any persons in the crowd who were threatening violence because they 'had determined that the ministers was the cause of the violence if any might occur,'[7] although the ministers were concededly orderly and polite and the police did not claim that it was beyond their power to control the allegedly disorderly crowd. The arrests and convictions were followed by this lawsuit.

We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court.[8] Few doctrines were more solidly ***554** established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in ****1218** Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decisionmaking but to intimidation.

We do not believe that this settled principle of law was abolished by s 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and ***555** we presume that Congress would have specifically so provided had it wished to abolish the doctrine.[9]

The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. Restatement, Second, Torts s 121 (1965); 1 Harper & James, The Law of Torts s 3.18, at 277—278 (1956); State of Missouri ex rel. and to Use of, Ward v. Fidelity & Deposit Co. of Maryland, 179 F.2d 327 (C.A.8th Cir. 1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt,[10] the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied.

The Court of Appeals held that the officers had such a limited privilege under the common law of Mississippi,[11] and indicated that it would have recognized a similar privilege under s 1983 except that it felt compelled to hold otherwise by our decision in ***556** Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). monroe v. Pape presented no question of immunity, however, and none was decided. The complaint in that case alleged that '13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further ****1219** allege(d) that Mr. Monroe was then taken to the police station and detained on 'open' charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a

magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him.' 365 U.S., at 169, 81 S.Ct., at 474. The police officers did not choose to go to trial and defend the case on the hope that they could convince a jury that they believed in good faith that it was their duty to assault Monroe and his family in this manner. Instead, they sought dismissal of the complaint, contending principally that their activities were so plainly illegal under state law that they did not act 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory' as required by s 1983. In rejecting this argument we in no way intimated that the defense of good faith and probable cause was foreclosed by the statute. We also held that the complaint should not be dismissed for failure to state that the officers had 'a specific intent to deprive a person of a federal right,' but this holding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers. As we went on to say in the same paragraph, s 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S., at 187, 81 S.Ct. at 484. Part of the background of tort liability, in the ***557** case of police officers making an arrest, is the defense of good faith and probable cause.

We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under s 1983. This holding does not, however, mean that the count based thereon should be dismissed. The Court of Appeals ordered dismissal of the common-law count on the theory that the police officers were not required to predict our decision in Thomas v. Mississippi, 380 U.S. 524, 85 S.Ct. 1327, 14 L.Ed.2d 265. We agree that a police officer is not charged with predicting the future course of constitutional law. But the petitioners in this case did not simply argue that they were arrested under a statute later held unconstitutional. They claimed and attempted to prove that the police officers arrested them solely for attempting to use the 'White Only' waiting room, that no crowd was present, and that no one threatened violence or seemed about to cause a disturbance. The officers did not defend on the theory that they believed in good faith that it was constitutional to arrest the ministers solely for using the waiting room. Rather, they claimed and attempted to prove that they did not arrest the ministers for the purpose of preserving the custom of segregation in Mississippi, but solely for the purpose of preventing violence. They testified, in contradiction to the ministers, that a crowd gathered and that imminent violence was likely. If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional The jury did resolve the factual issues in favor of the officers but, for reasons previously stated, ***558** its verdict was influenced by irrelevant and prejudicial evidence. Accordingly, the case must be remanded to the trial court for a new trial.

It is necessary to decide what importance should be given at the new trial to the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested. We do not agree with the Court of Appeals that they somehow consented to the arrest because of their anticipation that ****1220** they would be illegally arrested, even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations. The case contains no proof or allegation that they in any way tricked or goaded the officers into arresting them. The petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under s 1983.[12]

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Judgment of Court of Appeals affirmed in part and reversed in part and cases remanded with directions.

Mr. Justice DOUGLAS, dissenting.

I do not think that all judges, under all circumstances, no matter how outrageous their conduct are immune ***559** from suit under 17 Stat. 13, 42 U.S.C. s 1983. The Court's ruling is not justified by the admitted need for a vigorous and independent judiciary, is not commanded by the common-law doctrine of judicial immunity, and does not follow inexorably from our prior decisions.

The statute, which came on the books as s 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, provides that 'every person' who under color of state law or custom 'subjects, or causes to be subjected, any citizen * * * 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.' To most, 'every person' would mean every person, not every person except judges. Despite the plain import of those words, the court decided in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019, that state legislators are immune from suit as long as the deprivation of civil rights which they caused a person occurred while the legislators 'were acting in a field where legislators traditionally have power to act.' Id., at 379, 71 S.Ct. at 789. I dissented from the creation of that judicial exception as I do from the creation of the present one.

The congressional purpose seems to me to be clear. A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated. And its members were not unaware that certain members of the judiciary were implicated in the state of affairs which the statute was intended to rectify. It was often noted that '(i)mmunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.' Cong. Globe, 42d Cong., 1st Sess., 374. Mr. Rainey of South Carolina noted that '(T)he courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity.' Id., at 394. ***560** Congressman Beatty of Ohio claimed that it was the duty of Congress to listen to the appeals of those who 'by reason of popular sentiment or secret organizations or prejudiced juries or bribed judges, (cannot) obtain the rights and privileges due an American citizen * * *.' Id., at 429. The members supporting the proposed measure were apprehensive that there had ****1221** been a complete breakdown in the administration of justice in certain States and that laws nondiscriminatory on their face were being applied in a discriminatory manner, that the newly won civil rights of the Negro were being ignored, and that the Constitution was being defied. it was against this background that the section was passed, and it is against this background that it should be interpreted.

It is said that, at the time of the statute's enactment, the doctrine of judicial immunity was well settled and that Congress cannot be presumed to have intended to abrogate the doctrine since it did not clearly evince such a purpose. This view is beset by many difficulties. It assumes that Congress could and should specify in advance all the possible circumstances to which a remedial statute might apply and state which cases are within the scope of a statute.
'Underlying (this) view is an atomistic conception of intention, coupled with what may be called a pointer theory of meaning. This view conceives the mind to be directed toward individual things, rather than toward general ideas, toward distinct situations of fact rather than toward some significance in human affairs that these situations may share. If this view were taken seriously, then we would have to regard the intention of the draftsman of a statute directed against 'dangerous weapons' as being directed toward an endless series of individual objects: revolvers, ***561** automatic pistols, daggers, Bowie knives, etc. If a court applies the statute to a weapon its draftsman had not thought of, then it would be 'legislaing,' not 'interpreting,' as even more obviously it would be if it were to apply the statute to a weapon not yet invented when the statute was passed.' Fuller, The Morality of Law 84 (1964).

Congress of course acts in the context of existing common-law rules, and in construing a statute a court considers the 'common law before the making of the Act.' Heydon's Case, 3 Co.Rep. 7a, 76 Eng.Rep. 637 (Ex. 1584). But Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law.[1] It cannot be presumed that the common law is the perfection of reason, is superior to statutory law (Sedgwick, Construction of Statutes 270 (1st ed. 1857); Pound, Common Law and Legislation, 21 Harv.L.Rev. 383, 404—406 (1908)), and that the legislature always changes law for the worse. Nor should the canon of construction 'statutes in derogation of the common law are to be strictly construed' be applied so as to weaken a remedial statute whose purpose is to remedy the defects of the preexisting law.

The position that Congress did not intend to change the common-law rule of judicial immunity ignores the fact that every member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable. Many members of Congress objected to the statute because it imposed ***562** liability on members of the judiciary. Mr. Arthur of Kentucky opposed the measure because:

'Hitherto * * * no judge or court has been held liable, civilly or criminally, for judicial acts * * *. Under the provisions of (section 1) every judge in the State court * * * will enter upon and pursue the call of official duty with the sward of Damocles suspended over him * * *.' Cong. Globe, 42d Cong., 1st Sess., 365—366.

**1222 And Senator Thurman noted that:
'There have been two or three instances already under the civil rights bill of State judges being taken into the United States district court, sometimes upon indictment for the offense * * * of honestly and conscientiously deciding the law to be as they understood it to be. * * *

'Is (section 1) intended to perpetuate that? Is it intended to enlarge it? Is it intended to extend it so that no longer a judge sitting on the bench to decide causes can decide them free from any fear except that of impeachment which never lies in the absence of corrupt motive? Is that to be extended, so that every judge of a State may be liable to be dragged before some Federal judge to vindicate his opinion and to be mulcted in damages if that Federal judge shall think the opinion was erroneous? That is the language of this bill.' Cong. Globe, 42d Cong., 1st Sess., Appendix 217.

Mr. Lewis of Kentucky expressed the fear that:
'By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor. * * *' Cong. Globe, 42d, Cong., 1st Sess., 385.

*563 Yet despite the repeated fears of its opponents, and the explicit recognition that the section would subject judges to suit, the section remained as it was proposed: it applied to 'any person.'[2] There was no exception for members of the judiciary. In light of the sharply contested nature of the issue of judicial immunity it would be reasonable to assume that the judiciary would have been expressly exempted from the wide sweep of the section, if Congress had intended such a result.

The section's purpose was to provide redress for the deprivation of civil rights. It was recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied. The parade of cases coming to this Court shows that a similar condition now obtains in some of the States. Some state courts have been instruments of suppression of civil rights. The methods may have changed; the means may have become more subtle; but the wrong to be remedied still exists.

Today's decision is not dictated by our prior decisions. In Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676, the Court held that a judge who excluded Negroes from juries could be held liable under the Act of March 1, 1875 (18 Stat. 335), one of the Civil Rights Acts. The Court assumed that the judge was merely performing a ministerial function. But it went on to state that the judge would be liable under the statute even if his actions were judicial.[3] It is one thing to say that the common-law doctrine of *564 judicial immunity is a defense to a common-law cause of action. But it is quite another to say that the common-law immunity rule is a defense to liability which Congress has imposed upon 'any officer or other person,' as in Ex parte Virginia or upon 'every person' as in these cases.

The immunity which the Court today grants the judiciary is not necessary to preserve an independent judiciary. If the threat of civil action lies in the background of litigation, so the argument goes, judges will be reluctant to exercise the discretion and judgment inherent in **1223 their position and vital to the effective operation of the judiciary. We should, of course, not protect a member of the judiciary 'who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good'. Gregoire v. Biddle, 2 Cir., 177 F.2d 579, 581. To deny recovery to a person injured by the ruling of a judge acting for personal gain or out of personal motives would be 'monstrous.' Ibid. But, it is argued that absolute immunity is necessary to prevent the chilling effects of a judicial inquiry, or the threat of such inquiry, into whether, in fact, a judge has been unfaithful to his oath of office. Thus, it is necessary to protect the guilty as well as the innocent.[4]

The doctrine of separation of powers is, of course, applicable only to the relations of coordinate branches of the same government, not to the relations between the *565 branches of the Federal Government and those of the States. See Baker

v. Carr, 369 U.S. 186, 210, 82 S.Ct. 691, 706, 7 L.Ed.2d 663. Any argument that Congress could not impose liability on state judges for the deprivation of civil rights would thus have to be based upon the claim that doing so would violate the theory of division of powers between the Federal and State Governments. This claim has been foreclosed by the cases recognizing 'that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State * * *.' Monroe v. Pape, 365 U.S. 167, 171—172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492. In terms of the power of Congress, I can see no difference between imposing liability on a state police officer (Monroe v. Pape, supra) and on a state judge. The question presented is not of constitutional dimension; it is solely a question of statutory interpretation.

The argument that the actions of public officials must not be subjected to judicial scrutiny because to do so would have an inhibiting effect on their work, is but a more sophisticated manner of saying 'The King can do no wrong.'[5] Chief Justice Cockburn long ago disposed of the argument that liability would deter judges:
'I cannot believe that judges * * * would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences * * * from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small and would be easily disposed of. ***566** While, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice as that, on sound principles, the authors of such wrong ought to be responsible to the parties wronged.' Dawkins v. Lord Paulet, L.R. 5 Q.B. 94, 110 (C. J. Cockburn, dissenting).

****1224** This is not to say that a judge who makes an honest mistake should be subjected to civil liability. It is necessary to exempt judges from liability for the consequences of their honest mistakes. The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks. It would be unfair to require a judge to exercise his independent judgment and then to punish him for having exercised it in a manner which, in retrospect, was erroneous. Imposing liability for mistaken, though honest judicial acts, would curb the independent mind and spirit needed to perform judicial functions. Thus, a judge who sustains a conviction on what he forthrightly considers adequate evidence should not be subjected to liability when an appellate court decides that the evidence was not adequate. Nor should a judge who allows a conviction under what is later held an unconstitutional statute.

But that is far different from saying that a judge shall be immune from the consequences of any of his judicial actions, and that he shall not be liable for the knowing and intentional deprivation of a person's civil rights. What about the judge who conspires with local law enforcement officers to 'railroad' a dissenter? What about the judge who knowingly turns a trial into a 'kangaroo' court? Or one who intentionally flouts the ***567** Constitution in order to obtain a conviction? Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights.[6]

The plight of the oppressed is indeed serious. Under City of Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944, the defendant cannot remove to a federal court to prevent a state court from depriving him of his civil rights. And under the rule announced today, the person cannot recover damages for the deprivation.

All Citations

386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288

Footnotes

1 'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' 42 U.S.C. s 1983.

2 '1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

'(1) Crowds or congregates with others in * * * any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, * * * or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, * * * shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars ($200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment * * *.'

3 The ministers involved in No. 79 will be designated as 'petitioners' throughout this opinion, although they are the respondents in No. 94.

4 In Thomas various 'Freedom Riders' were arrested and convicted under circumstances substantially similar to the facts of these cases. The police testified that they ordered the 'Freedom Riders' to leave because they feared that onlookers might breach the peace. We reversed without argument or opinion, citing Boynton v. Virginia, 364 U.S. 454, 81 S.Ct. 182, 5 L.Ed.2d 206 (1960) Boynton held that racial discrimination in a bus terminal restaurant utilized as an integral part of the transportation of interstate passengers violates s 216(d) of the Interstate Commerce Act. State enforcement of such discrimination is barred by the Supremacy Clause.

5 Respondents read the court's opinion as remanding for a new trial on this claim. The court stated, however, that the officers 'are immune from liability for false imprisonment at common law but not from liability for violations of the Federal statutes on civil rights. It therefore follows that there should be a new trial of the civil rights claim against the appellee police officers so that there may be a determination of the fact issue as to whether the appellants invited or consented to the arrest and imprisonment.' 352 F.2d at 221.

6 Respondents did not challenge in their petition in No. 94 the holding of the Court of Appeals that a new trial is necessary because of the prejudicial cross-examination. Belatedly, they devoted a section of their brief to the contention that the cross-examination was proper. This argument is no more meritorious than it is timely. The views of the Communist Party on racial equality were not an issue in these cases.

7 Transcript of Record, at 347. (Testimony of Officer Griffith.)

8 Petitioners attempted to suggest a 'conspiracy' between Judge Spencer and the police officers by questioning him about his reasons for finding petitioners guilty in these cases and by showing that he had found other 'Freedom Riders' guilty under similar circumstances in previous cases. The proof of conspiracy never went beyond this suggestion that inferences could be drawn from Judge Spencer's judicial decisions. See Transcript of Record, at 352—371.

9 Since our decision in Tenney v. Brandhove, supra, the courts of appeals have consistently held that judicial immunity is a defense to an action under s 1983. See Bauers v. Heisel, 361 F.2d 581 (C.A.3d Cir. 1966), and cases cited therein.

10 See Caveat, Restatement, Second, Torts s 121, at 207—208 (1965); Miller v. Stinnett, 257 F.2d 910 (C.A.10th Cir. 1958).

11 See Golden v. Thompson, 194 Miss. 241, 11 So.2d 906 (1943).

12 The petition for certiorari in No. 79 also presented the question whether the Court of Appeals correctly dismissed the count based on the common law of Mississippi. We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case. The state common-law claim in this case is merely cumulative, and petitioners' right to recover for an invasion of their civil rights, subject to the defense of good faith and probable cause, is adequately secured by s 1983.

1 'Remedial statutes are to be liberally construed.' See generally, Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand.L.Rev. 395 (1950); Llewellyn, The Common Law Tradition, Appendix C (1960).

2 As altered by the reviser who prepared the Revised Statutes of 1878, and as printed in 42 U.S.C. s 1983, the statute refers to 'every person' rather than to 'any person.'

3 The opinion in Ex parte Virginia, supra, did not mention Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646, which held that a judge could not be held liable for causing the name of an attorney to be struck from the court rolls. But in Bradley, the action was not brought under any of the Civil Rights Acts.

4 Other justifications for the doctrine of absolute immunity have been advanced: (1) preventing threat of suit from influencing decision; (2) protecting judges from liability for honest mistakes; (3) relieving judges of the time and expense of defending suits; (4) removing an impediment to responsible men entering the judiciary; (5) necessity of finality; (6) appellate review is satisfactory remedy; (7) the judge's duty is to the public and not to the individual; (8) judicial self-protection; (9) separation of powers. See generally Jennings, Tort Liability of Administrative Officers, 21 Minn.L.Rev. 263, 271—272 (1937).

5 Historically judicial immunity was a corollary to that theory. Since the King could do no wrong, the judges, his delegates for dispensing justice, 'ought not to be drawn into question for any supposed corruption (for this tends) to the slander of the justice of the King.'

Floyd & Barker, 12 Co.Rep. 23, 25, 77 Eng.Rep. 1305, 1307 (Star Chamber 1607). Because the judges were the personal delegates of the King they should be answerable to him alone. Randall v. Brigham, 7 Wall. 523, 539, 19 L.Ed. 285.

6 A judge is liable for injury caused by a ministerial act; to have immunity the judge must be performing a judicial function. See, e.g., Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676; 2 Harper & James, The Law of Torts 1642—1643 (1956). The presence of malice and the intention to deprive a person of his civil rights is wholly incompatible with the judicial function. When a judge acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as a 'minister' of his own prejudices.

Monell v. Dep't of Social Serv's of City of New York

436 U.S. 658 (1978)

98 S.Ct. 2018
Supreme Court of the United States

Jane MONELL et al., Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF the CITY OF NEW YORK et al.

No. 75–1914.
|
Argued Nov. 2, 1977.
|
Decided June 6, 1978.

Synopsis

Female employees of the Department of Social Services and the Board of Education of the City of New York brought an action challenging the policies of those bodies in requiring pregnant employees to take unpaid leaves of absence before those leaves were required for medical reasons. The United States District Court for the Southern District of New York, 394 F.Supp. 853, found the practice unconstitutional but denied claims for back pay. The Court of Appeals, 532 F.2d 259, affirmed and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held that: (1) local government units were "persons" for purposes of § 1983, the Civil Rights Act of 1871; (2) local governments could not be held liable under a theory of respondeat superior but rather could be held liable only when the constitutional deprivation arises from a governmental custom; (3) the Tenth Amendment did not impose any impediment to liability; (4) the Eleventh Amendment did not preclude imposition of liability except with respect to local government units which are part of the state for Eleventh Amendment purposes; (5) local government officials sued in their official capacity are "persons" under § 1983 in those cases in which local government is suable in its own name, and (6) the deprivation complained of in the instant case arose out of official policy.

Reversed.

Mr. Justice Powell filed a concurring opinion.

Mr. Justice Stevens filed an opinion concurring in part.

Mr. Justice Rehnquist filed a dissenting opinion in which Mr. Chief Justice Burger concurred.

****2019** *Syllabus*[*]

***658** Petitioners, female employees of the Department of Social Services and the Board of Education of the City of New York, brought this class action against the Department and its Commissioner, the Board and its Chancellor, and the city of New York and its Mayor under 42 U.S.C. § 1983, which provides that every "person" who, under color of any statute, ordinance, regulation, custom, or usage of any State subjects, or "causes to be subjected," any person to the deprivation of any federally protected rights, privileges, or immunities shall be civilly liable to the injured party. In each case, the individual defendants were sued solely in their official capacities. The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The District Court found that petitioners' constitutional rights had been violated, but held that petitioners' claims for injunctive relief were mooted by a supervening change in the official maternity leave policy. That court further held that *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, barred recovery of back pay from the Department, the Board, and the city.

In addition, to avoid circumvention of the immunity conferred by *Monroe*, the District Court held that natural persons sued in their official capacities as officers of a local government also enjoy the immunity conferred on local governments by that decision. The Court of Appeals affirmed on a similar theory. *Held* :

1. In *Monroe v. Pape, supra*, after examining the legislative history of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, and particularly the rejection of the so-called Sherman amendment, the Court held that Congress in 1871 doubted its constitutional authority to impose civil liability on municipalities and therefore could not have intended to include municipal bodies within the class of "persons" subject to the Act. Re-examination of this legislative history compels the conclusion that Congress in 1871 would *not* have thought § 1983 constitutionally infirm if it applied to local governments. In addition, that history confirms that local governments were intended to be included ***659** among the "persons" to which § 1983 applies. Accordingly, *Monroe v. Pape* is overruled insofar as it holds that local governments are wholly immune from suit under § 1983. Pp. 2022–2035.

2. Local governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under § 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. In addition, local governments, like every other § 1983 "person," may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decision-making channels. Pp. 2035–2036.

3. On the other hand, the language and legislative history of § 1983 compel the conclusion that Congress did not intend a local government to be held liable solely because it employs a tort-feasor—in other words, a local government cannot be held liable under § 1983 on a *respondeat superior* theory. Pp. 2036–2038.

4. Considerations of *stare decisis* do not counsel against overruling *Monroe v. Pape* insofar as it is inconsistent with this opinion. Pp. 2038–2041.

****2020** (a) *Monroe v. Pape* departed from prior practice insofar as it completely immunized municipalities from suit under § 1983. Moreover, since the reasoning of *Monroe* does not allow a distinction to be drawn between municipalities and school boards, this Court's many cases holding school boards liable in § 1983 actions are inconsistent with *Monroe*, especially as the principle of that case was extended to suits for injunctive relief in *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109. Pp. 2038–2039.

(b) Similarly, extending absolute immunity to school boards would be inconsistent with several instances in which Congress has refused to immunize school boards from federal jurisdiction under § 1983. Pp. 2038–2040.

(c) In addition, municipalities cannot have arranged their affairs on an assumption that they can violate constitutional rights for an indefinite period; accordingly, municipalities have no reliance interest that would support an absolute immunity. Pp. 2040–2041.

(d) Finally, it appears beyond doubt from the legislative history of the Civil Rights Act of 1871 that *Monroe* misapprehended the meaning of the Act. Were § 1983 unconstitutional as to local governments, it would have been equally unconstitutional as to state or local officers, ***660** yet the 1871 Congress clearly intended § 1983 to apply to such officers and all agreed that such officers could constitutionally be subjected to liability under § 1983. The Act also unquestionably was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights. Therefore, without a clear statement in the legislative history, which is not present, there is no justification for excluding municipalities from the "persons" covered by § 1983. Pp. 2040–2041.

5. Local governments sued under § 1983 cannot be entitled to an absolute immunity, lest today's decision "be drained of meaning," *Scheuer v. Rhodes*, 416 U.S. 232, 248, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90. P. 2041.

532 F.2d 259, reversed.

Attorneys and Law Firms

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L. Kevin Sheridan, New York City, for respondents.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

Petitioners, a class of female employees of the Department of Social Services and of the Board of Education of the city of New York, commenced this action under 42 U.S.C. § 1983 in July 1971.[1] The gravamen of the complaint was that the ***661** Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.[2] Cf. ****2021** *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974). The suit sought injunctive relief and backpay for periods of unlawful forced leave. Named as defendants in the action were the Department and its Commissioner, the Board and its Chancellor, and the city of New York and its Mayor. In each case, the individual defendants were sued solely in their official capacities.[3]

On cross-motions for summary judgment, the District Court for the Southern District of New York held moot petitioners' claims for injunctive and declaratory relief since the City of New York and the Board, after the filing of the complaint, had changed their policies relating to maternity leaves so that no pregnant employee would have to take leave unless she was medically unable to continue to perform her job. 394 F.Supp. 853, 855 (1975). No one now challenges this conclusion. ***662** The court did conclude, however, that the acts complained of were unconstitutional under *LaFleur, supra*. 394 F.Supp., at 855. Nonetheless plaintiffs' prayers for backpay were denied because any such damages would come ultimately from the City of New York and, therefore, to hold otherwise would be to "circumven[t]" the immunity conferred on municipalities by *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). See 394 F.Supp., at 855.

On appeal, petitioners renewed their arguments that the Board of Education[4] was not a "municipality" within the meaning of *Monroe v. Pape, supra,* and that, in any event, the District Court had erred in barring a damages award against the individual defendants. The Court of Appeals for the Second Circuit rejected both contentions. The court first held that the Board of Education was not a "person" under § 1983 because "it performs a vital governmental function . . . , and, significantly, while it has the right to determine how the funds appropriated to it shall be spent . . . , it has no final say in deciding what its appropriations shall be." 532 F.2d 259, 263 (1976). The individual defendants, however, were "persons" under § 1983, even when sued solely in their official capacities. 532 F.2d, at 264. Yet, because a damages award would "have to be paid by a city that was held not to be amenable to such an action in *Monroe v. Pape,"* a damages action against officials sued in their official capacities could not proceed. *Id.,* at 265.

We granted certiorari in this case, 429 U.S. 1071, 97 S.Ct. 807, 50 L.Ed.2d 789, to consider
"Whether local governmental officials and/or local independent school boards are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?" Pet. for Cert. 8.

***663** Although, after plenary consideration, we have decided the merits of over a score of cases brought under § 1983 in which the principal defendant was a school board[5] ****2022** —and, indeed, in some of which § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343, provided the only basis for jurisdiction[6]—we indicated in *Mt. Healthy City Board of Education v. Doyle,*

429 U.S. 274, 279, 97 S.Ct. 568, 573, 50 L.Ed.2d 471 (1977), last Term that the question presented here was open and would be decided "another day." That other day has come and we now overrule *Monroe v. Pape, supra,* insofar as it holds that local governments are wholly immune from suit under § 1983.[7]

***664** I

In *Monroe v. Pape,* we held that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]." 365 U.S., at 187, 81 S.Ct. at 484. The sole basis for this conclusion was an inference drawn from Congress' rejection of the "Sherman amendment" to the bill which became the Civil Rights Act of 1871, 17 Stat. 13, the precursor of § 1983. The Amendment would have held a municipal corporation liable for damage done to the person or property of its inhabitants by *private* persons "riotously and tumultuously assembled."[8] Cong. Globe, 42d Cong., 1st Sess., 749 (1871) (hereinafter Globe). Although the Sherman amendment did not seek to amend § 1 of the Act, which is now § 1983, and although the nature of the obligation created by that amendment was vastly different from that created by § 1, the Court nonetheless concluded in *Monroe* that Congress must have meant to exclude municipal corporations from the coverage of § 1 because " 'the House [in voting against the Sherman amendment] had solemnly decided that in their judgment Congress had no constitutional power to impose any *obligation* upon county and town organizations, the mere instrumentality for the administration of state law.' " 365 U.S., at 190, 81 S.Ct. at 485 (emphasis added), quoting Globe 804 (Rep. Poland). This statement, we thought, showed that Congress doubted its "constitutional power . . . to impose *civil liability* on municipalities," 365 U.S., at 190, 81 S.Ct. at 486 (emphasis added), and that such doubt would have extended to any type of civil liability.[9]

***665** A fresh analysis of the debate on the Civil Rights Act of 1871, and particularly of the ****2023** case law which each side mustered in its support, shows, however, that *Monroe* incorrectly equated the "obligation" of which Representative Poland spoke with "civil liability."

A. An Overview

There are three distinct stages in the legislative consideration of the bill which became the Civil Rights Act of 1871. On March 28, 1871, Representative Shellabarger, acting for a House select committee, reported H.R. 320, a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." H.R. 320 contained four sections. Section 1, now codified as 42 U.S.C. § 1983, was the subject of only limited debate and was passed without amendment.[10] Sections 2 through 4 dealt primarily with the "other purpose" of suppressing Ku Klux Klan violence in the Southern States.[11] The wisdom and constitutionality of these sections—not § 1, now § 1983—were the subject of almost all congressional debate and each of these sections was amended. The House finished its initial debates on H.R. 320 on April 7, 1871, and one week later the Senate also voted out a bill.[12] Again, debate on § 1 of the bill was limited and that section was passed as introduced.

***666** Immediately prior to the vote on H.R. 320 in the Senate, Senator Sherman introduced his amendment.[13] This was *not* an amendment to § 1 of the bill, but was to be added as § 7 at the end of the bill. Under the Senate rules, no discussion of the amendment was allowed and, although attempts were made to amend the amendment, it was passed as introduced. In this form, the amendment did *not* place liability on municipal corporations, but made any inhabitant of a municipality liable for damage inflicted by persons "riotously and tumultuously assembled."[14]

The House refused to acquiesce in a number of amendments made by the Senate, including the Sherman amendment, and the respective versions of H.R. 320 were therefore sent to a conference committee. Section 1 of the bill, however, was not a subject of this conference since, as noted, it was passed verbatim as introduced in both Houses of Congress.

On April 18, 1871, the first conference committee completed its work on H.R. 320. The main features of the conference committee draft of the Sherman amendment were these:[15] First, a cause of action was given to persons injured by

"any persons riotously and tumultuously assembled together . . . with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude . . . ."

***667** Second, the bill provided that the action would be against the county, city, or parish in which the riot had occurred and that it could be maintained by either the person ****2024** injured or his legal representative. Third, unlike the amendment as proposed, the conference substitute made the government defendant liable on the judgment if it was not satisfied against individual defendants who had committed the violence. If a municipality were liable, the judgment against it could be collected "by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment [would become] a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof."

In the ensuing debate on the first conference report, which was the first debate of any kind on the Sherman amendment, Senator Sherman explained that the purpose of his amendment was to enlist the aid of persons of property in the enforcement of the civil rights laws by making their property "responsible" for Ku Klux Klan damage.[16] Statutes drafted on a similar theory, he stated, had long been in force in England and were in force in 1871 in a number of States.[17] ***668** Nonetheless there were critical differences between the conference substitute and extant state and English statutes: The conference substitute, unlike most state riot statutes, lacked a short statute of limitations and imposed liability on the government defendant whether or not it had notice of the impending riot, whether or not the municipality was authorized to exercise a police power, whether or not it exerted all reasonable efforts to stop the riot, and whether or not the rioters were caught and punished.[18]

The first conference substitute passed the Senate but was rejected by the House. House opponents, within whose ranks were some who had supported § 1, thought the Federal Government could not, consistent with the Constitution, obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized by their state charters. And, because of this constitutional objection, opponents of the Sherman amendment were unwilling to impose damages liability for nonperformance of a duty which Congress could not require municipalities to perform. This position is reflected in Representative Poland's statement that is quoted in *Monroe*.[19]

Because the House rejected the first conference report a second conference was called and it duly issued its report. The second conference substitute for the Sherman amendment abandoned municipal liability and, instead, made "any person ***669** or persons having knowledge [that a conspiracy to violate civil rights was afoot], and having power to prevent or aid in preventing ****2025** the same," who did not attempt to stop the same, liable to any person injured by the conspiracy.[20] The amendment in this form was adopted by both Houses of Congress and is not codified as 42 U.S.C. § 1986.

The meaning of the legislative history sketched above can most readily be developed by first considering the debate on the report of the first conference committee. This debate shows conclusively that the constitutional objections raised against the Sherman amendment—on which our holding in *Monroe* was based, see *supra*, at 2022–2023—would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights. Because § 1 of the Civil Rights Act does not state expressly that municipal corporations come within its ambit, it is finally necessary to interpret § 1 to confirm that such corporations were indeed intended to be included within the "persons" to whom that section applies.

B. Debate on the First Conference Report

The style of argument adopted by both proponents and opponents of the Sherman amendment in both Houses of Congress was largely legal, with frequent references to cases decided by this Court and the Supreme Courts of the several States. Proponents of the Sherman amendment did not, however, discuss in detail the argument in favor of its constitutionality. Nonetheless, it is possible to piece together such an argument from the debates on the first conference report and those on § 2 of the civil rights

bill, which, because it allowed the Federal Government to prosecute crimes "in the States," had also raised questions of federal power. The account of Representative Shellabarger, the House sponsor of H.R. 320, is the most complete.

***670** Shellabarger began his discussion of H.R. 320 by stating that "there is a domain of constitutional law involved in the right consideration of this measure which is wholly unexplored." Globe, App. 67. There were analogies, however. With respect to the meaning of § 1 of the Fourteenth Amendment, and particularly its Privileges or Immunities Clause, Shellabarger relied on the statement of Mr. Justice Washington in *Corfield v. Coryell,* 3 F.Cas. 230, 4 Wash.C.C. 371 (CC ED Pa.1825), which defined the privileges protected by Art. IV:
" 'What these fundamental privileges are[,] it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government;'—

"*Mark that—*

" '*protection by the Government;* the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . .' " Globe App. 69 (emphasis added), quoting 4 Wash.C.C., at 380–381.

Building on his conclusion that citizens were owed protection—a conclusion not disputed by opponents of the Sherman amendment[21]—Shellabarger then considered Congress' role in providing that protection. Here again there were precedents:
****2026** "[Congress has always] assumed to enforce, as against ***671** the States, and also persons, every one of the provisions of the Constitution. Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in [Art. I, § 10,] relate to the divisions of the political powers of the State and General Governments. . . . These prohibitions upon political powers of the States are all of such nature that they can be, and even have been, . . . enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.
"These three are: first, that as to fugitives from justice;[22] second, that as to fugitives from service, (or slaves;) [23] third, that declaring that the 'citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.' [24]

***672** "And, sir, every one of these—the only provisions where it was deemed that legislation was required to enforce the constitutional provisions—the only three where the rights or liabilities of persons in the States, as between these persons and the States, are directly provided for, Congress has by legislation affirmatively interfered to protect . . . such persons." Globe App. 69–70.

Of legislation mentioned by Shellabarger, the closest analog of the Sherman amendment, ironically, was the statute implementing the fugitives from justice and fugitive slave provisions of Art. IV—the Act of Feb. 12, 1793, 1 Stat. 302—the constitutionality of which had been sustained in 1842, in *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L.Ed. 1060. There, Mr. Justice Story, writing for the Court, held that Art. IV gave slaveowners a federal right to the unhindered possession of their slaves in whatever State such slaves might be found. 16 Pet., at 612. Because state process for recovering runaway slaves might be inadequate or even hostile to the rights of the slaveowner, the right intended to be conferred could be negated if left to state implementation. *Id.*, at 614. Thus, since the Constitution guaranteed the right and this in turn required a remedy, Story held it to be a "natural inference" that Congress had the power itself to ensure an appropriate (in the Necessary and Proper Clause sense) remedy for the right. *Id.*, at 615.

Building on *Prigg*, Shellabarger argued that a remedy against municipalities and counties was an appropriate—and hence constitutional—method for ensuring the protection which the Fourteenth Amendment made every citizen's federal right.[25] This much was clear from the adoption of such statutes by the several States as devices for suppressing riot.[26] Thus, said Shellabarger,

the only serious question remaining ***673** was "whether, since a county is an integer or part of a State, the United States can impose upon it, as such, *any obligations to keep the peace* in obedience to United ****2027** States laws."[27] This he answered affirmatively, citing *Board of Comm'rs v. Aspinwall*, 24 How. 376, 16 L.Ed. 735 (1861), the first of many cases[28] upholding the power of federal courts to enforce the Contract Clause against municipalities.[29]

House opponents of the Sherman amendment—whose views are particularly important since only the House voted down the amendment—did not dispute Shellabarger's claim that the Fourteenth Amendment created a federal right to protection, see n. 21, *supra*, but they argued that the local units of government upon which the amendment fastened liability were not obligated to keep the peace at state law and further that the Federal Government could not constitutionally require local governments to create police forces, whether this requirement was levied directly, or indirectly by imposing damages for breach of the peace on municipalities. The most complete statement of this position is that of Representative Blair:[30]

"The proposition known as the Sherman amendment ***674** . . . is entirely new. It is altogether without a precedent in this country. . . . That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone. . . .

****2028** ". . . [H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to ***675** create that obligation, and that is the provision I am unable to assent to. The parallel of the hundred does not in the least meet the case. The power that laid the obligation upon the hundred first put the duty upon the hundred that it should perform in that regard, and failing to meet the obligation which had been laid upon it, it was very proper that it should suffer damage for its neglect. . . .

". . . [T]here are certain rights and duties that belong to the States, . . . there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, . . . where [will] its power . . . stop and what obligations . . . might [it] not lay upon a municipality. . . .

"Now, only the other day, the Supreme Court . . . decided [in *Collector v. Day*, 11 Wall. 113, 20 L.Ed. 122 (1871)] that there is no power in the Government of the United States, under its authority to tax, to tax the salary of a State officer. Why? Simply because the power to tax involves the power to destroy, and it was not the intent to give the Government of the United States power to destroy the government of the States in any respect. It was held also in the case of *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L.Ed. 1060 (1842) that it is not within the power of the Congress of the United States to lay duties upon a State officer; that we cannot command a State officer to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality, which is equally the creature of the State, to perform a duty." Globe 795.

Any attempt to impute a unitary constitutional theory to opponents of the Sherman amendment is, of course, fraught ***676** with difficulties, not the least of which is that most Members of Congress did not speak to the issue of the constitutionality of the amendment. Nonetheless, two considerations lead us to conclude that opponents of the Sherman amendment found it unconstitutional substantially because of the reasons stated by Representative Blair: First, Blair's analysis is precisely that of Poland, whose views were quoted as authoritative in *Monroe*, see *supra*, at 2022–2023, and that analysis was shared in large part by all House opponents who addressed the constitutionality of the Sherman amendment.[31] Second, Blair's exegesis of the reigning constitutional theory of his day, as we shall explain, was clearly supported by precedent—albeit precedent that has not survived, see *Ex parte Virginia*, 100 U.S. 339, 347–348, 25 L.Ed. 676 (1880); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486, 59 S.Ct. 595, 83 L.Ed. 927 (1939)—and no other constitutional formula was advanced by participants in the House debates.

Collector v. Day, cited by Blair, was the clearest and, at the time of the debates, the most recent pronouncement of a doctrine of coordinate sovereignty that, as Blair stated, placed limits on even the enumerated powers of the National Government in favor of protecting state prerogatives. There, the Court held that the United States could not tax the income of Day, a Massachusetts state judge, because the independence of the States within their legitimate spheres would be imperiled if the instrumentalities through

which States executed their powers were "subject to the control of another and distinct government." 11 Wall., at 127. Although the Court in *Day* apparently rested this holding in part on the proposition that the taxing "power acknowledges no limits but the will of the legislative body imposing the tax," *id.*, at 125–126; cf. ****2029** *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 4 L.Ed. 579 (1819), the Court had in other cases limited other national powers in order to avoid interference with the States.[32]

***677** In *Prigg v. Pennsylvania,* for example, Mr. Justice Story, in addition to confirming a broad national power to legislate under the Fugitive Slave Clause, see *supra*, at 2026, held that Congress could not "insist that states . . . provide means to carry into effect the duties of the national government." 16 Pet., at 615–616.[33] And Mr. Justice McLean agreed that, "[a]s a general principle," it was true "that Congress had no power to impose duties on state officers, as provided in the [Act of Feb. 12, 1793]." Nonetheless he wondered whether Congress might not impose "positive" duties on state officers where a clause of the Constitution, like the Fugitive Slave Clause, seemed to require affirmative government assistance, rather than restraint of government, to secure federal rights. See *id.*, at 664–665.

Had Mr. Justice McLean been correct in his suggestion that, where the Constitution envisioned affirmative government assistance, the States or their officers or instrumentalities could be required to provide it, there would have been little doubt that Congress could have insisted that municipalities afford by "positive" action the protection[34] owed individuals under § 1 of the Fourteenth Amendment whether or not municipalities were obligated by state law to keep the peace. However, any such argument, largely foreclosed by *Prigg*, was made ***678** impossible by the Court's holding in *Kentucky v. Dennison*, 24 How. 66, 16 L.Ed. 717 (1861). There, the Court was asked to require Dennison, the Governor of Ohio, to hand over Lago, a fugitive from justice wanted in Kentucky, as required by § 1 of the Act of Feb. 12, 1793,[35] which implemented Art. IV, § 2, cl. 2, of the Constitution. Mr. Chief Justice Taney, writing for a unanimous Court, refused to enforce that section of the Act:
"[W]e think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State." 24 How., at 107–108.

The rationale of *Dennison* —that the Nation could not impose duties on state officers since that might impede States in their legitimate activities—is obviously identical to that which animated the decision in *Collector v. Day*. See *supra*, at 2028–2029. And, as Blair indicated, municipalities as ****2030** instrumentalities through which States executed their policies could be equally disabled from carrying out state policies if they were also obligated to carry out federally imposed duties. Although no one cited *Dennison* by name, the principle for which it ***679** stands was well known to Members of Congress,[36] many of whom discussed *Day*[37] as well as a series of State Supreme Court cases[38] in the mid-1860's which had invalidated a federal tax on the process of state courts on the ground that the tax threatened the independence of a vital state function.[39] Thus, there was ample support for Blair's view that the Sherman amendment, by putting municipalities to the Hobson's choice of keeping the peace or paying civil damages, attempted to impose obligations on municipalities by indirection that could not be imposed directly, thereby threatening to "destroy the government of the States." Globe 795.

If municipal liability under § 1 of the Civil Rights Act of 1871 created a similar Hobson's choice, we might conclude, as *Monroe* did, that Congress could not have intended municipalities to be among the "persons" to which that section applied. But this is not the case.

First, opponents expressly distinguished between imposing an obligation to keep the peace and merely imposing civil liability for damages on a municipality that was obligated by state law to keep the peace, but which had not in violation of the Fourteenth Amendment. Representative Poland, for example, reasoning from Contract Clause precedents, indicated that Congress could constitutionally confer jurisdiction on the federal courts to entertain suits seeking to hold municipalities ***680** liable for using their authorized powers in violation of the Constitution—which is as far as § 1 of the Civil Rights Act went:
"I presume . . . that where a State had imposed a duty [to keep the peace] upon [a] municipality . . . an action would be allowed to be maintained against them in the courts of the United States under the ordinary restrictions as to jurisdiction. But the enforcing

a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever." Globe 794.

Representative Burchard agreed:
"[T]here is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance. But counties . . . do not have any control of the police . . . ." *Id.*, at 795.

See also the views of Rep. Willard, discussed at n.30, *supra*.

****2031** Second, the doctrine of dual sovereignty apparently put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it. Under the theory of dual sovereignty set out in *Prigg*, this is quite understandable. So long as federal courts were vindicating the Federal Constitution, they were providing the "positive" government action ***681** required to protect federal constitutional rights and no question was raised of enlisting the States in "positive" action. The limits of the principles announced in *Dennison* and *Day* are not so well defined in logic, but are clear as a matter of history. It must be remembered that the same Court which rendered *Day* also vigorously enforced the Contract Clause against municipalities—an enforcement effort which included various forms of "positive" relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found.[40] Thus, federal judicial enforcement of the Constitution's express limits on state power, since it was done so frequently, must, notwithstanding anything said in *Dennison* or *Day*, have been permissible, at least so long as the interpretation of the Constitution was left in the hands of the judiciary. Since § 1 of the Civil Rights Act simply conferred jurisdiction on the federal courts to enforce § 1 of the Fourteenth Amendment—a situation precisely analogous to the grant of diversity jurisdiction under which the Contract Clause was enforced against municipalitiess ***682** is no reason to suppose that opponents of the Sherman amendment would have found any constitutional barrier to § 1 suits against municipalities.

Finally, the very votes of those Members of Congress, who opposed the Sherman amendment but who had voted for § 1, confirm that the liability imposed by § 1 was something very different from that imposed by the amendment. Section 1 without question could be used to obtain a damages judgment against state or municipal *officials* who violated federal constitutional rights while acting under color of law.[41] However, for *Prigg-Dennison-Day* purposes, as Blair and others recognized,[42] there was no distinction of constitutional magnitude between officers and agents—including corporate agents—of the State: Both were state instrumentalities and the State could be impeded no matter over which sort of instrumentality the Federal Government sought to assert its power. *Dennison* and *Day*, after all, were not suits against municipalities but against *officers*, and Blair was quite conscious that he was extending these cases by applying them to ****2032** municipal corporations.[43] Nonetheless, Senator Thurman, who gave the most exhaustive critique of § 1—*inter alia*, complaining that it would be applied to state officers, see Globe App. 217—and who opposed both § 1 and the Sherman amendment, the latter on*Prigg* grounds, agreed unequivocally that § 1 was constitutional. ***683** [44] Those who voted for § 1 must similarly have believed in its constitutionality despite *Prigg, Dennison,* and *Day*.

C. Debate on § 1 of the Civil Rights Bill

From the foregoing discussion, it is readily apparent that nothing said in debate on the Sherman amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment. The question remains, however, whether the general language describing those to be liable under § 1—"any person"—covers

more than natural persons. An examination of the debate on § 1 and application of appropriate rules of construction show unequivocally that § 1 was intended to cover legal as well as natural persons.

Representative Shellabarger was the first to explain the function of § 1:
"[Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Globe App. 68.

By extending a remedy to all people, including whites, § 1 went beyond the mischief to which the remaining sections of the 1871 Act were addressed. Representative Shellabarger also stated without reservation that the constitutionality of § 2 of the Civil Rights Act of 1866 controlled the constitutionality of § 1 of the 1871 Act, and that the former had been ***684** approved by "the supreme courts of at least three States of this Union" and by Mr. Justice Swayne, sitting on circuit, who had concluded: " 'We have no doubt of the constitutionality of every provision of this act.' " Globe App. 68. Representative Shellabarger then went on to describe how the courts would and should interpret § 1:
"This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. . . . Chief Justice Jay and also Story say:

" 'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws.'—1 *Story on Constitution,* sec. 429." Globe App., at 68.

The sentiments expressed in Representative Shellabarger's opening speech were echoed by Senator Edmunds, the manager of H.R. 320 in the Senate:
"The first section is one that I believe nobody objects to, as defining the rights ****2033** secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [of 1866], which have since become a part of the Constitution." Globe 568.

***685** "[Section 1 is] so very simple and really reënact[s] the Constitution." *Id.,* at 569.

And he agreed that the bill "secure[d] the rights of white men as much as of colored men." *Id.,* at 696.

In both Houses, statements of the supporters of § 1 corroborated that Congress, in enacting § 1, intended to give a broad remedy for violations of federally protected civil rights.[45] Moreover, since municipalities through their official ***686** acts could, equally with natural persons, create the harms intended to be remedied by § 1, and, further, since Congress intended § 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1. Cf., *e. g., Ex parte Virginia,* 100 U.S. 339, 346–347, 25 L.Ed. 676 (1880); *Home Tel. & Tel. Co. v. Los Angeles,* 227 U.S. 278, 286–287, 294–296, 33 S.Ct. 312, 57 L.Ed. 510 (1913). One need not rely on this inference alone, however, for the debates show that Members of Congress understood "persons" to include municipal corporations.

Representative Bingham, for example, in discussing § 1 of the bill, explained that he ****2034** had drafted § 1 of the Fourteenth Amendment with the case of *Barron v. Mayor of Baltimore,* 7 Pet. 243, 8 L.Ed. 672 (1833), especially in mind. "In [that] case the ***687** *city* had taken private property for public use, without COMPENSATION . . . , AND THERE WAS NO REDRESS FOR THE wrong . . . ." globe App. 84 (emphasis added). Bingham's further remarks clearly indicate his view that such takings by cities, as had occurred in *Barron,* would be redressable under § 1 of the bill. See Globe App. 85. More generally, and as Bingham's remarks confirm, § 1 of the bill would logically be the vehicle by which Congress provided redress for takings, since that section provided the only civil remedy for Fourteenth Amendment violations and that Amendment unequivocally

prohibited uncompensated takings.[46] Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken.[47]

In addition, by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis. This had not always been so. When this Court first considered the question of the status of corporations, Mr. Chief Justice Marshall, writing for the Court, denied that corporations "as such" were persons as that term was used in Art. III and the Judiciary Act of 1789. See *Bank of the United States v. Deveaux,* 5 Cranch 61, 86, 3 L.Ed. 38 (1809).[48] By 1844, however, the *Deveaux* doctrine was unhesitatingly abandoned:
"[A] corporation created by and doing business in a particularstate, ***688** is to be deemed *to all intents and purposes as a person,* although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person." *Louisville R. Co. v. Letson,* 2 How. 497, 558, 11 L.Ed. 353 (1844) (emphasis added), discussed in Globe 752.
And only two years before the debates on the Civil Rights Act, in *Cowles v. Mercer County,* 7 Wall. 118, 121, 19 L.Ed. 86 (1869), the *Letson* principle was automatically and without discussion extended to municipal corporations. Under this doctrine, municipal corporations were routinely sued in the federal courts[49] and this fact was well known to Members of Congress.[50]

That the "usual" meaning of the word "person" would extend to municipal corporations is also evidenced by an Act of Congress which had been passed only months before the Civil Rights Act was passed. This Act provided that
"in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

Municipal corporations in 1871 were included within the phrase "bodies politic and ****2035** corporate"[51] and, accordingly, the ***689** "plain meaning" of § 1 is that local government bodies were to be included within the ambit of the persons who could be sued under § 1 of the Civil Rights Act. Indeed, a Circuit Judge, writing in 1873 in what is apparently the first reported case under § 1, read the Dictionary Act in precisely this way in a case involving a corporate plaintiff and a municipal defendant.[52] See *Northwestern Fertilizing Co. v. Hyde Park,* 18 F.Cas. 393, 394 (No. 10,336) (CC ND Ill.1873).[53]

***690** II

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.[54] Local governing bodies,[55] therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements ****2036** or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional ***691** deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 167–168, 90 S.Ct. 1598, 1613, 26 L.Ed.2d 142 (1970): "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."[56]

On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature

caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

We begin with the language of § 1983 as originally passed:
"*[A]ny person who,* under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected,* any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such ***692** law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." 17 Stat. 13. (emphasis added).

The italicized language plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent.[57] ****2037** See *Rizzo v. Goode,* 423 U.S. 362, 370–371, 96 S.Ct. 598, 602, 46 L.Ed.2d 561 (1976).

***693** Equally important, creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional. To this day, there is disagreement about the basis for imposing liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship. See W. Prosser, Law of Torts § 69, p. 459 (4th ed. 1971). Nonetheless, two justifications tend to stand out. First is the common-sense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had to bear the cost of accidents. See, *e. g., ibid.;* 2 F. Harper & F. James, Law of Torts, § 26.3, pp. 1368–1369 (1956). Second is the argument that the cost of accidents should be ***694** spread to the community as a whole on an insurance theory. See, *e. g., id.,* § 26.5; Prosser, *supra,* at 459.[58]

The first justification is of the same sort that was offered for statutes like the Sherman amendment: "The obligation to make compensation for injury resulting from riot is, by arbitrary enactment of statutes, affirmatory law, and the reason of passing the statute is to secure a more perfect police regulation." Globe 777 (Sen. Frelinghuysen). This justification was obviously insufficient to sustain the amendment against perceived constitutional difficulties and there is no reason to suppose that a more general liability imposed for a similar reason would have been thought less constitutionally objectionable. The second justification was similarly put forward as a justification for the Sherman amendment: "we do not look upon [the Sherman amendment] as a punishment . . . . It is a mutual insurance." *Id.,* at 792 (Rep. Butler). Again, this justification was insufficient to sustain the amendment.

We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent ****2038** official policy, inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see ***695** *supra*, at 2020–2021, and n. 2, we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day.

III

Although we have stated that *stare decisis* has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct our mistakes through legislation, see, *e. g., Edelman v. Jordan*, 415 U.S. 651, 671, and n. 14, 94 S.Ct. 1347, 1365, 39 L.Ed.2d 662 (1974), we have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes. See, *e. g., Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47–49, 97 S.Ct. 2549, 2559, 53 L.Ed.2d 568 (1977); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 n. 1, 52 S.Ct. 443, 454, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting) (collecting cases). Nor is this a case where we should "place on the shoulders of Congress the burden of the Court's own error." *Girouard v. United States*, 328 U.S. 61, 70, 66 S.Ct. 826, 830, 90 L.Ed. 1084 (1946).

First, *Monroe v. Pape,* insofar as it completely immunizes municipalities from suit under § 1983, was a departure from prior practice. See, *e. g., Northwestern Fertilizing Co. v. Hyde Park*, 18 Fed.Cas. 393 (No. 10,336) (CC ND Ill.1873); *City of Manchester v. Leiby*, 117 F.2d 661 (CA1 1941); *Hannan v. City of Haverhill*, 120 F.2d 87 (CA1 1941); *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); *Holmes v. City of Atlanta*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955), in each of which municipalities were defendants in § 1983 suits.[59] Moreover, the constitutional defect ***696** that led to the rejection of the Sherman amendment would not have distinguished between municipalities and school boards, each of which is an instrumentality of state administration. See *supra*, at 2027–2032. For this reason, our cases—decided both before and after *Monroe*, see n. 5, *supra* —holding school boards liable in § 1983 actions are inconsistent with *Monroe*, especially as *Monroe* 's immunizing principle was extended to suits for injunctive relief in *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973).[60] And although in many of these cases jurisdiction was not questioned, we ought not "disregard the implications of an exercise of judicial authority assumed to be proper for [100] years." *Brown Shoe Co. v. United States*, 370 U.S. 294, 307, 82 S.Ct. 1502, 1514, 8 L.Ed.2d 510 (1962); see *Bank of the United States v. Deveaux,* 5 Cranch, at 88 (Marshall, C. J.) ("Those decisions are not cited as authority . . . but they have much weight as they show that this point neither occurred to the bar or the bench"). Thus, while we have reaffirmed *Monroe* without further examination on three occasions,[61] it can scarcely be said that *Monroe* ****2039** is so consistent with the warp and woof of civil rights law as to be beyond question.

Second, the principle of blanket immunity established in *Monroe* cannot be cabined short of school boards. Yet such an extension would itself be inconsistent with recent expressions of congressional intent. In the wake of our decisions, Congress not only has shown no hostility to federal-court decisions against school boards, but it has indeed rejected efforts to strip the federal courts of jurisdiction over school boards.[62] Moreover, recognizing that school boards are often ***697** defendants in school desegregation suits, which have almost without exception been § 1983 suits, Congress has twice passed legislation authorizing grants to school boards to assist them in complying with federal-court decrees.[63] Finally, in ***698** regard to ****2040** the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988 (1976 ed.), which allows prevailing parties (in the discretion of the court) in § 1983 suits ***699** to obtain attorney's fees from the losing parties, the Senate stated:
"[D]efendants in these cases are often State or local *bodies* or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, *in his official capacity*, from funds of his agency or under his control, or *from the State or local government (whether or not the agency or government is a named party)*." S.Rep.No.94–1011, p. 5 (1976); U.S.Code Cong. & Admin.News 1976, pp. 5908, 5913 (emphasis added; footnotes omitted).
Far from showing that Congress has relied on *Monroe*, therefore, events since 1961 show that Congress has refused to extend the benefits of *Monroe* to school boards and has attempted to allow awards of attorney's fees against local governments even though *Monroe, City of Kenosha v. Bruno*, and *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), have made the joinder of such governments impossible.[64]

Third, municipalities can assert no reliance claim which can ***700** support an absolute immunity. As Mr. Justice Frankfurter said in *Monroe*, "[t]his is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision." 365 U.S., at 221–222, 81 S.Ct., at 503 (dissenting in part). Indeed, municipalities simply cannot "arrange their affairs" on an assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement. And it scarcely need be mentioned that nothing

in *Monroe* encourages municipalities to violate constitutional rights or even suggests that such violations are anything other than completely wrong.

Finally, even under the most stringent test for the propriety of overruling a statutory decision proposed by Mr. Justice Harlan in *Monroe*[65]—"that it appear beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the [section]," 365 U.S., at 192, 81 S.Ct., at 487 (concurring opinion)—the overruling of *Monroe* insofar as it holds that local governments are not "persons" ****2041** who may be defendants in § 1983 suits is clearly proper. It is simply beyond doubt that, under the 1871 Congress' view of the law, were § 1983 liability unconstitutional as to local governments, it would have been equally unconstitutional as to state officers. Yet everyone—proponents and opponents alike—knew § 1983 would be applied to state officers and nonetheless stated that § 1983 was constitutional. See*supra*, at 2030–2032. And, moreover, there can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected ***701** rights. Therefore, absent a clear statement in the legislative history supporting the conclusion that § 1 was not to apply to the official acts of a municipal corporation—which simply is not present—there is no justification for excluding municipalities from the "persons" covered by § 1.

For reasons stated above, therefore, we hold that *stare decisis* does not bar our overruling of *Monroe* insofar as it is inconsistent with Parts I and II of this opinion.[66]

IV

Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties or addressed by the courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 "be drained of meaning," *Scheuer v. Rhodes*, 416 U.S. 232, 248, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Cf. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397–398, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

***702** V

For the reasons stated above, the judgment of the Court of Appeals is

Reversed.

APPENDIX TO OPINION OF THE COURT

As proposed, the Sherman amendment was as follows:
"That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative ****2042** if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or

parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, ***703** from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction." Globe 663.

The complete text of the first conference substitute for the Sherman amendment is:
"That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced ***704** against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment." *Id.*, at 749, 755.

The relevant text of the second conference substitute for the Sherman amendment is as follows:
"[A]ny person or persons having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, *shall neglect or refuse so to do*, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives." *Id.*, at 804 (emphasis added).

****2043** Mr. Justice POWELL, concurring.

I join the opinion of the Court, and express these additional views.

Few cases in the history of the Court have been cited more frequently than *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), decided less than two decades ago. Focusing new light on 42 U.S.C. § 1983, that decision widened access to the federal courts and permitted expansive interpretations of the reach of ***705** the 1871 measure. But *Monroe* exempted local governments from liability at the same time it opened wide the courthouse door to suits against officers and employees of those entities—even when they act pursuant to express authorization. The oddness of this result, and the weakness of the historical evidence relied on by the *Monroe* Court in support of it, are well demonstrated by the Court's opinion today. Yet the gravity of overruling a part of so important a decision prompts me to write.

I

In addressing a complaint alleging unconstitutional police conduct that probably was unauthorized and actionable under state law,[1] the *Monroe* Court treated the 42d Congress' rejection of the Sherman amendment as conclusive evidence of an intention to immunize local governments from all liability under the statute for constitutional injury. That reading, in light of today's thorough canvass of the legislative history, clearly "misapprehended the meaning of the controlling provision," *Monroe, supra,* at 192, 81 S.Ct. at 487 (Harlan, J., concurring). In this case, involving formal, written policies of the Department of Social Services and the Board of Education of the city of New York that are alleged to conflict ***706** with the command of the Due Process Clause, cf. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), the Court decides "not to reject [wisdom] merely because it comes late," *Henslee v. Union Planters Bank,* 335 U.S. 595, 600, 69 S.Ct. 290, 293, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting).

As the Court demonstrates, the Sherman amendment presented an extreme example of "riot act" legislation that sought to impose vicarious liability on government subdivisions for the consequences of private lawlessness. As such, it implicated concerns that are of marginal pertinence to the operative principle of § 1 of the 1871 legislation—now § 1983—that "any person" acting "under color of" state law may be held liable for affirmative conduct that "subjects, or causes to be subjected, any person . . . to the deprivation of any" federal constitutional or statutory right. Of the many reasons for the defeat of the Sherman proposal, none supports *Monroe* 's observation that the 42d Congress was fundamentally "antagonistic," 365 U.S., at 191, 81 S.Ct. 473, to the proposition that government entities and natural persons alike should be held accountable for the consequences of conduct directly working a constitutional violation. Opponents in the Senate appear to have been troubled primarily by the proposal's unprecedented lien provision, which would have exposed even property held for public purposes to the demands of § 1983 judgment lienors. *Ante,* at 2027, 2028, n. 30. The opposition in the House of Representatives focused largely ****2044** on the Sherman amendment's attempt to impose a peacekeeping obligation on municipalities when the Constitution itself imposed no such affirmative duty and when many municipalities were not even empowered under state law to maintain police forces. *Ante,* at 2027–2028, 2030–2032.[2]

***707** The Court correctly rejects a view of the legislative history that would produce the anomalous result of immunizing local government units from monetary liability for action directly causing a constitutional deprivation, even though such actions may be fully consistent with, and thus not remediable under, state law. No conduct of government comes more clearly within the "under color of" state law language of § 1983. It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be *exclusively* liable for resulting constitutional injury.[3]

As elaborated in Part II of today's opinion, the rejection of the Sherman amendment can best be understood not as evidence of Congress' acceptance of a rule of absolute municipal immunity but as a limitation of the statutory ambit to actual wrongdoers, *i. e.,* a rejection of *respondeat superior* or any other principle of vicarious liability. Cf. Levin, The Section 1983 Municipal Immunity Doctrine, 65 Geo.L.J. 1483, 1531–1535 (1977). Thus, it has been clear that a public official may be held liable in damages when his actions are found to violate a constitutional right and there is no qualified immunity, see *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 922, 43 L.Ed.2d 214 (1975); *Procunier v. Navarette,* 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). Today the Court recognizes ***708** that this principle also applies to a local government when implementation of its official policies or established customs inflicts the constitutional injury.

II

This Court traditionally has been hesitant to overrule prior constructions of statutes or interpretations of common-law rules. "*Stare decisis* is usually the wise policy," *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting), but this cautionary principle must give way to countervailing considerations in appropriate circumstances.[4] I concur in the Court's view that this is not a case where we should "place on the shoulders of Congress the burden of the Court's own error." *Girouard* ****2045** *v. United States,* 328 U.S. 61, 70, 66 S.Ct. 826, 830, 90 L.Ed. 1084 (1946).

Nor is this the usual case in which the Court is asked to overrule a precedent. Here considerations of *stare decisis* cut in both directions. On the one hand, we have a series of rulings that municipalities and counties are not "persons" for purposes of § 1983. On the other hand, many decisions of this Court have been premised on the amenability of school boards and similar entities to § 1983 suits.

In *Monroe* and its progeny, we have answered a question that was never actually briefed or argued in this Court—whether a municipality is liable in damages for injuries that are the direct result of its official policies. "The theory of the complaint [in *Monroe* was] that under the circumstances [t]here alleged the City [was] liable for the acts of its police officers, by virtue of *respondeat superior*." Brief for Petitioners, ***709** O.T.1960, No. 39, p. 21.[5] Respondents answered that adoption of petitioners' position would expose "Chicago and every other municipality in the United States . . . to Civil Rights Act liability through no action of its own and based on action contrary to its own ordinances and the laws of the state it is a part of." Brief for Respondents, O.T.1960, No. 39, p. 26. Thus the ground of decision in *Monroe* was not advanced by either party and was broader than necessary to resolve the contentions made in that case.[6]

***710** Similarly, in *Moor v. County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), petitioners asserted that "the County was vicariously liable for the acts of its deputies and sheriff," *id.,* at 696, 93 S.Ct. at 1789, under 42 U.S.C. § 1988. In rejecting this vicarious-liability claim, 411 U.S., at 710, and n. 27, 93 S.Ct., at 1796, and n. 27, we reaffirmed *Monroe* 's reading of the statute, but there was no challenge in that case to "the holding in *Monroe* concerning the status under § 1983 of public entities ****2046** such as the County," 411 U.S., at 700, 93 S.Ct., at 1790; Brief for Petitioners, O.T.1972, No. 72–10, p. 9.

Only in *City of Kenosha v. Bruno,* 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), did the Court confront a § 1983 claim based on conduct that was both authorized under state law and the direct cause of the claimed constitutional injury. In *Kenosha,* however, we raised the issue of the city's amenability to suit under § 1983 on our own initiative.[7]

This line of cases—from *Monroe* to *Kenosha* —is difficult to reconcile on a principled basis with a parallel series of cases ***711** in which the Court has assumed *sub silentio* that some local government entities could be sued under § 1983. If now, after full consideration of the question, we continued to adhere to *Monroe,* grave doubt would be cast upon the Court's exercise of § 1983 jurisdiction over school boards. See *ante,* at 2022 n. 5. Since "the principle of blanket immunity established in *Monroe* cannot be cabined short of school boards," *ante,* at 2039, the conflict is squarely presented. Although there was an independent basis of jurisdiction in many of the school board cases because of the inclusion of individual public officials as nominal parties, the opinions of this Court make explicit reference to the school board party, particularly in discussions of the relief to be awarded, see, *e. g., Green v. County School Board,* 391 U.S. 430, 437–439, 441–442, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Milliken v. Bradley,* 433 U.S. 267, 292–293, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (Powell, J., concurring in judgment). And, as the Court points out, *ante,* at 2038–2039, and nn. 62, 63, Congress has focused specifically on this Court's school board decisions in several statutes. Thus the exercise of § 1983 jurisdiction over school boards, while perhaps not premised on considered holdings, has been longstanding. Indeed, it predated *Monroe.*

Even if one attempts to explain away the school board decisions as involving suits which "may be maintained against board members in their official capacities for injunctive relief under either § 1983 or *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)," *post,* at 2049, n. 2, some difficulty remains in rationalizing the relevant body of precedents. At least two of the school board cases involved claims for monetary relief. *Cohen v. Chesterfield County School Board,* 326 F.Supp. 1159, 1161 (ED Va.1971), rev'd, 474 F.2d 395 (CA4 1973), rev'd and remanded, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Tinker v. Des Moines School Dist.,* 393 U.S. 503, 504, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). See also *Vlandis v. Kline,* 412 U.S. 441, 445, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). Although the point was not squarely presented in this Court, these claims ***712** for damages could not have been maintained in official-capacity suits if the government entity were not itself suable. Cf. *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).[8] Moreover the rationale of *Kenosha* would have to be disturbed to avoid closing all avenues under § 1983 to injunctive relief against constitutional violations by local government. The Court of Appeals in this case suggested that we import, by analogy, the Eleventh Amendment fiction of *Ex parte Young* into § 1983, 532 F.2d 259, 264–266 (CA2 1976). That approach, however, would create tension with *Kenosha* because it would require "a

bifurcated application" **2047 of "the generic word 'person' in § 1983" to public officials "depending on the nature of the relief sought against them." 412 U.S., at 513, 93 S.Ct. at 2226. A public official sued in his official capacity for carrying out official policy would be a "person" for purposes of injunctive relief, but a non-"person" in an action for damages. The Court's holding avoids this difficulty. See *ante,* at 2036 n. 55.

Finally, if we continued to adhere to a rule of absolute municipal immunity under § 1983, we could not long avoid the question whether "we should, by analogy to our decision in *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983 . . . ." *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 278, 97 S.Ct. 568, 571, 50 L.Ed.2d 471 (1977). One aspect of that inquiry would be whether there are any "special factors counselling hesitation in the absence of affirmative action by Congress," *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619 (1971), such as an "explicit congressional declaration *713 that persons injured by a [municipality] may not recover money damages . . . , but must instead be remitted to another remedy, equally effective in the view of Congress," *id.,* at 397, 91 S.Ct. at 2005. In light of the Court's persuasive re-examination in today's decision of the 1871 debates, I would have difficulty inferring from § 1983 "an explicit congressional declaration" against municipal liability for the implementation of official policies in violation of the Constitution. Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today.[9]

III

Difficult questions nevertheless remain for another day. There are substantial line-drawing problems in determining "when execution of a government's policy or custom" can be said to inflict constitutional injury such that "government as an entity is responsible under § 1983." *Ante,* at 2038. This case, however, involves formal, written policies of a municipal department and school board; it is the clear case. The Court also reserves decision on the availability of a qualified municipal immunity. *Ante,* at 2041. Initial resolution of the question whether the protection available at common law for municipal corporations, see *post,* at 2051, or other principles support a *714 qualified municipal immunity in the context of the § 1983 damages action, is left to the lower federal courts.

Mr. Justice STEVENS, concurring in part.

Since Parts II and IV of the opinion of the Court are merely advisory and are not necessary to explain the Court's decision, I join only Parts I, III, and V.

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Seventeen years ago, in *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), this Court held that the 42d Congress did not intend to subject a municipal corporation to liability as a "person" within the meaning of 42 U.S.C. § 1983. Since then, the Congress has remained silent, but this Court has reaffirmed that holding on at **2048 least three separate occasions. *Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *City of Kenosha v. Bruno,* 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Moor v. County of Alameda,* 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). See also *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 277–279, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Today, the Court abandons this long and consistent line of precedents, offering in justification only an elaborate canvass of the same legislative history which was before the Court in 1961. Because I cannot agree that this Court is "free to disregard these precedents," which have been "considered maturely and recently" by this Court, *Runyon v. McCrary,* 427 U.S. 160, 186, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (Powell, J., concurring), I am compelled to dissent.

I

As this Court has repeatedly recognized, *id.,* at 175 n. 12, 96 S.Ct., at 2596; *Edelman v. Jordan,* 415 U.S. 651, 671 n. 14, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this Court's settled construction of the law, but the Congress is at ***715** liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit. The controlling principles were best stated by Mr. Justice Brandeis:
"*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406–407, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (dissenting opinion) (footnotes omitted).

Only the most compelling circumstances can justify this Court's abandonment of such firmly established statutory precedents. The best exposition of the proper burden of persuasion was delivered by Mr. Justice Harlan in *Monroe* itself:
"From my point of view, the policy of *stare decisis,* as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation, require that it appear *beyond doubt* from the legislative history of the 1871 statute that [*United States v.*] *Classic*, [313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941)] and *Screws* [*v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945)] misapprehended the meaning of the controlling provision, before a departure from what was decided in those cases would be justified." 365 U.S., at 192, 81 S.Ct., at 487 (concurring opinion) (footnote omitted; emphasis added).

The Court does not demonstrate that any exception to this general rule is properly applicable here. The Court's first assertion, that *Monroe* "was a departure from prior practice," *ante,* at 2038, is patently erroneous. Neither in *Douglas v. City of Jeannette,* 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943), nor in ***716** *Holmes v. Atlanta,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955), nor in any of the school board cases cited by the Court, *ante,* at 2022 n. 5, was the question now before us raised by any of the litigants or addressed by this Court. As recently as four Terms ago, we said in *Hagans v. Lavine,* 415 U.S. 528, 535 n. 5, 94 S.Ct. 1372, 1378 n. 5, 39 L.Ed.2d 577 (1974):
"Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."

The source of this doctrine that jurisdictional issues decided *sub silentio* are not binding in other cases seems to be Mr. Chief Justice ****2049** Marshall's remark in *United States v. More,* 3 Cranch 159, 172, 2 L.Ed. 397 (1805).[1] While the Chief Justice also said that such decisions may "have much weight, as they show that this point neither occurred to the bar or the bench," *Bank of the United States v. Deveaux,* 5 Cranch 61, 88, 3 L.Ed. 38 (1809), unconsidered assumptions of jurisdiction simply cannot outweigh four consistent decisions of this Court, explicitly considering and rejecting that jurisdiction.

Nor is there any indication that any later Congress has ever approved suit against any municipal corporation under § 1983. Of all its recent enactments, only the Civil Rights Attorney's Fees Awards Act of 1976, § 2, 90 Stat. 2641, 42 U.S.C. § 1988 (1976 ed.), explicitly deals with the Civil Rights Act of 1871.[2] The 1976 Act provides that attorney's fees may be awarded ***717** to the prevailing party "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title." There is plainly no language in the 1976 Act which would enlarge the parties suable under those substantive sections; it simply provides that parties who are already suable may be made liable for attorney's fees. As the Court admits, *ante,* at 2040, the language in the Senate Report stating that liability may be imposed "whether or not the agency or government is a named party," S.Rep.No. 94–1011, p. 5 (1976); U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912, suggests that Congress did not view its purpose as being in any way inconsistent with the well-known holding of *Monroe.*

The Court's assertion that municipalities have no right to act "on an assumption that they can violate constitutional rights indefinitely," *ante,* at 2040, is simply beside the point. Since *Monroe,* municipalities *have* had the right to expect that they would not be held liable retroactively for their officers' failure to predict this Court's recognition of new constitutional rights. No doubt

innumerable municipal insurance policies and indemnity ordinances have been founded on this assumption, which is wholly justifiable under established principles of *stare decisis.* To obliterate those legitimate expectations without more compelling justifications than those advanced by the Court is a significant departure from our prior practice.

I cannot agree with Mr. Justice POWELL's view that "[w]e owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." *Ante,* at 2045 n. 6. Private parties must be able to rely upon explicitly stated holdings of this Court without being ***718** obliged to peruse the briefs of the litigants to predict the likelihood that this Court might change its mind. To cast such doubt upon each of our cases, from *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803), forward, in which the explicit ground of decision "was never actually briefed or argued," *ante,* at 2044 (POWELL, J., concurring), would introduce intolerable uncertainty into the law. Indeed, in *Marbury* itself, the argument of Charles Lee on behalf of the applicants—which, unlike the arguments in *Monroe,* is reproduced in the Reports of this Court where anyone ****2050** can see it—devotes not a word to the question of whether this Court has the power to invalidate a statute duly enacted by the Congress. Neither this ground of decision nor any other was advanced by Secretary of State Madison, who evidently made no appearance. 1 Cranch, at 153–154. More recent landmark decisions of this Court would appear to be likewise vulnerable under my Brother POWELL's analysis. In *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), none of the parties requested the Court to overrule *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); it did so only at the request of an *amicus curiae.* 367 U.S., at 646 n. 3, 81 S.Ct. 1684. That *Marbury, Mapp,* and countless other decisions retain their vitality despite their obvious flaws is a necessary by-product of the adversary system, in which both judges and the general public rely upon litigants to present "all the relevant considerations." *Ante,* at 2045 n. 6 (POWELL, J., concurring). While it undoubtedly has more latitude in the field of constitutional interpretation, this Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing.[3]

Thus, our only task is to discern the intent of the 42d Congress. That intent was first expounded in *Monroe,* and it ***719** has been followed consistently ever since. This is not some esoteric branch of the law in which congressional silence might reasonably be equated with congressional indifference. Indeed, this very year, the Senate has been holding hearings on a bill, S. 35, 95th Cong., 1st Sess. (1977), which would remove the municipal immunity recognized by *Monroe.* 124 Cong.Rec. D117 (daily ed. Feb. 8, 1978). In these circumstances, it cannot be disputed that established principles of *stare decisis* require this Court to pay the highest degree of deference to its prior holdings. *Monroe* may not be overruled unless it has been demonstrated "beyond doubt from the legislative history of the 1871 statute that [*Monroe*] misapprehended the meaning of the controlling provision." *Monroe*, 365 U.S., at 192, 81 S.Ct., at 487 (Harlan, J., concurring). The Court must show not only that Congress, in rejecting the Sherman amendment, concluded that municipal liability was not unconstitutional, but also that, in enacting § 1, it intended to impose that liability. I am satisfied that no such showing has been made.

II

Any analysis of the meaning of the word "person" in § 1983, which was originally enacted as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, must begin, not with the Sherman amendment, but with the Dictionary Act. The latter Act, which supplied rules of construction for all legislation, provided:
"That in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense . . . ." Act of Feb. 25, 1871, § 2, 16 Stat. 431.

The Act expressly provided that corporations need not be included within the scope of the word "person" where the context suggests a more limited reach. Not a word in the legislative history of the Act gives any indication of the contexts ***720** in which Congress felt it appropriate to include a corporation as a person. Indeed, the chief cause of concern was that the Act's provision that "words importing the masculine gender may be applied to females," might lead to an inadvertent extension of the suffrage to women. Cong. Globe, 41st Cong., 3d Sess., 777 (1871) (remarks of Sen. Sawyer).

There are other factors, however, which suggest that the Congress which enacted § 1983 may well have intended the word ****2051** "person" "to be used in a more limited sense," as *Monroe* concluded. It is true that this Court had held that both commercial corporations, *Louisville R. Co. v. Letson,* 2 How. 497, 558, 11 L.Ed. 353 (1844), and municipal corporations, *Cowles*

v. Mercer County, 7 Wall. 118, 121, 19 L.Ed. 86 (1869), were "citizens" of a State within the meaning of the jurisdictional provisions of Art. III. Congress, however, also knew that this label did not apply in all contexts, since this Court in *Paul v. Virginia,* 8 Wall. 168, 19 L.Ed. 357 (1869), had held commercial corporations not to be "citizens" within the meaning of the Privileges and Immunities Clause, U.S.Const., Art. IV, § 2. Thus, the Congress surely knew that, for constitutional purposes, corporations generally enjoyed a different status in different contexts. Indeed, it may be presumed that Congress intended that a corporation should enjoy the same status under the Ku Klux Klan Act as it did under the Fourteenth Amendment, since it had been assured that § 1 "was so very simple and really reënact[ed] the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871) (remarks of Sen. Edmunds). At the time § 1983 was enacted the only federal case to consider the status of corporations under the Fourteenth Amendment had concluded, with impeccable logic, that a corporation was neither a "citizen" nor a "person." *Insurance Co. v. New Orleans,* 13 Fed.Cas. 67 (No. 7,052) (CC La.1870).

Furthermore, the state courts did not speak with a single voice with regard to the tort liability of municipal corporations. Although many Members of Congress represented ***721** States which had retained absolute municipal tort immunity, see, *e. g., Irvine v. Town of Greenwood,* 89 S.C. 511, 72 S.E. 228 (1911) (collecting earlier cases), other States had adopted the currently predominant distinction imposing liability for proprietary acts, see generally 2 F. Harper & F. James, Law of Torts § 29.6 (1956), as early as 1842, *Bailey v. Mayor of City of New York,* 3 Hill 531 (N.Y.1842). Nevertheless, no state court had ever held that municipal corporations were always liable in tort in precisely the same manner as other persons.

The general remarks from the floor on the liberal purposes of § 1 offer no explicit guidance as to the parties against whom the remedy could be enforced. As the Court concedes, only Representative Bingham raised a concern which could be satisfied only by relief against governmental bodies. Yet he never directly related this concern to § 1 of the Act. Indeed, Bingham stated at the outset, "I do not propose now to discuss the provisions of the bill in detail," Cong. Globe, 42d Cong., 1st Sess., App. 82 (1871), and, true to his word, he launched into an extended discourse on the beneficent purposes of the Fourteenth Amendment. While Bingham clearly stated that Congress could "provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor," *id.,* at 85, he never suggested that such a power was exercised in § 1.[4] ***722** Finally, while Bingham has often been advanced as the chief expositor of the Fourteenth Amendment, *Duncan v. Louisiana,* 391 U.S. 145, 165, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Black, J., concurring); *Adamson v. California,* 332 U.S. 46, 73–74, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947) (Black, J., dissenting), there is nothing ****2052** to indicate that his colleagues placed any greater credence in his theories than has this Court. See *Duncan, supra,* at 174–176, 88 S.Ct. 1444 (Harlan, J., dissenting); *Adamson, supra,* at 64, 67 S.Ct. 1672 (Frankfurter, J., concurring).

Thus, it ought not lightly to be presumed, as the Court does today, *ante,* at 2035 n. 53 that § 1983 "should prima facie be construed to include 'bodies politic' among the entities that could be sued." Neither the Dictionary Act, the ambivalent state of judicial decisions, nor the floor debate on § 1 of the Act gives any indication that any Member of Congress had any inkling that § 1 could be used to impose liability on municipalities. Although Senator Thurman, as the Court emphasizes, *ante,* at 2033 n. 45, expressed his belief that the terms of § 1 "are as comprehensive as can be used," Cong. Globe, 42d Cong., 1st Sess., App. 217 (1871), an examination of his lengthy remarks demonstrates that it never occurred to him that § 1 did impose or could have imposed any liability upon municipal corporations. In an extended parade of horribles, this "old Roman," who was one of the Act's most implacable opponents, suggested that state legislatures, Members of Congress, and state judges might be held liable under the Act. *Ibid.* If, at that point in the debate, he had any idea that § 1 was designed to impose tort liability upon cities and counties, he would surely have raised an additional outraged objection. Only once was that possibility placed squarely before the Congress—in its consideration of the Sherman amendment—and the Congress squarely rejected it.

The Court is probably correct that the rejection of the Sherman amendment does not lead ineluctably to the conclusion that Congress intended municipalities to be immune from liability under all circumstances. Nevertheless, it cannot be ***723** denied that the debate on that amendment, the only explicit consideration of municipal tort liability, sheds considerable light on the Congress' understanding of the status of municipal corporations in that context. Opponents of the amendment were well aware that municipalities had been subjected to the jurisdiction of the federal courts in the context of suits to enforce their contracts, Cong. Globe, 42d Cong., 1st Sess., 789 (1871) (remarks of Rep. Kerr), but they expressed their skepticism that such jurisdiction should be exercised in cases sounding in tort:

"Suppose a judgment obtained under this section, and no property can be found to levy upon except the courthouse, can we levy on the courthouse and sell it? So this section provides, and that too in an action of tort, in an action *ex delicto,* where the county has never entered into any contract, where the State has never authorized the county to assume any liability of the sort or imposed any liability upon it. It is in my opinion simply absurd." *Id.,* at 799 (remarks of Rep. Farnsworth).

Whatever the merits of the constitutional arguments raised against it, the fact remains that Congress rejected the concept of municipal tort liability on the only occasion in which the question was explicitly presented. Admittedly this fact is not conclusive as to whether Congress intended § 1 to embrace a municipal corporation within the meaning of "person," and thus the reasoning of *Monroe* on this point is subject to challenge. The meaning of § 1 of the Act of 1871 has been subjected in this case to a more searching and careful analysis than it was in *Monroe*, and it may well be that on the basis of this closer analysis of the legislative debates a conclusion contrary to the *Monroe* holding could have been reached when that case was decided 17 years ago. But the rejection of the Sherman amendment remains instructive in that here alone did the legislative debates squarely focus on the liability of municipal corporations, and that liability was rejected. ***724** Any inference which might be drawn from the Dictionary Act or from general expressions of benevolence in the debate on § 1 that the word "person" was intended to include municipal corporations falls far short of showing "beyond doubt" that this Court in *Monroe* ****2053** "misapprehended the meaning of the controlling provision." Errors such as the Court may have fallen into in *Monroe* do not end the inquiry as to *stare decisis* ; they merely begin it. I would adhere to the holding of*Monroe* as to the liability of a municipal corporation under § 1983.

III

The decision in *Monroe v. Pape* was the fountainhead of the torrent of civil rights litigation of the last 17 years. Using § 1983 as a vehicle, the courts have articulated new and previously unforeseeable interpretations of the Fourteenth Amendment. At the same time, the doctrine of municipal immunity enunciated in *Monroe* has protected municipalities and their limited treasuries from the consequences of their officials' failure to predict the course of this Court's constitutional jurisprudence. None of the Members of this Court can foresee the practical consequences of today's removal of that protection. Only the Congress, which has the benefit of the advice of every segment of this diverse Nation, is equipped to consider the results of such a drastic change in the law. It seems all but inevitable that it will find it necessary to do so after today's decision.

I would affirm the judgment of the Court of Appeals.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The complaint was amended on September 14, 1972, to allege a claim under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V). The District Court held that the 1972 amendments to Title VII did not apply retroactively to discrimination suffered prior to those amendments even when an action challenging such prior discrimination was pending on the date of the amendments. 394 F.Supp. 853, 856 (SDNY 1975). This holding was affirmed on appeal. 532 F.2d 259, 261–262 (CA2 1976). Although petitioners sought certiorari on the Title VII issue as well as the § 1983 claim, we restricted our grant of certiorari to the latter issue. 429 U.S. 1071, 97 S.Ct. 807, 50 L.Ed.2d 789.

2 The plaintiffs alleged that New York had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of an employee's agency allowed up to an additional two months of work. Amended Complaint ¶ 28, App. 13–14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer ¶ 13, App. 32–33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher could remain through the end of the school term. Amended Complaint ¶¶ 39, 42, 45, App. 18–19, 21. This allegation was denied. Answer ¶¶ 18, 22, App. 35, 37.

3 Amended Complaint ¶ 24, App. 11–12.

4 Petitioners conceded that the Department of Social Services enjoys the same status as New York City for *Monroe* purposes. See 532 F.2d, at 263.

5 *Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977); *Vorchheimer v. School District of Philadelphia,* 430 U.S. 703, 97 S.Ct. 1671, 51 L.Ed.2d 750 (1977); *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976); *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974); *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Keyes v. School District No. 1, Denver, Colo.,* 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973); *San Antonio School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Northcross v. City of Memphis Board of Education,* 397 U.S. 232, 90 S.Ct. 891, 25 L.Ed.2d 246 (1970); *Carter v. West Feliciana Parish School Board,* 396 U.S. 226, 90 S.Ct. 467, 24 L.Ed.2d 382 (1969); *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969); *Kramer v. Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Monroe v. Board of Comm'rs,* 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968); *Raney v. Board of Education,* 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727 (1968); *Green v. County School Board of New Kent County, Va.,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *School District of Abington Township v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Goss v. Board of Education,* 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963); *McNeese v. Board of Education,* 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Orleans Parish School Board v. Bush,* 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806 (1961); *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

6 *Cleveland Board of Education v. LaFleur, supra,* 414 U.S., at 636, 94 S.Ct., at 792; App., in *Keyes v. School District No. 1, Denver Colo.,* 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548; App., in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554; Pet. for Cert. in *Northcross v. Memphis Board of Education,* 397 U.S. 232, 90 S.Ct. 891, 25 L.Ed.2d 246; *Tinker v. Des Moines Independent School District, supra,* 393 U.S., at 504, 89 S.Ct., at 735; *McNeese v. Board of Education, supra,* 373 U.S., at 671, 83 S.Ct., at 1435.

7 However, we do uphold *Monroe v. Pape,* insofar as it holds that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees. See Part II, *infra*.

8 We expressly declined to consider "policy considerations" for or against municipal liability. See 365 U.S., at 191, 81 S.Ct., at 495.

9 Mr. Justice Douglas, the author of *Monroe,* has suggested that the municipal exclusion might more properly rest on a theory that Congress sought to prevent the financial ruin that civil rights liability might impose on municipalities. See *City of Kenosha v. Bruno,* 412 U.S. 507, 517–520, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). However, this view has never been shared by the Court, see *Monroe v. Pape,* 365 U.S., at 190, 81 S.Ct., at 494; *Moor v. County of Alameda,* 411 U.S. 693, 708, 93 S.Ct. 1785, 1795, 36 L.Ed.2d 596 (1973), and the debates do not support this position.

10 Globe 522.

11 Briefly, § 2 created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, each aimed primarily at the Ku Klux Klan. Section 3 provided that the President could send the militia into any State wracked with Klan violence. Finally, § 4 provided for suspension of the writ of habeas corpus in enumerated circumstances, again primarily those thought to obtain where Klan violence was rampant. See Cong. Globe, 42d Cong., 1st Sess., App. 335–336 (1871) (hereinafter Globe App.).

12 Globe 709.

13 See *id.,* at 663, quoted in Appendix to this opinion, *infra,* at 2041–2042.

14 *Ibid.* An action for recovery of damages was to be in the federal courts and denominated as a suit against the county, city, or parish in which the damage had occurred. *Ibid.* Execution of the judgment was not to run against the property of the government unit, however, but against the private property of any inhabitant. *Ibid.*

15 See Globe 749 and 755, quoted in Appendix to this opinion, *infra,* at 2042.

16 "Let the people of property in the southern States understand that if they will not make the hue and cry and take the necessary steps to put down lawless violence in those States their property will be holden responsible, and the effect will be most wholesome." Globe 761.

Senator Sherman was apparently unconcerned that the conference committee substitute, unlike the original amendment, did not place liability for riot damage directly on the property of the well-to-do, but instead placed it on the local government. Presumably he assumed that taxes would be levied against the property of the inhabitants to make the locality whole.

17 According to Senator Sherman, the law had originally been adopted in England immediately after the Norman Conquest and had most recently been promulgated as the law of 7 & 8 Geo. 4, ch. 31 (1827). See Globe 760. During the course of the debates, it appeared that Kentucky, Maryland, Massachusetts, and New York had similar laws. See *id.,* at 751 (Rep. Shellabarger); *id.,* at 762

(Sen. Stevenson); *id.,* at 771 (Sen. Thurman); *id.,* at 792 (Rep. Butler). Such a municipal liability was apparently common throughout New England. See *id.,* at 761 (Sen. Sherman).

18 In the Senate, opponents, including a number of Senators who had voted for § 1 of the bill, criticized the Sherman amendment as an imperfect and impolitic rendering of the state statutes. Moreover, as drafted, the conference substitute could be construed to protect rights that were not protected by the Constitution. A complete critique was given by Senator Thurman. See Globe 770–772.

19 See 365 U.S., at 190, 81 S.Ct., at 494, quoted *supra*, at 2022–2023.

20 See Globe 804, quoted in Appendix to this opinion, *infra,* at 2042–2043.

21 See Globe 758 (Sen. Trumbull); *id.*, at 772 (Sen. Thurman); *id.*, at 791 (Rep. Willard). The Supreme Court of Indiana had so held in giving effect to the Civil Rights Act of 1866. See *Smith v. Moody*, 26 Ind. 299 (1866) (following *Coryell*), one of three State Supreme Court cases referred to in Globe App. 68 (Rep. Shellabarger). Moreover, § 2 of the 1871 Act as passed, unlike § 1, prosecuted persons who violated federal rights whether or not that violation was under color of official authority, apparently on the theory that Ku Klux Klan violence was infringing the right of protection defined by *Coryell*. Nonetheless, opponents argued that municipalities were not generally charged by the States with keeping the peace and hence did not have police forces, so that the duty to afford protection ought not devolve on the municipality, but on whatever agency of state government was charged by the State with keeping the peace. See *infra*, at 2027, and n. 30. In addition, they argued that Congress could not constitutionally add to the duties of municipalities. See *infra*, at 2027–2030.

22 U.S.Const., Art. IV, § 2, cl. 2:
"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

23 *Id.*, cl. 3:
"No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

24 *Id.*, cl. 1.

25 See Globe 751. See also *id.*, at 760 (Sen. Sherman) ("If a State may . . . pass a law making a county . . . responsible for a riot in order to deter such crime, then we may pass the same remedies . . .").

26 *Id.*, at 751; see n. 17, *supra*.

27 Globe 751 (emphasis added). Compare this statement with Representative Poland's remark upon which our holding in *Monroe* was based. See *supra*, at 2022–2023.

28 See, *e. g., Gelpcke v. City of Dubuque*, 68 U.S. 175, 1 Wall. 175, 17 L.Ed. 519 (1864); *Von Hoffman v. City of Quincy*, 71 U.S. 535, 4 W all. 535, 18 L.Ed. 403 (1867); *Riggs v. Johnson County*, 73 U.S. 166, 6 Wall. 166, 18 L.Ed. 768 (1868); *Weber v. Lee County*, 73 U.S. 210, 6 W all. 210, 18 L.Ed. 781 (1868); *Supervisors v. Rogers*, 74 U.S. 175, 7 W all. 175, 19 L.Ed. 162 (1869); *Benbow v. Iowa City*, 74 U.S. 313, 7 W all. 313, 19 L.Ed. 79 (1869); *Supervisors v. Durant*, 76 U.S. 415, 9 W all. 415, 19 L.Ed. 732 (1870). See generally 6 C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–1888, chs. 17–18 (1971).

29 See Globe 751–752.

30 Others taking a view similar to Representative Blair's included: Representative Willard, see *id.*, at 791; Representative Poland, see *id.*, at 794; Representative Burchard, see *id.*, at 795; Representative Farnsworth, see *id.*, at 799. Representative Willard also took a somewhat different position. He thought that the Constitution would not allow the Federal Government to dictate the manner in which a State fulfilled its obligation of protection. That is, he thought it a matter of state discretion whether it delegated the peacekeeping power to a municipal or county corporation, to a sheriff, etc. He did not doubt, however, that the Federal Government could impose on the *States* the obligation imposed by the Sherman amendment, and presumably he would have enforced the amendment against a municipal corporation to which the peacekeeping obligation had been delegated. See *id.*, at 791.
Opponents of the Sherman amendment in the Senate agreed with Blair that Congress had no power to pass the Sherman amendment because it fell outside limits on national power implicit in the federal structure of the Constitution and recognized in, *e. g., Collector v. Day*, 11 Wall. 113, 20 L.Ed. 122 (1871). However, the Senate opponents focused not on the amendment's attempt to obligate municipalities to keep the peace, but on the lien created by the amendment, which ran against *all* money and property of a defendant municipality, including property held for public purposes, such as jails or courthouses. Opponents argued that such a lien once entered would have the effect of making it impossible for the municipality to function, since no one would trade with it. See, *e. g.*, Globe 762 (Sen. Stevenson); *id.*, at 763 (Sen. Casserly). Moreover, everyone knew that sound policy prevented execution against public property since this, too, was needed if local government was to survive. See, *e. g., ibid.* See also *Meriwether v. Garrett*, 102 U.S. 472, 501, 513, 26 L.Ed. 197 (1880) (recognizing principle that public property of a municipality was not subject to execution); 2 J. Dillon, The Law of Municipal Corporations §§ 445–446 (1873 ed.) (same).

Although the arguments of the Senate opponents appear to be a correct analysis of then-controlling constitutional and common-law principles, their arguments are not relevant to an analysis of the constitutionality of § 1 of the Civil Rights Act since any judgment under that section, as in any civil suit in the federal courts in 1871, would have been enforced pursuant to *state* laws under the Process Acts of 1792 and 1828. See Act of May 8, 1792, ch. 36, 1 Stat. 275; Act of May 19, 1828, 4 Stat. 278.

31 See n. 30, *supra*.

32 In addition to the cases discussed in the text, see *Lane County v. Oregon*, 7 Wall. 71, 77, 81, 19 L.Ed. 101 (1869), in which the Court held that the federal Legal Tender Acts should not be construed to require the States to accept taxes tendered in United States notes since this might interfere with a legitimate state activity.

33 Mr. Chief Justice Taney agreed:
"The state officers mentioned in the law [of 1793] are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by a law of the state; and the state legislature has the power, if it thinks proper, to prohibit them. The act of 1793, therefore, must depend altogether for its execution upon the officers of the United States named in it." 16 Pet., at 630 (concurring in part).

34 See *supra*, at 2025–2026, and n. 21.

35 "*Be it enacted* . . . That whenever the executive authority of any state in the Union . . . shall demand any person as a fugitive from justice . . . and shall moreover produce the copy of an indictment found . . . charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state . . . from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured . . . and to cause the fugitive to be delivered to such agent [of the demanding State] when he shall appear . . . ." 1 Stat. 302.

36 "The Supreme Court of the United States has decided repeatedly that Congress can impose no duty on a State officer." Globe 799 (Rep. Farnsworth). See also *id.*, at 788–789 (Rep. Kerr).

37 See, *e. g., id.*, at 764 (Sen. Davis); *ibid.* (Sen. Casserly); *id.*, at 772 (Sen. Thurman) (reciting logic of *Day*); *id.*, at 777 (Sen. Frelinghuysen); *id.*, at 788–789 (Rep. Kerr) (reciting logic of *Day*); *id.*, at 793 (Rep. Poland); *id.*, at 799 (Rep. Farnsworth) (also reciting logic of *Day*).

38 *Warren v. Paul*, 22 Ind. 276 (1864); *Jones v. Estate of Keep*, 19 Wis. 369 (1865); *Fifield v. Close*, 15 Mich. 505 (1867); *Union Bank v. Hill*, 43 Tenn. 325 (1866); *Smith v. Short*, 40 Ala. 385 (1867).

39 See Globe 764 (Sen. Davis); *ibid.* (Sen. Casserly). See also T. Cooley, Constitutional Limitations *483–*484 (1871 ed.).

40 See cases cited in n. 28, *supra*. Since this Court granted unquestionably "positive" relief in Contract Clause cases, it appears that the distinction between the Sherman amendment and those cases was not that the former created a positive obligation whereas the latter imposed only a negative restraint. Instead, the distinction must have been that a violation of the Constitution was the predicate for "positive" relief in the Contract Clause cases, whereas the Sherman amendment imposed damages without regard to whether a local government was in any way at fault for the breach of the peace for which it was to be held for damages. See *supra*, at 2024. While no one stated this distinction expressly during the debates, the inference is strong that Congressmen in 1871 would have drawn this distinction since it explains why Representatives Poland, Burchard, and Willard, see *supra*, at 2030–2031, could oppose the amendment while at the same time saying that the Federal Government might impose damages on a local government that had defaulted in a state-imposed duty to keep the peace, and it also explains why everyone agreed that a state or municipal officer could constitutionally be held liable under § 1 for violations of the Constitution. See *infra*, at 2031–2032.

41 See, *e. g.*, Globe 334 (Rep. Hoar); *id.*, at 365 (Rep. Arthur); *id.*, at 367–368 (Rep. Sheldon); *id.*, at 385 (Rep. Lewis); Globe App. 217 (Sen. Thurman). In addition, officers were included among those who could be sued under the second conference substitute for the Sherman amendment. See Globe 805 (exchange between Rep. Willard and Rep. Shellabarger). There were no constitutional objections to the second report.

42 See *id*., at 795 (Rep. Blair); *id.*, at 788 (Rep. Kerr); *id.*, at 795 (Rep. Burchard); *id.*, at 799 (Rep. Farnsworth).

43 "[W]e cannot command a State officer to do any duty whatever, as such; and I ask . . . the difference between that and commanding a municipality . . . ." *Id.*, at 795.

44 See Globe App. 216–217, quoted in n.45, *infra*. In 1880, moreover, when the question of the limits of the *Prigg* principle was squarely presented in *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676, this Court held that *Dennison* and *Day* and the principle of federalism for which they stand did not prohibit federal enforcement of § 5 of the Fourteenth Amendment through suits directed to state officers. See 100 U.S., at 345–348.

45 Representative Bingham, the author of § 1 of the Fourteenth Amendment, for example, declared the bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution." Globe App. 81. He continued:

"The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws . . . [And] the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. . . . They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. . . . Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?" *Id.,* at 85.

Representative Perry, commenting on Congress' action in passing the civil rights bill also stated:

"Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied. We have asserted as clearly as we can assert our belief that it is the duty of Congress to redress that mischief. We have also asserted as fully as we can assert the constitutional right of Congress to legislate." Globe 800.

See also *id.,* at 376 (Rep. Lowe); *id.,* at 428–429 (Rep. Beatty); *id.,* at 448 (Rep. Butler); *id.,* at 475–477 (Rep. Dawes); *id.,* at 578–579 (Sen. Trumbull); *id.,* at 609 (Sen. Pool); Globe App. 182 (Rep. Mercur).

Other supporters were quite clear that § 1 of the Act extended a remedy not only where a State had passed an unconstitutional statute, but also where officers of the State were deliberately indifferent to the rights of black citizens:

"But the chief complaint is . . . [that] by a systematic maladministration of [state law], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe [§ 5 of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." *Id.*, at 153 (Rep. Garfield). See also *Monroe v. Pape,* 365 U.S., at 171–187, 81 S.Ct., at 475–484.

Importantly for our inquiry, even the opponents of § 1 agreed that it was constitutional and, further, that it swept very broadly. Thus, Senator Thurman, who gave the most exhaustive critique of § 1, said:

"This section relates wholly to civil suits. . . . Its whole effect is to give to the Federal Judiciary that which now does not belong to it—*a jurisdiction that may be constitutionally conferred upon it, I grant,* but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. . . .

—

"[T]here is no limitation whatsoever upon the terms that are employed [in the bill], and they are as comprehensive as can be used." Globe App. 216–217 (emphasis added).

46 See 2 J. Story, Commentaries on the Constitution of the United States § 1956 (T. Cooley ed. 1873).

47 Indeed the federal courts found no obstacle to awards of damages against municipalities for common-law takings. See *Sumner v. Philadelphia,* 23 F.Cas. 392 (No. 13,611) (CC ED Pa.1873) (awarding damages of $2,273.36 and costs of $346.35 against the city of Philadelphia).

48 Nonetheless, suits could be brought in federal court if the natural persons who were members of the corporation were of diverse citizenship from the other parties to the litigation. See 5 Cranch, at 91.

49 See n. 28, *supra.*

50 See, *e. g.,* Globe 777 (Sen. Sherman); *id.,* at 752 (Rep. Shellabarger) ("[C]ounties, cities, and corporations of all sorts, after years of judicial conflict, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual, or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States").

51 See *Northwestern Fertilizing Co. v. Hyde Park,* 18 Fed.Cas. pp. 393, 394 (No. 10,336) (CC ND Ill.1873); 2 J. Kent, Commentaries on American Law 2 *278–*279 (12th O. W. Holmes ed. 1873). See also *United States v. Maurice,* 26 Fed.Cas.No. 15,747, 2 Brock. 96, 109 (CC Va.1823) (Marshall, C. J.) ("The United States is a government, and, consequently, a body politic and corporate"); Apps. D and E to Brief for Petitioners in *Monroe v. Pape*, O.T. 1960, No. 39 (collecting state statutes which, in 1871, defined municipal corporations as bodies politic and corporate).

52 The court also noted that there was no discernible reason why persons injured by municipal corporations should not be able to recover. See 18 F., at 394.

53 In considering the effect of the Act of Feb. 25, 1871, in *Monroe,* however, Mr. Justice Douglas, apparently focusing on the word "may," stated: "[T]his definition [of person] is merely an allowable, not a mandatory, one." 365 U.S., at 191, 81 S.Ct., at 486. A review of the legislative history of the Dictionary Act shows this conclusion to be incorrect.

There is no express reference in the legislative history to the definition of "person," but Senator Trumbull, the Act's sponsor, discussed the phrase "words importing the masculine gender *may* be applied to females," (emphasis added), which immediately precedes the definition of "person," and stated:

"The only object [of the Act] is to get rid of a great deal of verbosity in our statutes by providing that when the word 'he' is used it *shall* include females as well as males." Cong. Globe, 41st Cong., 3d Sess., 775 (1871) (emphasis added).

Thus, in Trumbull's view the word "may" meant "shall." Such a mandatory use of the extended meanings of the words defined by the Act is also required for it to perform its intended function—to be a guide to "rules of construction" of Acts of Congress. See *ibid.* (remarks of Sen. Trumbull). Were the defined words "allowable, [but] not mandatory" constructions, as *Monroe* suggests, there would be no "rules" at all. Instead, Congress must have intended the definitions of the Act to apply across-the-board except where the Act by its terms called for a deviation from this practice—"[where] the context shows that [defined] words were to be used in a more limited sense." Certainly this is how the *Northwestern Fertilizing* court viewed the matter. Since there is nothing in the "context" of § 1 of the Civil Rights Act calling for a restricted interpretation of the word "person," the language of that section should prima facie be construed to include "bodies politic" among the entities that could be sued.

54 There is certainly no constitutional impediment to municipal liability. "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken v. Bradley,* 433 U.S. 267, 291, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977); see *Ex parte Virginia,* 100 U.S., at 347–348, 25 L.Ed. 676. For this reason, *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), is irrelevant to our consideration of this case. Nor is there any basis for concluding that the Eleventh Amendment is a bar to municipal liability. See, *e. g., Fitzpatrick v. Bitzer,* 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); *Lincoln County v. Luning,* 133 U.S. 529, 530, 10 S.Ct. 363, 33 L.Ed. 766 (1890). Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes.

55 Since official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent—at least where Eleventh Amendment considerations do not control analysis—our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.

56 See also Mr. Justice Frankfurter's statement for the Court in *Nashville, C. & St. L. R. Co. v. Browning,* 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940):

"It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not writ an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text."

57 Support for such a conclusion can be found in the legislative history. As we have indicated, there is virtually no discussion of § 1 of the Civil Rights Act. Again, however, Congress' treatment of the Sherman amendment gives a clue to whether it would have desired to impose *respondeat superior* liability.

The primary constitutional justification for the Sherman amendment was that it was a necessary and proper remedy for the failure of localities to protect citizens as the Privileges or Immunities Clause of the Fourteenth Amendment required. See *supra*, at 2025–2027. And according to Sherman, Shellabarger, and Edmunds, the amendment came into play only when a locality was at fault or had knowingly neglected its duty to provide protection. See Globe 761 (Sen. Sherman); *id.,* at 756 (Sen. Edmunds); *id.,* at 751–752 (Rep. Shellabarger). But other proponents of the amendment apparently viewed it as a form of vicarious liability for the unlawful acts of the citizens of the locality. See *id.,* at 792 (Rep. Butler). And whether intended or not, the amendment as drafted did impose a species of vicarious liability on municipalities since it could be construed to impose liability even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it. Indeed, the amendment held a municipality liable even if it had done everything in its power to curb the riot. See *supra*, at 2024; Globe 761 (Sen. Stevenson); *id.,* at 771 (Sen. Thurman); *id.,* at 788 (Rep. Kerr); *id.,* at 791 (Rep. Willard). While the first conference substitute was rejected principally on constitutional grounds see *id.,* at 804 (Rep. Poland), it is plain from the text of the second conference substitute—which limited liability to those who, having the power to intervene against Ku Klux Klan violence, "neglect[ed] or refuse[d] so to do," see Appendix to this opinion, *infra,* at 2042, and which was enacted as § 6 of the 1871 Act and is now codified as 42 U.S.C. § 1986—that Congress also rejected those elements of vicarious liability contained in the first conference substitute even while accepting the basic principle that the inhabitants of a community were bound to provide protection against the Ku Klux Klan. Strictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality's employees. Nonetheless, when Congress' rejection of the only form of vicarious liability presented to it is combined with the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability, the inference that Congress did not intend to impose such liability is quite strong.

58 A third justification, often cited but which on examination is apparently insufficient to justify the doctrine of *respondeat superior,* see, *e. g.,* 2 F. Harper & F. James, § 26.3, is that liability follows the right to control the actions of a tortfeasor. By our decision in *Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), we would appear to have decided that the mere right to control

without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability. See 423 U.S., at 370–371, 96 S.Ct., at 602.

59 Each case cited by *Monroe*, see 365 U.S., at 191 n. 50, 81 S.Ct. 495 as consistent with the position that local governments were not § 1983 "persons" reached its conclusion by assuming that state-law immunities overrode the § 1983 cause of action. This has never been the law.

60 Although many suits against school boards also include private individuals as parties, the "principal defendant is usually the local board of education or school board." *Milliken v. Bradley,* 433 U.S., at 292–293, 97 S.Ct. at 2763 (Powell, J., concurring in judgment).

61 *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976).

62 During the heyday of the furor over busing, both the House and the Senate refused to adopt bills that would have removed from the federal courts jurisdiction

"to make any decision, enter any judgment, or issue any order requiring any *school board* to make any change in the racial composition of the student body at any public school or in any class at any public school to which students are assigned in conformity with a freedom of choice system, or requiring any *school board* to transport any students from one public school to another public school or from one place to another place or from one school district to another school district in order to effect a change in the racial composition of the student body at any school or place or in any school district, or denying to any student the right or privilege of attending any public school or class at any public school chosen by the parent of such student in conformity with a freedom of choice system, or requiring any *school board* to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial composition of the student body at any public school, or precluding any *school board* from carrying into effect any provision of any contract between it and any member of the faculty of any public school it operates specifying the public school where the member of the faculty is to perform his or her duties under the contract." S. 1737, 93d Cong., 1st Sess., § 1207 (1973) (emphasis added).

Other bills designed either completely to remove the federal courts from the school desegregation controversy, S. 287, 93d Cong., 1st Sess. (1973), or to limit the ability of federal courts to subject school boards to remedial orders in desegregation cases, S. 619, 93d Cong., 1st Sess. (1973); S. 179, 93d Cong., 1st Sess., § 2(a) (1973); H.R. 13534, 92d Cong., 2d Sess., § 1 (1972), have similarly failed.

63 In 1972, spurred by a finding "that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access," 86 Stat. 354, 20 U.S.C. § 1601(a) (1976 ed.), Congress passed the Emergency School Aid Act. Section 706(a)(1)(A)(i) of that Act, 20 U.S.C. § 1605(a)(1)(A)(i) (1976 ed.), authorizes the Assistant Secretary

"to make a grant to, or a contract with, *a local educational agency [w]hich is implementing a plan . . . which has been undertaken pursuant to a final order issued by a court of the United States* . . . which requires the desegregation of minority group segregated children or faculty in the elementary and secondary schools of such agency, or otherwise requires the elimination or reduction of minority group isolation in such schools." (Emphasis added.)

A "local educational agency" is defined by 20 U.S.C. § 1619(8) (1976 ed.) as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or a federally recognized Indian reservation, or such combination of school districts, or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools, or a combination of local educational agencies . . . ." Congress thus clearly recognized that school boards were often parties to federal school desegregation suits. In § 718 of the Act, 86 Stat. 369, 20 U.S.C. § 1617 (1976 ed.), Congress gave its explicit approval to the institution of federal desegregation suits against school boards—presumably under § 1983. Section 718 provides:

"Upon the entry of a final order *by a court of the United States against a local educational agency* . . . for discrimination on the basis of race, color, or national origin in violation of . . . the fourteenth amendment to the Constitution of the United States . . . the court . . . may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (Emphasis added.)

Two years later in the Equal Educational Opportunities Act of 1974, Congress found that "the implementation of desegregation plans that require extensive student transportation has, in many cases, required *local educational agencies* to expend large amounts of funds, thereby depleting their financial resources . . . ." 20 U.S.C. § 1702(a)(3) (1976 ed.). (Emphasis added.) Congress did not respond by declaring that school boards were not subject to suit under § 1983 or any other federal statute, "but simply [legislated] revised evidentiary standards and remedial priorities to be employed by the courts in deciding such cases." Brief for National Education Assn., et al. as *Amici Curiae* 15–16. Indeed, Congress expressly reiterated that a cause of action, cognizable in the federal courts, exists for discrimination in the public school context. 20 U.S.C. §§ 1703, 1706, 1708, 1710, 1718 (1976 ed.). The Act assumes that school boards will usually be the defendants in such suits. For example, § 211 of the Act, 88 Stat. 516, as set forth in 20 U.S.C. § 1710 (1976 ed.), provides:

"The Attorney General shall not institute a civil action under section 1706 of this title [which allows for suit by both private parties and the Attorney General to redress discrimination in public education] before he—

"(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of part 2 [the prohibitions against discrimination in public education]." Section 219 of the Act, 20 U.S.C. § 1718 (1976 ed.), provides for the termination of court-ordered busing "if the court finds the defendant educational agency has satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable, and will continue to be in compliance with the requirements thereof."

64 Whether Congress' attempt is in fact effective is the subject of *Hutto v. Finney*, O.T.1977, No. 76–1660, cert. granted, 434 U.S. 901, 98 S.Ct. 295, 54 L.Ed.2d 187, and therefore we express no view on it here.

65 We note, however, that Mr. Justice Harlan's test has not been expressly adopted by this Court. Moreover, that test is based on two factors: *stare decisis* and "indications of congressional acceptance of this Court's earlier interpretation [of the statute in question]." 365 U.S., at 192, 81 S.Ct., at 487. As we have explained, the second consideration is not present in this case.

66 No useful purpose would be served by an attempt at this late date to determine whether *Monroe* was correct on its facts. Similarly, since this case clearly involves official policy and does not involve *respondeat superior*, we do not assay a view on how our cases which have relied on that aspect of *Monroe* that is overruled today—*Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *City of Kenosha v. Bruno,* 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); and *Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976)—should have been decided on a correct view of § 1983. Nothing we say today affects the conclusion reached in *Moor*, see 411 U.S., at 703–704, 93 S.Ct. 1785, that 42 U.S.C. § 1988 cannot be used to create a federal cause of action where § 1983 does not otherwise provide one, or the conclusion reached in *City of Kenosha*, see 412 U.S., at 513, 93 S.Ct., at 2226 that "nothing . . . suggest[s] that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them."

1 The gravamen of the complaint in *Monroe* was that Chicago police officers acting "under color of" state law had conducted a warrantless, early morning raid and ransacking of a private home. Although at least one of the allegations in the complaint could have been construed to charge a custom or usage of the Police Department of the city of Chicago that did not violate state law, see 365 U.S., at 258–259, 81 S.Ct. 473 (Frankfurter, J., dissenting in part), and there is a hint of such a theory in Brief for Petitioners, O.T.1960, No. 39, pp. 41–42, that feature of the case was not highlighted in this Court. The dispute that divided the Court was over whether a complaint alleging police misconduct in violation of state law, for which state judicial remedies were available, stated a § 1983 claim in light of the statutory requirement that the conduct working injury be "under color of" state law. Compare 365 U.S., at 172–183, 81 S.Ct. 473 (opinion of the Court), and *id.,* at 193–202, 81 S.Ct. 473 (Harlan, J., concurring), with *id.,* at 202–259, 81 S.Ct. 473 (Frankfurter, J., dissenting in part).

2 If in the view of House opponents, such as Representatives Poland, Burchard, and Willard, see *ante,* at 2030–2032, a municipality obligated by state law to keep the peace could be held liable for a failure to provide equal protection against private violence, it seems improbable that they would have opposed imposition of liability on a municipality for the affirmative implementation of policies promulgated within its proper sphere of operation under state law. Such liability is promised not on a failure to take affirmative action in an area outside the contemplation of the state-law charter—the sort of liability that would have been imposed by the Sherman amendment—but on the consequences of activities actually undertaken within the scope of the powers conferred by state law.

3 The view taken today is consistent with the understanding of the 42d Congress that unless the context revealed a more limited definition, "the word 'person' may extend and be applied to bodies politic and corporate . . . ." Act of Feb. 25, 1871, § 2, 16 Stat. 431. It also accords with the interpretation given the same word when it was used by Senator Sherman in the antitrust legislation of 1890 bearing his name. See *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) (plurality opinion); *Chattanooga Foundry v. Atlanta,* 203 U.S. 390, 396, 27 S.Ct. 65, 51 L.Ed. 241 (1906); cf. *Pfizer, Inc. v. Government of India,* 434 U.S. 308, 98 S.Ct. 585, 54 L.Ed.2d 563 (1978).

4 See, *e. g., Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); *Machinists v. Wisconsin Emp. Rel. Comm'n,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976); *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); *Griffin v. Breckenridge,* 91 S.Ct. 1790, 29 L.Ed.2d 338, 403 U.S. 88 (1971); *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970); *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406–407, n. 1, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting).

5 The District Court in *Monroe* ruled in the municipality's favor, stating: "[S]ince the liability of the City of Chicago is based on the doctrine of *respondeat superior,* and since I have already held that the complaint fails to state a claim for relief against the agents of the city, there is no claim for relief against the city itself." Record, O.T.1960, No. 39, p. 30. The Court of Appeals affirmed for the same reason. 272 F.2d 365–366 (CA7 1959).

Petitioners in this Court also offered an alternative argument that the city of Chicago was a "person" for purposes of § 1983, Brief for Petitioners, O.T.1960, No. 39, p. 25, but the underlying theory of municipal liability remained one of *respondeat superior.*

6 The doctrine of *stare decisis* advances two important values of a rational system of law: (i) the certainty of legal principles and (ii) the wisdom of the conservative vision that existing rules should be presumed rational and not subject to modification "at any time a new thought seems appealing," dissenting opinion of Mr. Justice REHNQUIST, *post,* at 2050; cf. O. Holmes, The Common Law 36 (1881). But, at the same time, the law has recognized the necessity of change, lest rules "simply persis[t] from blind imitation of the past." Holmes, The Path of the Law, 10 Harv.L.Rev. 457, 469 (1897). Any overruling of prior precedent, whether of a constitutional decision or otherwise, disserves to some extent the value of certainty. But I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations. That is the premise of the canon of interpretation that language in a decision not necessary to the holding may be accorded less weight in subsequent cases. I also would recognize the fact that until this case the Court has not had to confront squarely the consequences of holding § 1983 inapplicable to official municipal policies.

Of course, the mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding. *Marbury v. Madison,* 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803), cited by the dissent, *post,* at 2049–2050, is a case in point. But the Court's recognition of its power to invalidate legislation not in conformity with constitutional command was essential to its judgment in *Marbury.* And on numerous subsequent occasions, the Court has been required to apply the full breadth of the *Marbury* holding. In *Monroe,* on the other hand, the Court's rationale was broader than necessary to meet the contentions of the parties and to decide the case in a principled manner. The language in *Monroe* cannot be dismissed as dicta, but we may take account of the fact that the Court simply was not confronted with the implications of holding § 1983 inapplicable to official municipal policies. It is an appreciation of those implications that has prompted today's re-examination of the legislative history of the 1871 measure.

7 In *Aldinger v. Howard,* 427 U.S. 1, 16, 96 S.Ct. 2413, 2421, 49 L.Ed.2d 276 (1976), we reaffirmed *Monroe,* but petitioner did not contest the proposition that counties were excluded from the reach of § 1983 under *Monroe*, and the question before us concerned the scope of pendent-party jurisdiction with respect to a state-law claim. Similarly, the parties in *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), did not seek a re-examination of our ruling in *Monroe.*

8 To the extent that the complaints in those cases asserted claims against the individual defendants in their personal capacity, as well as official capacity, the court would have had authority to award the relief requested. There is no suggestion in the opinions, however, that the practices at issue were anything other than official, duly authorized policies.

9 Mr. Justice REHNQUIST's dissent makes a strong argument that "[s]ince *Monroe,* municipalities *have* had the right to expect that they would not be held liable retroactively for their officers' failure to predict this Court's recognition of new constitutional rights." *Post,* at 2049. But it reasonably may be assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority, a policy that furthers the important interest of attracting and retaining competent officers, board members, and employees. In any event, the possibility of a qualified immunity, as to which the Court reserves decision, may remove some of the harshness of liability for good-faith failure to predict the often uncertain course of constitutional adjudication.

1 As we pointed out in *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 278–279, 97 S.Ct. 568, 571–572, 50 L.Ed.2d 471 (1977), the existence of a claim for relief under § 1983 is "jurisdictional" for purposes of invoking 28 U.S.C. § 1343, even though the existence of a meritorious constitutional claim is not similarly required in order to invoke jurisdiction under 28 U.S.C. § 1331. See *Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

2 The other statutes cited by the Court, *ante*, at 2039–2040, n. 63, make no mention of § 1983, but refer generally to suits against "a local educational agency." As noted by the Court of Appeals, 532 F.2d 259, 264–266, such suits may be maintained against board members in their official capacities for injunctive relief under either § 1983 or *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Congress did not stop to consider the technically proper avenue of relief, but merely responded to the fact that relief was being granted. The practical result of choosing the avenue suggested by petitioners would be the subjection of school corporations to liability in damages. Nothing in recent congressional history even remotely supports such a result.

3 I find it somewhat ironic that, in abandoning the supposedly ill-considered holding of *Monroe,* my Brother Powell relies heavily upon cases involving school boards, although he admits that "the exercise of § 1983 jurisdiction . . . [was] perhaps not premised on considered holdings." *Ante,* at 2046.

4 It has not been generally thought, before today, that § 1983 provided an avenue of relief from unconstitutional takings. Those federal courts which have granted compensation against state and local governments have resorted to an implied right of action under the Fifth and Fourteenth Amendments. *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency,* 561 F.2d 1327 (CA9 1977), aff'g 389 F.Supp. 486 (N.D.Cal.1975); *Foster v. City of Detroit,* 405 F.2d 138, 140 (CA6 1968). Since the Court today abandons the holding of *Monroe* chiefly on the strength of Bingham's arguments, it is indeed anomalous that § 1983 will provide relief only when a local government, not the State itself, seizes private property. See *ante,* at 2035 n. 54; *Fitzpatrick v. Bitzer,* 427 U.S. 445, 452, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); *Edelman v. Jordan,* 415 U.S. 651, 674–677, 94 S.Ct. 1347, 1361–1363, 39 L.Ed.2d 662 (1974).

Pearson v. Callahan

555 U.S. 223 (2009)

129 S.Ct. 808
Supreme Court of the United States

Cordell PEARSON, et al., Petitioners,

v.

Afton CALLAHAN.

No. 07–751.
|
Argued Oct. 14, 2008.
|
Decided Jan. 21, 2009.

Synopsis

Background: Arrestee brought § 1983 action alleging that police officers violated his Fourth Amendment rights by entering his home without a warrant. The United States District Court for the District of Utah, 2006 WL 1409130, granted officers summary judgment based on qualified immunity. Arrestee appealed. The United States Court of Appeals for the Tenth Circuit, Murguia, District Judge, sitting by designation, 494 F.3d 891, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

in resolving government officials' qualified immunity claims, courts need not first determine whether facts alleged or shown by plaintiff make out violation of constitutional right, receding from *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272, and

officers were entitled to qualified immunity.

Reversed.

****810** *Syllabus*[*]

After the Utah Court of Appeals vacated respondent's conviction for possession and distribution of drugs, which he sold to an undercover informant he had voluntarily admitted into his house, he brought this 42 U.S.C. § 1983 damages action in federal court, alleging that petitioners, the officers who supervised and conducted the warrantless search of the premises that led to his arrest after the sale, had violated the Fourth Amendment. The District Court granted summary judgment in favor of the officers. Noting that other courts had adopted the "consent-once-removed" doctrine—which permits a warrantless police entry into a home when consent to enter has already been granted to an undercover officer who has observed contraband in plain view—the court concluded that the officers were entitled to qualified immunity because they could reasonably have believed that the doctrine authorized their conduct. Following the procedure mandated in *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272, the Tenth Circuit held that petitioners were not entitled to qualified immunity. The court disapproved broadening the consent-once-removed doctrine to situations in which the person granted initial consent was not an undercover officer, but merely an informant. It further held that the Fourth Amendment right to be free in one's home from unreasonable searches and arrests was clearly established at the time of respondent's arrest, and determined that, under this Court's clearly established precedents, warrantless entries into a home are *per se* unreasonable unless they satisfy one of the two established exceptions for

consent and exigent circumstances. The court concluded that petitioners ****811** could not reasonably have believed that their conduct was lawful because they knew that (1) they had no warrant; (2) respondent had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them. In granting certiorari, this Court directed the parties to address whether *Saucier* should be overruled in light of widespread criticism directed at it.

Held:

1. The *Saucier* procedure should not be regarded as an inflexible requirement. Pp. 815 – 822.

(a) *Saucier* mandated, see 533 U.S., at 194, 121 S.Ct. 2151, a two-step sequence for resolving government officials' qualified immunity claims: A court must decide (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was "clearly established" at the time of the defendant's alleged misconduct, *id*., at 201, 121 S.Ct. 2151. Qualified immunity applies unless the official's conduct violated such a right. *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523. Pp. 815 – 816.

(b) *Stare decisis* does not prevent this Court from determining whether the *Saucier* procedure should be modified or abandoned. Revisiting precedent is particularly appropriate where, as here, a departure would not upset settled expectations, see, *e.g., United States v. Gaudin,* 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444; the precedent consists of a rule that is judge made and adopted to improve court operations, not a statute promulgated by Congress, see, *e.g., State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275*;* and the precedent has "been questioned by Members of th[is] Court in later decisions and [has] defied consistent application by the lower courts," *Payne v. Tennessee,* 501 U.S. 808, 829–830, 111 S.Ct. 2597, 115 L.Ed.2d 720. Respondent's argument that *Saucier* should not be reconsidered unless the Court concludes that it was "badly reasoned" or that its rule has proved "unworkable," see *Payne, supra,* at 827, 111 S.Ct. 2597, is rejected. Those standards are out of place in the present context, where a considerable body of new experience supports a determination that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained. Pp. 816 – 818.

(c) Reconsideration of the *Saucier* procedure demonstrates that, while the sequence set forth therein is often appropriate, it should no longer be regarded as mandatory in all cases. Pp. 818 – 822.

(i) The Court continues to recognize that the *Saucier* protocol is often beneficial. In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all. And *Saucier* was correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable for questions that do not frequently arise in cases in which a qualified immunity defense is unavailable. See 533 U.S., at 194, 121 S.Ct. 2151. P. 818.

(ii) Nevertheless, experience in this Court and the lower federal courts has pointed out the rigid *Saucier* procedure's shortcomings. For example, it may result in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the case's outcome, and waste the parties' resources by forcing them to assume the costs of litigating constitutional questions and endure delays attributable to resolving those questions when the suit otherwise could be disposed ****812** of more readily. Moreover, although the procedure's first prong is intended to further the development of constitutional precedent, opinions following that procedure often fail to make a meaningful contribution to such development, as where, *e.g.,* a court of appeals decision is issued in an opinion marked as not precedential. Further, when qualified immunity is asserted at the pleading stage, the answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed. And the first step may create a risk of bad decisionmaking, as where the briefing of constitutional questions is woefully inadequate. Application of the *Saucier* rule also may make it hard for affected parties to obtain appellate review of constitutional decisions having a serious prospective effect on their operations. For example, where a court holds that a defendant has committed a constitutional violation, but then holds that the violation was not clearly established, the defendant, as the winning party, may have his right to appeal the adverse constitutional holding challenged. Because rigid adherence to *Saucier* departs from the general rule of constitutional avoidance, cf., *e.g., Scott v. Harris,* 550 U.S. 372, 388, 127 S.Ct. 1769, 167 L.Ed.2d 686, the Court

may appropriately decline to mandate the order of decision that the lower courts must follow, see, *e.g., Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674. This flexibility properly reflects the Court's respect for the lower federal courts. Because the two-step *Saucier* procedure is often, but not always, advantageous, those judges are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case. Pp. 818 – 822.

(iii) Misgivings concerning today's decision are unwarranted. It does not prevent the lower courts from following *Saucier;* it simply recognizes that they should have the discretion to decide whether that procedure is worthwhile in particular cases. Moreover, it will not retard the development of constitutional law, result in a proliferation of damages claims against local governments, or spawn new litigation over the standards for deciding whether to reach the particular case's merits. Pp. 822 – 823.

2. Petitioners are entitled to qualified immunity because it was not clearly established at the time of the search that their conduct was unconstitutional. When the entry occurred, the consent-once-removed doctrine had been accepted by two State Supreme Courts and three Federal Courts of Appeals, and not one of the latter had issued a contrary decision. Petitioners were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on consent-once-removed entries. See *Wilson v. Layne,* 526 U.S. 603, 618, 119 S.Ct. 1692, 143 L.Ed.2d 818. P. 823.

494 F.3d 891, reversed.

ALITO, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

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Opinion

Justice ALITO delivered the opinion of the Court.

***227** This is an action brought by respondent under Rev. Stat. § 1979, 42 U.S.C. § 1983, against state law enforcement officers who conducted a warrantless search of his house incident to his arrest for the sale of methamphetamine to an undercover informant whom he had voluntarily admitted to the premises. The Court of Appeals held that petitioners were not entitled to summary judgment on qualified immunity grounds. Following the procedure we mandated in *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Court of Appeals held, first, that respondent adduced facts sufficient to make out a violation of the Fourth Amendment and, second, that the unconstitutionality of the officers' conduct was clearly established. In granting review, we required the parties to address the additional question whether the mandatory procedure set out in *Saucier* should be retained.

We now hold that the *Saucier* procedure should not be regarded as an inflexible requirement and that petitioners are entitled to qualified immunity on the ground that it was not clearly established at the time of the search that their conduct was unconstitutional. We therefore reverse.

I

A

The Central Utah Narcotics Task Force is charged with investigating illegal drug use and sales. In 2002, Brian Bartholomew, who became an informant for the task force after having been charged with the unlawful possession of methamphetamine, informed Officer Jeffrey Whatcott that respondent Afton Callahan had arranged to sell Bartholomew methamphetamine later that day.

That evening, Bartholomew arrived at respondent's residence at about 8 p.m. Once there, Bartholomew went inside and confirmed that respondent had methamphetamine available for sale. Bartholomew then told respondent that he needed to obtain money to make his purchase and left.

***228** Bartholomew met with members of the task force at about 9 p.m. and told them that he would be able to buy a gram of methamphetamine for $100. After concluding that Bartholomew was capable of completing the planned purchase, the officers searched him, determined that he had no controlled substances on his person, gave him a marked $100 bill and a concealed electronic transmitter to monitor his conversations, and agreed on a signal that he would give after completing the purchase.

The officers drove Bartholomew to respondent's trailer home, and respondent's daughter let him inside. Respondent then retrieved a large bag containing methamphetamine from his freezer and sold Bartholomew a gram of methamphetamine, which he put into a small plastic bag. Bartholomew gave the arrest signal to the officers who were monitoring the conversation, and they entered the trailer through a porch door. In the enclosed porch, the officers encountered Bartholomew, respondent, and two other persons, and they saw respondent drop a plastic bag, which they later determined contained methamphetamine. The officers then conducted a protective sweep of the premises. In addition to the large bag of methamphetamine, the officers recovered the marked bill from respondent and a small bag containing methamphetamine from Bartholomew, and they found drug syringes in the residence. ****814** As a result, respondent was charged with the unlawful possession and distribution of methamphetamine.

B

The trial court held that the warrantless arrest and search were supported by exigent circumstances. On respondent's appeal from his conviction, the Utah attorney general conceded the absence of exigent circumstances, but urged that the inevitable discovery doctrine justified introduction of the fruits of the warrantless search. The Utah Court of Appeals disagreed and vacated respondent's conviction. See *State v. Callahan,* 2004 UT App. 164, 93 P.3d 103. Respondent ***229** then brought this damages action under 42 U.S.C. § 1983 in the United States District Court for the District of Utah, alleging that the officers had violated the Fourth Amendment by entering his home without a warrant. See *Callahan v. Millard Cty.,* No. 2:04–CV–00952, 2006 WL 1409130 (2006).

In granting the officers' motion for summary judgment, the District Court noted that other courts had adopted the "consent-once-removed" doctrine, which permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view. Believing that this doctrine was in tension with our intervening decision in *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), the District Court concluded that "the simplest approach is to assume that the Supreme Court will ultimately reject the [consent-once-removed] doctrine and find that searches such as the one in this case are not reasonable under the Fourth Amendment." 2006 WL 1409130, *8. The court then held that the officers were entitled to qualified immunity because they could reasonably have believed that the consent-once-removed doctrine authorized their conduct.

On appeal, a divided panel of the Tenth Circuit held that petitioners' conduct violated respondent's Fourth Amendment rights. *Callahan v. Millard Cty.,* 494 F.3d 891, 895–899 (2007). The panel majority stated that "[t]he 'consent-once-removed' doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance." *Id*., at 896. The majority took no issue with application of the doctrine when the initial consent was granted to an undercover law enforcement officer, but the majority disagreed with decisions that "broade[n] this doctrine to grant informants the same capabilities as undercover officers." *Ibid*.

***230** The Tenth Circuit panel further held that the Fourth Amendment right that it recognized was clearly established at the time of respondent's arrest. *Id*., at 898–899. "In this case," the majority stated, "the relevant right is the right to be free in one's home from unreasonable searches and arrests." *Id*., at 898. The Court determined that, under the clearly established precedents of this Court and the Tenth Circuit, "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions." *Id*., at 898–899. In the panel's words, "the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Id*., at 899. Against that backdrop, the panel concluded, petitioners could not reasonably have believed that their conduct was lawful because petitioners "knew (1) they had no warrant; (2) [respondent] had not consented to their entry; and (3) [respondent's] ****815** consent to the entry of an informant could not reasonably be interpreted to extend to them." *Ibid*.

In dissent, Judge Kelly argued that "no constitutional violation occurred in this case" because, by inviting Bartholomew into his house and participating in a narcotics transaction there, respondent had compromised the privacy of the residence and had assumed the risk that Bartholomew would reveal their dealings to the police. *Id*., at 903. Judge Kelly further concluded that, even if petitioners' conduct had been unlawful, they were nevertheless entitled to qualified immunity because the constitutional right at issue—"the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause"—was not "clearly established" at the time of the events in question. *Id*., at 903–904.

***231** As noted, the Court of Appeals followed the *Saucier* procedure. The *Saucier* procedure has been criticized by Members of this Court and by lower court judges, who have been required to apply the procedure in a great variety of cases and thus have much firsthand experience bearing on its advantages and disadvantages. Accordingly, in granting certiorari, we directed the parties to address the question whether *Saucier* should be overruled. 552 U.S. 1279, 128 S.Ct. 1702, 170 L.Ed.2d 512 (2008).

II

A

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity balances two important interests —the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez,* 540 U.S. 551, 567, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (KENNEDY, J., dissenting) (quoting *Butz v. Economou,* 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), for the proposition that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law").

Because qualified immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted). Indeed, we have made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire

to ensure that " 'insubstantial claims' against government officials [will] be resolved prior to discovery." *Anderson v. Creighton,* 483 U.S. 635, 640, n. 2, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam)*. ***232**

In *Saucier,* 533 U.S. 194, 121 S.Ct. 2151, this Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. 533 U.S., at 201, 121 S.Ct. 2151. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Ibid*. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Anderson, supra,* at 640, 107 S.Ct. 3034. ****816**

Our decisions prior to *Saucier* had held that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *County of Sacramento v. Lewis,* 523 U.S. 833, 841, n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). *Saucier* made that suggestion a mandate. For the first time, we held that whether "the facts alleged show the officer's conduct violated a constitutional right ... *must* be the initial inquiry" in every qualified immunity case. 533 U.S., at 201, 121 S.Ct. 2151 (emphasis added). Only after completing this first step, we said, may a court turn to "the next, sequential step," namely, "whether the right was clearly established." *Ibid*.

This two-step procedure, the *Saucier* Court reasoned, is necessary to support the Constitution's "elaboration from case to case" and to prevent constitutional stagnation. *Ibid*. "The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." *Ibid*.

***233** B

In considering whether the *Saucier* procedure should be modified or abandoned, we must begin with the doctrine of *stare decisis*. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Although "[w]e approach the reconsideration of [our] decisions ... with the utmost caution," "[*s*]*tare decisis* is not an inexorable command." *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (internal quotation marks omitted). Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings.

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases ... involving procedural and evidentiary rules" that do not produce such reliance. *Payne, supra,* at 828, 111 S.Ct. 2597 (citations omitted). Like rules governing procedures and the admission of evidence in the trial courts, *Saucier*'s two-step protocol does not affect the way in which parties order their affairs. Withdrawing from *Saucier*'s categorical rule would not upset settled expectations on anyone's part. See *United States v. Gaudin,* 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

Nor does this matter implicate "the general presumption that legislative changes should be left to Congress." *Khan, supra,* at 20, 118 S.Ct. 275. We recognize that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). But the *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations. Any change should come from this Court, not Congress. ****817** ***234**

Respondent argues that the *Saucier* procedure should not be reconsidered unless we conclude that its justification was "badly reasoned" or that the rule has proved to be "unworkable," see *Payne, supra,* at 827, 111 S.Ct. 2597, but those standards, which are appropriate when a constitutional or statutory precedent is challenged, are out of place in the present context. Because of the basis and the nature of the *Saucier* two-step protocol, it is sufficient that we now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure. This experience supports our present determination that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained.

Lower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have not been reticent in their criticism of *Saucier*'s "rigid order of battle." See, *e.g., Purtell v. Mason,* 527 F.3d 615, 622 (C.A.7 2008) ("This 'rigid order of battle' has been criticized on practical, procedural, and substantive grounds"); Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U.L.Rev. 1249, 1275, 1277 (2006) (hereinafter Leval) (referring to *Saucier*'s mandatory two-step framework as "a new and mischievous rule" that amounts to "a puzzling misadventure in constitutional dictum"). And application of the rule has not always been enthusiastic. See *Higazy v. Templeton,* 505 F.3d 161, 179, n. 19 (C.A.2 2007) ("We do not reach the issue of whether [plaintiff's] Sixth Amendment rights were violated, because principles of judicial restraint caution us to avoid reaching constitutional questions when they are unnecessary to the disposition of a case"); *Cherrington v. Skeeter,* 344 F.3d 631, 640 (C.A.6 2003) ("[I]t ultimately is unnecessary for us to decide whether the individual Defendants did or did not heed the Fourth Amendment ***235** command ... because they are entitled to qualified immunity in any event"); *Pearson v. Ramos,* 237 F.3d 881, 884 (C.A.7 2001) ("Whether [the *Saucier*] rule is absolute may be doubted").

Members of this Court have also voiced criticism of the *Saucier* rule. See *Morse v. Frederick,* 551 U.S. 393, 432, 127 S.Ct. 2618, 2642, 168 L.Ed.2d 290 (2007) (BREYER, J., concurring in judgment in part and dissenting in part) ("I would end the failed *Saucier* experiment now"); *Bunting v. Mellen,* 541 U.S. 1019, 124 S.Ct. 1750, 158 L.Ed.2d 636 (2004) (STEVENS, J., joined by GINSBURG and BREYER, JJ., respecting denial of certiorari) (criticizing the "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity"); *id*., at 1025, 124 S.Ct. 1750 (SCALIA, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are *not* insulated from our review ... or else drop any pretense at requiring the ordering in every case" (emphasis in original)); *Brosseau v. Haugen,* 543 U.S. 194, 201–202, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (BREYER, J., joined by SCALIA and GINSBURG, JJ., concurring) (urging Court to reconsider *Saucier*'s "rigid 'order of battle,' " which "requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the ****818** decision (*e.g.,* qualified immunity) that will satisfactorily resolve the case before the court"); *Saucier,* 533 U.S., at 210, 121 S.Ct. 2151 (GINSBURG, J., concurring in judgment) ("The two-part test today's decision imposes holds large potential to confuse").

Where a decision has "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts," these factors weigh in favor of reconsideration. *Payne,* 501 U.S., at 829–830, 111 S.Ct. 2597; see also *Crawford v. Washington,* 541 U.S. 36, 60, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Collectively, the factors we have noted make our present reevaluation of the *Saucier* two-step protocol appropriate.

***236** III

On reconsidering the procedure required in *Saucier,* we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

A

Although we now hold that the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial. For one thing, there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the "clearly established" prong. "[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Lyons v. Xenia,* 417 F.3d 565, 581 (C.A.6 2005) (Sutton, J., concurring). In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all. In addition, the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.

B

At the same time, however, the rigid *Saucier* procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult ***237** questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise.

Unnecessary litigation of constitutional issues also wastes the parties' resources. Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell,* 472 U.S., at 526, 105 S.Ct. 2806 (emphasis deleted). *Saucier*'s two-step protocol "disserve[s] the purpose of qualified immunity" when it "forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily." Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 30.

****819** Although the first prong of the *Saucier* procedure is intended to further the development of constitutional precedent, opinions following that procedure often fail to make a meaningful contribution to such development. For one thing, there are cases in which the constitutional question is so factbound that the decision provides little guidance for future cases. See *Scott v. Harris,* 550 U.S. 372, 388, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (BREYER, J., concurring) (counseling against the *Saucier* two-step protocol where the question is "so fact dependent that the result will be confusion rather than clarity"); *Buchanan v. Maine,* 469 F.3d 158, 168 (C.A.1 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts").

A decision on the underlying constitutional question in a § 1983 damages action or a *Bivens v. Six Unknown Fed. Narcotics* ***238** *Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971),[1] action may have scant value when it appears that the question will soon be decided by a higher court. When presented with a constitutional question on which this Court had just granted certiorari, the Ninth Circuit elected to "bypass *Saucier's* first step and decide only whether [the alleged right] was clearly established." *Motley v. Parks,* 432 F.3d 1072, 1078, and n. 5 (2005) (en banc). Similar considerations may come into play when a court of appeals panel confronts a constitutional question that is pending before the court en banc or when a district court encounters a constitutional question that is before the court of appeals.

A constitutional decision resting on an uncertain interpretation of state law is also of doubtful precedential importance. As a result, several courts have identified an "exception" to the *Saucier* rule for cases in which resolution of the constitutional question requires clarification of an ambiguous state statute. *Egolf v. Witmer,* 526 F.3d 104, 109–111 (C.A.3 2008); accord, *Tremblay v. McClellan,* 350 F.3d 195, 200 (C.A.1 2003); *Ehrlich v. Glastonbury,* 348 F.3d 48, 57–60 (C.A.2 2003). Justifying the decision to grant qualified immunity to the defendant without first resolving, under *Saucier*'s first prong, whether the defendant's conduct violated the Constitution, these courts have observed that *Saucier*'s "underlying principle" of encouraging federal courts to decide unclear legal questions in order to clarify the law for the future "is not meaningfully advanced ... when the definition of

constitutional rights depends on a federal court's uncertain assumptions about state law." *Egolf, supra,* at 110; accord, *Tremblay, supra,* at 200; *Ehrlich, supra,* at 58.

When qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claim or claims ***239** may be hard to identify. See *Lyons,* 417 F.3d, at 582 (Sutton, J., concurring); *Kwai Fun Wong v. United States,* 373 F.3d 952, 957 (C.A.9 2004); *Mollica v. Volker,* 229 F.3d 366, 374 (C.A.2 2000). Accordingly, several courts have recognized that the two-step inquiry "is an uncomfortable exercise where ... the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed" and have suggested that "[i]t may be that *Saucier* was not strictly intended to cover" this situation. *Dirrane v. Brookline Police* ****820** *Dept.,* 315 F.3d 65, 69–70 (C.A.1 2002); see also *Robinette v. Jones,* 476 F.3d 585, 592, n. 8 (C.A.8 2007) (declining to follow *Saucier* because "the parties have provided very few facts to define and limit any holding" on the constitutional question).

There are circumstances in which the first step of the *Saucier* procedure may create a risk of bad decisionmaking. The lower courts sometimes encounter cases in which the briefing of constitutional questions is woefully inadequate. See *Lyons, supra*, at 582 (Sutton, J., concurring) (noting the "risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented"); *Mollica, supra,* at 374.

Although the *Saucier* rule prescribes the sequence in which the issues must be discussed by a court in its opinion, the rule does not—and obviously cannot—specify the sequence in which judges reach their conclusions in their own internal thought processes. Thus, there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all. In such situations, there is a risk that a court may not devote as much care as it would in other circumstances to the decision of the constitutional issue. See *Horne v. Coughlin,* 191 F.3d 244, 247 (C.A.2 1999) ("Judges risk being insufficiently thoughtful and cautious in ***240** uttering pronouncements that play no role in their adjudication"); Leval 1278–1279.

Rigid adherence to the *Saucier* rule may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations. Where a court holds that a defendant committed a constitutional violation but that the violation was not clearly established, the defendant may face a difficult situation. As the winning party, the defendant's right to appeal the adverse holding on the constitutional question may be contested. See *Bunting,* 541 U.S., at 1025, 124 S.Ct. 1750 (SCALIA, J., dissenting from denial of certiorari) ("The perception of unreviewability undermines adherence to the sequencing rule we ... created" in Saucier);[2] see also *Kalka v. Hawk,* 215 F.3d 90, 96, n. 9 (C.A.D.C.2000) (noting that "[n]ormally, a party may not appeal from a favorable judgment" and that the Supreme Court "has apparently never granted the certiorari petition of a party who prevailed in the appellate court"). In cases like *Bunting,* the "prevailing" defendant faces an unenviable choice: "compl[y] with the lower court's advisory dictum without opportunity to seek appellate [or certiorari] review," or "def[y] the views of the lower court, adher[e] to practices that have been declared illegal, and thus ***241** invit [e] new suits" and potential "punitive damages." *Horne, supra,* at 247–248.

****821** Adherence to *Saucier*'s two-step protocol departs from the general rule of constitutional avoidance and runs counter to the "older, wiser judicial counsel 'not to pass on questions of constitutionality ... unless such adjudication is unavoidable.' " *Scott,* 550 U.S., at 388, 127 S.Ct. 1769 (BREYER, J., concurring) (quoting *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944)); see *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of").

In other analogous contexts, we have appropriately declined to mandate the order of decision that the lower courts must follow. For example, in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we recognized a two-part test for determining whether a criminal defendant was denied the effective assistance of counsel: The defendant must demonstrate (1) that his counsel's performance fell below what could be expected of a reasonably competent practitioner; and (2) that he was prejudiced by that substandard performance. *Id*., at 687, 104 S.Ct. 2052. After setting forth and applying the analytical

framework that courts must use in evaluating claims of ineffective assistance of counsel, we left it to the sound discretion of lower courts to determine the order of decision. *Id*., at 697, 104 S.Ct. 2052 ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one").

In *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), we created an exception to the exclusionary rule when officers reasonably rely on a facially valid search warrant. *Id*., at 913, 104 S.Ct. 3405. In that context, we recognized that a defendant challenging a ***242** search will lose if either: (1) the warrant issued was supported by probable cause; or (2) it was not, but the officers executing it reasonably believed that it was. Again, after setting forth and applying the analytical framework that courts must use in evaluating the good-faith exception to the Fourth Amendment warrant requirement, we left it to the sound discretion of the lower courts to determine the order of decision. *Id*., at 924, 925, 104 S.Ct. 3405 ("There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated").

This flexibility properly reflects our respect for the lower federal courts that bear the brunt of adjudicating these cases. Because the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.

C

Any misgivings concerning our decision to withdraw from the mandate set forth in *Saucier* are unwarranted. Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases. Moreover, the development of constitutional law is by no means entirely dependent ****822** on cases in which the defendant may seek qualified immunity. Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. See *Lewis,* 523 U.S., at 841, n. 5, 118 S.Ct. 1708 (noting that qualified immunity is unavailable ***243** "in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion").

We also do not think that relaxation of *Saucier*'s mandate is likely to result in a proliferation of damages claims against local governments. Cf. Brief for National Association of Counties et al. as *Amici Curiae* 29, 30 ("[T]o the extent that a rule permitting courts to bypass the merits makes it more difficult for civil rights plaintiffs to pursue novel claims, they will have greater reason to press custom, policy, or practice [damages] claims against local governments"). It is hard to see how the *Saucier* procedure could have a significant effect on a civil rights plaintiff's decision whether to seek damages only from a municipal employee or also from the municipality. Whether the *Saucier* procedure is mandatory or discretionary, the plaintiff will presumably take into account the possibility that the individual defendant will be held to have qualified immunity, and presumably the plaintiff will seek damages from the municipality as well as the individual employee if the benefits of doing so (any increase in the likelihood of recovery or collection of damages) outweigh the litigation costs.

Nor do we think that allowing the lower courts to exercise their discretion with respect to the *Saucier* procedure will spawn "a new cottage industry of litigation ... over the standards for deciding whether to reach the merits in a given case." Brief for National Association of Counties, *supra*, at 29, 30. It does not appear that such a "cottage industry" developed prior to *Saucier,* and we see no reason why our decision today should produce such a result.

IV

Turning to the conduct of the officers here, we hold that petitioners are entitled to qualified immunity because the entry did not violate clearly established law. An officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the ***244** Fourth Amendment. See *Anderson,* 483 U.S., at 641, 107 S.Ct. 3034. This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne,* 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (internal quotation marks omitted); see *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) ("[Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful" (internal quotation marks omitted)).

When the entry at issue here occurred in 2002, the "consent-once-removed" doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. See, *e.g., United States v. Diaz,* 814 F.2d 454, 459 (CA7), cert. denied, 484 U.S. 857, 108 S.Ct. 166, 98 L.Ed.2d 120 (1987); *United States v. Bramble,* 103 F.3d 1475 (C.A.9 1996); *United States v. Pollard,* 215 F.3d 643, 648–649 (CA6), cert. denied, 531 U.S. 999, 121 S.Ct. 498, 148 L.Ed.2d 469 (2000); ****823** *State v. Henry,* 133 N.J. 104, 627 A.2d 125 (1993); *State v. Johnston,* 184 Wis.2d 794, 518 N.W.2d 759 (1994). It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants. See *United States v. Paul,* 808 F.2d 645, 648 (1986). The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit, see *United States v. Yoon,* 398 F.3d 802, 806–808, cert. denied, 546 U.S. 977, 126 S.Ct. 548, 163 L.Ed.2d 460 (2005), and prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision.

The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on "consent-once-removed" entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their ***245** actions. In *Wilson,* we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 526 U.S., at 618, 119 S.Ct. 1692. Likewise, here, where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

Because the unlawfulness of the officers' conduct in this case was not clearly established, petitioners are entitled to qualified immunity. We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

All Citations

555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565, 77 USLW 4068, 09 Cal. Daily Op. Serv. 755, 2009 Daily Journal D.A.R. 922, 21 Fla. L. Weekly Fed. S 588

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 See *Harlow v. Fitzgerald,* 457 U.S. 800, 818, and n. 30, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (noting that the Court's decisions equate the qualified immunity of state officials sued under 42 U.S.C. § 1983 with the immunity of federal officers sued directly under the Constitution).

2 In *Bunting,* the Court of Appeals followed the *Saucier* two-step protocol and first held that the Virginia Military Institute's use of the word "God" in a "supper roll call" ceremony violated the Establishment Clause, but then granted the defendants qualified immunity

because the law was not clearly established at the relevant time. *Mellen v. Bunting,* 327 F.3d 355, 365–376 (C.A.4 2003), cert. denied, 541 U.S. 1019, 124 S.Ct. 1750, 158 L.Ed.2d 636 (2004). Although they had a judgment in their favor below, the defendants asked this Court to review the adverse constitutional ruling. Dissenting from the denial of certiorari, Justice SCALIA, joined by Chief Justice Rehnquist, criticized "a perceived procedural tangle of the Court's own making." 541 U.S., at 1022, 124 S.Ct. 1750. The "tangle" arose from the Court's " 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below, a practice that insulates from review adverse merits decisions that are "locked inside" favorable qualified immunity rulings. *Id*., at 1022, 1023, 1024, 124 S.Ct. 1750.

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Ashcroft v. al-Kidd

563 U.S. 731 (2011)

131 S.Ct. 2074
Supreme Court of the United States

John D. ASHCROFT, Petitioner,

v.

Abdullah AL–KIDD.

No. 10–98.
|
Argued March 2, 2011.
|
Decided May 31, 2011.

Synopsis

Background: Arrestee brought *Bivens* action against former Attorney General, alleging defendant created practice under which federal material-witness statute was unlawfully employed to investigate or preemptively detain him for suspected terrorist activities. The United States District Court for the District of Idaho, 2006 WL 5429570, Edward J. Lodge, J., entered order denying defendant's motion to dismiss, and he appealed. The United States Court of Appeals for the Ninth Circuit, Milan D. Smith, Jr., Circuit Judge, 580 F.3d 949, affirmed in part and reversed in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

under the objective test for the reasonableness of a seizure, there was no Fourth Amendment violation, because the arrest, pursuant to a warrant issued under the federal material-witness statute, was based on individualized suspicion, and

the Attorney General did not violate clearly established law, for purposes of qualified immunity.

Reversed and remanded.

Justice Kennedy filed a concurring opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined in part.

Justice Ginsburg filed an opinion concurring in the judgment, in which Justices Breyer and Sotomayor joined.

Justice Sotomayor filed an opinion concurring in the judgment, in which Justices Ginsburg and Breyer joined.

Justice Kagan took no part in the consideration or decision of the case.

****2077** *Syllabus*[*]

Respondent al-Kidd alleges that, after the September 11th terrorist attacks, then-Attorney General Ashcroft authorized federal officials to detain terrorism suspects using the federal material-witness statute, 18 U.S.C. § 3144. He claims that this pretextual detention policy led to his material-witness arrest as he was boarding a plane to Saudi Arabia. To secure the warrant, federal officials had told a Magistrate Judge that information "crucial" to Sami Omar al-Hussayen's prosecution would be lost if al-Kidd boarded his flight. Prosecutors never called al-Kidd as a witness, and (as he alleges) never meant to do so. Al–Kidd filed

suit pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619, challenging the constitutionality of Ashcroft's alleged policy. The District Court denied Ashcroft's motion to dismiss on absolute and qualified-immunity grounds. The Ninth Circuit affirmed, holding that the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing, and that Ashcroft could not claim qualified or absolute immunity.

Held :

1. The objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive. Pp. 2080 – 2084.

(a) Qualified immunity shields a government official from money damages unless (1) the official violated a statutory or constitutional right, and (2) that right was "clearly established" at the time of the challenged conduct. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396. Where, as here, a court considers both prongs of this inquiry, this Court has the discretion to correct the lower court's errors at each step. P. 2080.

(b) Whether a detention is reasonable under the Fourth Amendment "is predominantly an objective inquiry." *Indianapolis v. Edmond,* 531 U.S. 32, 47, 121 S.Ct. 447, 148 L.Ed.2d 333. Courts ask whether "the circumstances, viewed objectively, justify [the challenged] action." *Scott v. United States,* 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168. Except for cases that involve special needs, *e.g., Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564, or administrative searches, *e.g., Michigan v. Clifford,* 464 U.S. 287, 294, 104 S.Ct. 641, 78 L.Ed.2d 477, this Court has almost uniformly rejected invitations to probe subjective intent. The Court of Appeals was ****2078** mistaken in believing that *Edmond* established that " 'programmatic purpose' is relevant to Fourth Amendment analysis of programs of seizures without probable cause." 580 F.3d 949, 968. It was not the absence of probable cause that triggered *Edmond* 's invalidating-purpose inquiry, but the checkpoints' failure to be based on "individualized suspicion." 531 U.S., at 47, 121 S.Ct. 447. Here a neutral Magistrate Judge issued a warrant authorizing al-Kidd's arrest, and the affidavit accompanying the warrant application gave individualized reasons to believe that he was a material witness who would soon disappear. A warrant based on individualized suspicion grants more protection than existed in most of this Court's cases eschewing inquiries into intent, *e.g., Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89, and *Terry v. Ohio,* 392 U.S. 1, 21–22, 88 S.Ct. 1868, 20 L.Ed.2d 889. Al–Kidd's contrary, narrow reading of those cases is rejected. Because he concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretext; there is no Fourth Amendment violation here. Pp. 2080 – 2083.

2. Ashcroft did not violate clearly established law and thus is entitled to qualified immunity. A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523. Here, the asserted constitutional right falls far short of that threshold. At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional. The Ninth Circuit's reliance on a District Court's footnoted dictum, irrelevant cases from this Court, and the Fourth Amendment's broad purposes and history is rejected. Because Ashcroft did not violate clearly established law, the question whether he enjoys absolute immunity need not be addressed. Pp. 2083 – 2085.

580 F.3d 949, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined as to Part I, *post*, pp. 2085 – 2087. GINSBURG, J., filed an opinion concurring in the judgment, in which BREYER and SOTOMAYOR, JJ., joined, *post*, pp. 2087 – 2089. SOTOMAYOR, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined, *post*, pp. 2089 – 2090. KAGAN, J., took no part in the consideration or decision of the case.

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Opinion

Justice SCALIA delivered the opinion of the Court.

***733** We decide whether a former Attorney General enjoys immunity from suit for allegedly authorizing federal prosecutors to obtain valid material-witness warrants for detention of terrorism suspects whom they would otherwise lack probable cause to arrest.

I

The federal material-witness statute authorizes judges to "order the arrest of [a] person" whose testimony "is material in a criminal proceeding ... if it is shown that it may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144. Material witnesses enjoy the same constitutional right to pretrial release as other federal detainees, and federal law requires release if their testimony "can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice." *Ibid.*

***734** Because this case arises from a motion to dismiss, we accept as true the factual allegations in Abdullah al-Kidd's complaint. The complaint alleges that, in the aftermath of the September 11th terrorist attacks, then-Attorney General John Ashcroft authorized federal prosecutors and law enforcement officials to use the material-witness statute to detain individuals with suspected ties to terrorist organizations. It is alleged that federal officials had no intention of calling most of these individuals as witnesses, and that they were detained, at Ashcroft's direction, because federal officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime.

It is alleged that this pretextual detention policy led to the material-witness arrest of al-Kidd, a native-born United States citizen. FBI agents apprehended him in March 2003 as he checked in for a flight to Saudi Arabia. Two days earlier, federal officials had informed a Magistrate Judge that, if al-Kidd boarded his flight, they believed information "crucial" to the prosecution of Sami Omar al-Hussayen would be lost. App. 64. Al–Kidd remained in federal custody for 16 days and on supervised release until al-Hussayen's trial concluded 14 months later. Prosecutors never called him as a witness.

In March 2005, al-Kidd filed this *Bivens* action, see *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), to challenge the constitutionality of Ashcroft's alleged policy; he also asserted several other claims not relevant here against Ashcroft and others. Ashcroft filed a motion to dismiss based on absolute and qualified immunity, which the District Court denied. A divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, holding that the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing, and that Ashcroft could not claim qualified or absolute immunity. See 580 F.3d 949 (2009).

****2080** ***735** Judge Bea dissented, *id.*, at 981, and eight judges dissented from the denial of rehearing en banc, see 598 F.3d 1129, 1137, 1142 (2010). We granted certiorari, 562 U.S. 980, 131 S.Ct. 415, 178 L.Ed.2d 321 (2010).

II

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). We recently reaffirmed that lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. See *Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

Courts should think carefully before expending "scarce judicial resources" to resolve difficult and novel questions of constitutional or statutory interpretation that will "have no effect on the outcome of the case." *Id.,* at 236–237, 129 S.Ct. 808; see *id.,* at 237–242, 129 S.Ct. 808. When, however, a court of appeals does address both prongs of qualified-immunity analysis, we have discretion to correct its errors at each step. Although not necessary to reverse an erroneous judgment, doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote. The former occurs when the constitutional-law question is wrongly decided; the latter when what is not clearly established is held to be so. In this case, the Court of Appeals' analysis at both steps of the qualified-immunity inquiry needs correction.

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." An arrest, of course, qualifies as a "seizure" of a "person" under this provision, ***736** *Dunaway v. New York,* 442 U.S. 200, 207–208, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), and so must be reasonable under the circumstances. Al–Kidd does not assert that Government officials would have acted unreasonably if they had used a material-witness warrant to arrest him for the purpose of securing his testimony for trial. See Brief for Respondent 16–17; Tr. of Oral Arg. 20–22. He contests, however (and the Court of Appeals here rejected), the reasonableness of using the warrant to detain him as a suspected criminal.

Fourth Amendment reasonableness "is predominantly an objective inquiry." *Indianapolis v. Edmond,* 531 U.S. 32, 47, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). We ask whether "the circumstances, viewed objectively, justify [the challenged] action." *Scott v. United States,* 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). If so, that action was reasonable "*whatever* the subjective intent" motivating the relevant officials. *Whren v. United States,* 517 U.S. 806, 814, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts, *Bond v. United States,* 529 U.S. 334, 338, n. 2, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000); and it promotes evenhanded, uniform enforcement of the law, *Devenpeck v. Alford,* 543 U.S. 146, 153–154, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004).

Two "limited exception[s]" to this rule are our special-needs and administrative-search cases, where "actual motivations" do matter. *United States v.* ****2081** *Knights,* 534 U.S. 112, 122, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (internal quotation marks

omitted). A judicial warrant and probable cause are not needed where the search or seizure is justified by "special needs, beyond the normal need for law enforcement," such as the need to deter drug use in public schools, *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (internal quotation marks omitted), or the need to ensure that railroad employees engaged in train operations are not under the influence of drugs or alcohol, *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); and where the search or seizure is in execution of an administrative warrant authorizing, for example, an inspection of fire-damaged premises to determine the cause, ***737** *Michigan v. Clifford,* 464 U.S. 287, 294, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984) (plurality opinion), or an inspection of residential premises to ensure compliance with a housing code, *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 535–538, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). But those exceptions do not apply where the officer's purpose is not to attend to the special needs or to the investigation for which the administrative inspection is justified. See *Whren, supra,* at 811–812, 116 S.Ct. 1769. The Government seeks to justify the present arrest on the basis of a properly issued judicial warrant—so that the special-needs and administrative-inspection cases cannot be the basis for a purpose inquiry here.

Apart from those cases, we have almost uniformly rejected invitations to probe subjective intent. See *Brigham City v. Stuart,* 547 U.S. 398, 404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). There is one category of exception, upon which the Court of Appeals principally relied. In *Edmond, supra*, we held that the Fourth Amendment could not condone suspicionless vehicle checkpoints set up for the purpose of detecting illegal narcotics. Although we had previously approved vehicle checkpoints set up for the purpose of keeping off the road unlicensed drivers, *Delaware v. Prouse,* 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), or alcohol-impaired drivers, *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990); and for the purpose of interdicting those who illegally cross the border, *United States v. Martinez–Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); we found the drug-detection purpose in *Edmond* invalidating because it was "ultimately indistinguishable from the general interest in crime control," 531 U.S., at 44, 121 S.Ct. 447. In the Court of Appeals' view, *Edmond* established that " 'programmatic purpose' is relevant to Fourth Amendment analysis of programs of seizures without probable cause." 580 F.3d, at 968.

That was mistaken. It was not the absence of probable cause that triggered the invalidating-purpose inquiry in *Edmond*. To the contrary, *Edmond* explicitly said that it would approve checkpoint stops for "general crime control ***738** purposes" that were based upon merely "some quantum of individualized suspicion." 531 U.S., at 47, 121 S.Ct. 447. Purpose was relevant in *Edmond* because "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken *pursuant to a general scheme without individualized suspicion,*" *id.,* at 45–46, 121 S.Ct. 447 (emphasis added).[1]

****2082** Needless to say, warrantless, "suspicionless intrusions pursuant to a general scheme," *id.,* at 47, 121 S.Ct. 447, are far removed from the facts of this case. A warrant issued by a neutral Magistrate Judge authorized al-Kidd's arrest. The affidavit accompanying the warrant application (as al-Kidd concedes) gave individualized reasons to believe that he was a material witness and that he would soon disappear. The existence of a judicial warrant based on individualized suspicion takes this case outside the domain of not only our special-needs and administrative-search cases, but of *Edmond* as well.

A warrant based on individualized suspicion[2] in fact grants more protection against the malevolent and the incompetent than existed in most of our cases eschewing inquiries into intent. In *Whren, supra*, at 813, 116 S.Ct. 1769, and *Devenpeck, supra*, at 153, 125 S.Ct. 588, we declined to probe the motives behind seizures supported by probable cause but lacking a warrant approved by a detached magistrate. ***739** *Terry v. Ohio,* 392 U.S. 1, 21–22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Knights,* 534 U.S., at 121–122, 122 S.Ct. 587, applied an objective standard to warrantless searches justified by a lesser showing of reasonable suspicion. We review even some suspicionless searches for objective reasonableness. See *Bond,* 529 U.S., at 335–336, 338, n. 2, 120 S.Ct. 1462. If concerns about improper motives and pretext do not justify subjective inquiries in those less protective contexts, we see no reason to adopt that inquiry here.

Al–Kidd would read our cases more narrowly. He asserts that *Whren* establishes that we ignore subjective intent only when there exists "probable cause to believe that a violation of law has occurred," 517 U.S., at 811, 116 S.Ct. 1769—which was not the case here. That is a distortion of *Whren*. Our unanimous opinion held that we would not look behind an objectively

reasonable traffic stop to determine whether racial profiling or a desire to investigate other potential crimes was the real motive. See *id.,* at 810, 813, 116 S.Ct. 1769. In the course of our analysis, we dismissed Whren's reliance on our inventory-search and administrative-inspection cases by explaining that those cases do not "endors[e] the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred," *id.,* at 811, 116 S.Ct. 1769 But to say that ulterior motives do *not* invalidate a search that is legitimate because of probable cause to believe a crime has occurred is not to say that it *does* invalidate all searches that are legitimate for other reasons.

"[O]nly an undiscerning reader," *ibid.,* would think otherwise. We referred to probable cause to believe that a violation of law had occurred because that was the legitimating factor in the case at hand. But the analysis of our opinion swept broadly to reject inquiries into motive generally. See *id.,* at 812–815, 116 S.Ct. 1769. ****2083** We remarked that our special-needs and administrative-inspection cases are unusual in their concern for pretext, and do nothing more than "explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory ***740** or administrative regulation, is not accorded to searches that are *not* made for those purposes," *id.,* at 811–812, 116 S.Ct. 1769. And our opinion emphasized that we had at that time (prior to *Edmond*) rejected every request to examine subjective intent outside the narrow context of special needs and administrative inspections. See 517 U.S., at 812, 116 S.Ct. 1769. Thus, al-Kidd's approach adds an "only" to a sentence plucked from the *Whren* opinion, and then elevates that sentence (as so revised) over the remainder of the opinion, and over the consistent holdings of our other cases.

Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation.[3] Efficient[4] and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer.

***741** B

A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would [have understood] that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. See *ibid.; Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). The constitutional question in this case falls far short of that threshold.

At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional. A district-court opinion had suggested, in a footnoted dictum devoid of supporting citation, that using such a warrant for preventive detention of suspects "is an illegitimate use of the statute"—implying (we accept for the ****2084** sake of argument) that the detention would therefore be unconstitutional. *United States v. Awadallah,* 202 F.Supp.2d 55, 77, n. 28 (S.D.N.Y.2002). The Court of Appeals thought nothing could "have given John Ashcroft fair[er] warning" that his conduct violated the Fourth Amendment, because the footnoted dictum "*call[ed] out Ashcroft by name* "*!* 580 F.3d, at 972–973 (internal quotation marks omitted; emphasis added). We will indulge the assumption (though it does not seem to us realistic) that Justice Department lawyers bring to the Attorney General's personal attention all district judges' footnoted speculations that boldly "call him out by name." On that assumption, would it prove that for him (and for him only?) it became clearly established that pretextual use of the material-witness statute rendered the arrest unconstitutional? An extraordinary proposition. Even a district judge's *ipse dixit* of a holding is not "controlling authority" in any jurisdiction, much less in the entire United States; and his *ipse dixit* of a footnoted dictum falls far short ***742** of what is necessary absent controlling authority: a robust "consensus of cases of persuasive authority." *Wilson v. Layne,* 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

The Court of Appeals' other cases "clearly establishing" the constitutional violation are, of course, those we rejected as irrelevant in our discussion of whether there was any constitutional violation at all. And the Court of Appeals' reference to those cases here makes the same error of assuming that purpose is only disregarded when there is probable cause to suspect a violation of law.

The Court of Appeals also found clearly established law lurking in the broad "history and purposes of the Fourth Amendment." 580 F.3d, at 971. We have repeatedly told courts—and the Ninth Circuit in particular, see *Brosseau v. Haugen,* 543 U.S. 194, 198–199, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) *(per curiam)*—not to define clearly established law at a high level of generality. See also, *e.g., Wilson, supra,* at 615, 119 S.Ct. 1692; *Anderson, supra,* at 639–640, 107 S.Ct. 3034; cf. *Sawyer v. Smith,* 497 U.S. 227, 236, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established. See *Saucier v. Katz,* 533 U.S. 194, 201–202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Wilson, supra,* at 615, 119 S.Ct. 1692.

The same is true of the Court of Appeals' broad historical assertions. The Fourth Amendment was a response to the English Crown's use of general warrants, which often allowed royal officials to search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown. See *Stanford v. Texas,* 379 U.S. 476, 481–485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). According to the Court of Appeals, Ashcroft should have seen that a pretextual warrant similarly "gut[s] the substantive protections of the Fourth Amendmen[t]" and allows the State "to arrest upon the executive's mere suspicion." 580 F.3d, at 972.

Ashcroft must be forgiven for missing the parallel, which escapes us as well. The principal evil of the general warrant ***743** was addressed by the Fourth Amendment's particularity requirement, *Stanford, supra,* at 485, 85 S.Ct. 506, which Ashcroft's alleged policy made no effort to evade. The warrant authorizing al-Kidd's arrest named al-Kidd and only al-Kidd. It might be argued, perhaps, that when, in response to the English abuses, the Fourth Amendment said that warrants could only issue "on probable cause" it meant only probable ****2085** cause to suspect a violation of law, and not probable cause to believe that the individual named in the warrant was a material witness. But that would make *all* arrests pursuant to material-witness warrants unconstitutional, whether pretextual or not—and that is not the position taken by al-Kidd in this case.

While featuring a District Court's footnoted dictum, the Court of Appeals made no mention of this Court's affirmation in *Edmond* of the "predominan[t]" rule that reasonableness is an objective inquiry, 531 U.S., at 47, 121 S.Ct. 447. Nor did it mention *Whren* 's and *Knights* ' statements that subjective intent mattered in a very limited subset of our Fourth Amendment cases; or *Terry* 's objective evaluation of investigatory searches premised on reasonable suspicion rather than probable cause; or *Bond* 's objective evaluation of a suspicionless investigatory search. The Court of Appeals seems to have cherry-picked the aspects of our opinions that gave colorable support to the proposition that the unconstitutionality of the action here was clearly established.

Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley, supra*, at 341, 106 S.Ct. 1092. Ashcroft deserves neither label, not least because eight Court of Appeals judges agreed with his judgment in a case of first impression. See *Wilson, supra,* at 618, 119 S.Ct. 1692. He deserves qualified immunity even assuming—contrafactually—that his alleged detention policy violated the Fourth Amendment.

* * *

***744** We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive. Because Ashcroft did not violate clearly established law, we need not address the more difficult question whether he enjoys absolute immunity. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice KENNEDY, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join as to Part I, concurring.
I join the opinion of the Court in full. In holding that the Attorney General could be liable for damages based on an unprecedented constitutional rule, the Court of Appeals for the Ninth Circuit disregarded the purposes of the doc-trine of qualified immunity. This concurring opinion makes two additional observations.

I

The Court's holding is limited to the arguments presented by the parties and leaves unresolved whether the Government's use of the material-witness statute in this case was lawful. See *ante,* at 2083 (noting that al-Kidd "does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant"). Under the statute, a magistrate judge may issue a warrant to arrest someone as a material witness upon a showing by affidavit that "the testimony of a person is material in a criminal proceeding" and "that it may become impracticable to secure the ***745** presence of the person by subpoena." 18 U.S.C. § 3144. The ****2086** scope of the statute's lawful authorization is uncertain. For example, a law-abiding citizen might observe a crime during the days or weeks before a scheduled flight abroad. It is unclear whether those facts alone might allow police to obtain a material witness warrant on the ground that it "may become impracticable" to secure the person's presence by subpoena. *Ibid.* The question becomes more difficult if one further assumes the traveler would be willing to testify if asked; and more difficult still if one supposes that authorities delay obtaining or executing the warrant until the traveler has arrived at the airport. These possibilities resemble the facts in this case. See *ante,* at 2079 – 2080.

In considering these issues, it is important to bear in mind that the material-witness statute might not provide for the issuance of warrants within the meaning of the Fourth Amendment's Warrant Clause. The typical arrest warrant is based on probable cause that the arrestee has committed a crime; but that is not the standard for the issuance of warrants under the material-witness statute. See *ante,* at 2084 – 2085 (reserving the possibility that probable cause for purposes of the Fourth Amendment's Warrant Clause means "only probable cause to suspect a violation of law"). If material witness warrants do not qualify as "Warrants" under the Fourth Amendment, then material witness arrests might still be governed by the Fourth Amendment's separate reasonableness requirement for seizures of the person. See *United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). Given the difficulty of these issues, the Court is correct to address only the legal theory put before it, without further exploring when material witness arrests might be consistent with statutory and constitutional requirements.

II

The fact that the Attorney General holds a high office in the Government must inform what law is clearly established ***746** for the purposes of this case. *Mitchell v. Forsyth,* 472 U.S. 511, 525, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Some federal officers perform their functions in a single jurisdiction, say, within the confines of one State or one federal judicial district. They "reasonably can anticipate when their conduct may give rise to liability for damages" and so are expected to adjust their behavior in accordance with local precedent. *Davis v. Scherer,* 468 U.S. 183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); see also *Anderson v. Creighton,* 483 U.S. 635, 639–640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In contrast the Attorney General occupies a national office and so sets policies implemented in many jurisdictions throughout the country. The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law. While it may be clear that one court of appeals has approved a certain course of conduct, other courts of appeals may have disapproved it, or at least reserved the issue.

When faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction where the action is taken. As we have explained, qualified immunity is lost when plaintiffs point either to "cases of controlling authority in their jurisdiction at the time of the incident" or to "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne,* 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999); see also *ante,* at 2083 – 2084. These standards ensure the officer has "fair and clear warning" of ****2087** what the Constitution requires. *United States v. Lanier,* 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

A national officeholder intent on retaining qualified immunity need not abide by the most stringent standard adopted anywhere in the United States. And the national officeholder need not guess at when a relatively small set of appellate precedents have established a binding legal rule. If national officeholders were subject to personal liability ***747** whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority. The consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security. See *Ashcroft v. Iqbal,* 556 U.S. 662, 685, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009). Furthermore, too expansive a view of "clearly established law" would risk giving local judicial determinations the effect of rules with *de facto* national significance, contrary to the normal process of ordered appellate review.

The proceedings in this case illustrate these concerns. The Court of Appeals for the Ninth Circuit appears to have reasoned that a Federal District Court sitting in New York had authority to establish a legal rule binding on the Attorney General and, therefore, on federal law enforcement operations conducted nationwide. See 580 F.3d 949, 972–973 (2009). Indeed, this case involves a material witness warrant issued in Boise, Idaho, and an arrest near Washington, D.C. Of course, district court decisions are not precedential to this extent. *Ante,* at 2084 – 2085. But nationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.

Justice GINSBURG, with whom Justice BREYER and Justice SOTOMAYOR join, concurring in the judgment.
Is a former U.S. Attorney General subject to a suit for damages on a claim that he instructed subordinates to use the material-witness statute, 18 U.S.C. § 3144, as a pretext to detain terrorist suspects preventively? Given *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), I agree with the Court that no "clearly established law" renders Ashcroft answerable in damages for the abuse of authority al-Kidd charged. *Ante,* at 2085. But I join Justice SOTOMAYOR in objecting to the Court's disposition of al-Kidd's Fourth Amendment ***748** claim on the merits; as she observes, *post,* at 2089 – 2090 (opinion concurring in judgment), that claim involves novel and trying questions that will "have no effect on the outcome of th[is] case." *Pearson v. Callahan,* 555 U.S. 223, 236–237, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

In addressing al-Kidd's Fourth Amendment claim against Ashcroft, the Court assumes at the outset the existence of a *validly obtained* material witness warrant. *Ante,* at 2079, 2085. That characterization is puzzling. See *post,* at 2090 (opinion of SOTOMAYOR, J.).[1] Is a warrant "validly obtained" when the affidavit on which it is based fails to inform the issuing Magistrate Judge that "the Government has no intention of using [al-Kidd as a witness] at [another's] trial," *post,* at 2090, and does not disclose that al-Kidd had cooperated with FBI agents each of the several times they had asked to interview him, App. 26?

****2088** Casting further doubt on the assumption that the warrant was validly obtained, the Magistrate Judge was not told that al-Kidd's parents, wife, and children were all citizens and residents of the United States. In addition, the affidavit misrepresented that al-Kidd was about to take a one-way flight to Saudi Arabia, with a first-class ticket costing approximately $5,000; in fact, al-Kidd had a round-trip, coach-class ticket that cost $1,700.[2] Given these omissions and ***749** misrepresentations, there is strong cause to question the Court's opening assumption—a valid material witness warrant—and equally strong reason to conclude that a merits determination was neither necessary nor proper.[3]

****2089** ***750** I also agree with Justice KENNEDY that al-Kidd's treatment presents serious questions, unaddressed by the Court, concerning "the [legality of] the Government's use of the material-witness statute in this case." *Ante,* at 2085 (concurring

opinion). In addition to the questions Justice KENNEDY poses, and even if the initial material witness classification had been proper, what even arguably legitimate basis could there be for the harsh custodial conditions to which al-Kidd was subjected: Ostensibly held only to secure his testimony, al-Kidd was confined in three different detention centers during his 16 days' incarceration, kept in high-security cells lit 24 hours a day, strip-searched and subjected to body-cavity inspections on more than one occasion, and handcuffed and shackled about his wrists, legs, and waist. App. 29–36; cf. *Bell v. Wolfish,* 441 U.S. 520, 539, n. 20, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, ***751** employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.").

However circumscribed al-Kidd's *Bivens* claim against Ashcroft may have been, see *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *ante,* at 2083 (majority opinion); *ante,* at 2085 (KENNEDY, J., concurring), his remaining claims against the FBI agents who apprehended him invite consideration of the issues Justice KENNEDY identified.[4] His challenges to the brutal conditions of his confinement have been settled. But his ordeal is a grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times.

Justice SOTOMAYOR, with whom Justice GINSBURG and Justice BREYER join, concurring in the judgment.
I concur in the Court's judgment reversing the Court of Appeals because I agree with the majority's conclusion that Ashcroft did not violate clearly established law. I cannot join the majority's opinion, however, because it unnecessarily "resolve[s][a] ****2090** difficult and novel questio[n] of constitutional ... interpretation that will 'have no effect on the outcome of the case.' " *Ante,* at 2081 (quoting *Pearson v. Callahan,* 555 U.S. 223, 237, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)).

Whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is, in my view, a closer question than the majority's ***752** opinion suggests. Although the majority is correct that a government official's subjective intent is generally "irrelevant in determining whether that officer's actions violate the Fourth Amendment," *Bond v. United States,* 529 U.S. 334, 338, n. 2, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000), none of our prior cases recognizing that principle involved prolonged detention of an individual without probable cause to believe he had committed any criminal offense. We have never considered whether an official's subjective intent matters for purposes of the Fourth Amendment in that novel context, and we need not and should not resolve that question in this case. All Members of the Court agree that, whatever the merits of the underlying Fourth Amendment question, Ashcroft did not violate clearly established law.

The majority's constitutional ruling is a narrow one premised on the existence of a "valid material-witness warran[t]," *ante,* at 2079—a premise that, at the very least, is questionable in light of the allegations set forth in al-Kidd's complaint. Based on those allegations, it is not at all clear that it would have been "impracticable to secure [al-Kidd's] presence ... by subpoena" or that his testimony could not "adequately be secured by deposition." 18 U.S.C. § 3144; see First Amended Complaint in No. 05–093–EJL, ¶ 55, App. 26 ("Mr. al-Kidd would have complied with a subpoena had he been issued one or agreed to a deposition"). Nor is it clear that the affidavit supporting the warrant was sufficient; its failure to disclose that the Government had no intention of using al-Kidd as a witness at trial may very well have rendered the affidavit deliberately false and misleading. Cf. *Franks v. Delaware,* 438 U.S. 154, 155–156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The majority assumes away these factual difficulties, but in my view, they point to the artificiality of the way the Fourth Amendment question has been presented to this Court and provide further reason to avoid rendering an unnecessary holding on the constitutional question.

***753** I also join Part I of Justice KENNEDY's concurring opinion. As that opinion makes clear, this case does not present an occasion to address the proper scope of the material witness statute or its constitutionality as applied in this case. Indeed, nothing in the majority's opinion today should be read as placing this Court's *imprimatur* on the actions taken by the Government against al-Kidd. *Ante,* at 2085 (KENNEDY, J., concurring) ("The Court's holding is limited to the arguments presented by the parties and leaves unresolved whether the Government's use of the material-witness statute in this case was lawful").

All Citations

563 U.S. 731, 131 S.Ct. 2074, 179 L.Ed.2d 1149, 79 USLW 4393, 11 Cal. Daily Op. Serv. 6468, 2011 Daily Journal D.A.R. 7777, 22 Fla. L. Weekly Fed. S 1057

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The Court of Appeals also relied upon *Ferguson v. Charleston,* 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001), which held unconstitutional a program of mandatory drug testing of maternity patients. Like *Edmond,* that case involved a general scheme of searches without individualized suspicion. 532 U.S., at 77, n. 10, 121 S.Ct. 1281.

2 Justice GINSBURG suggests that our use of the word "suspicion" is peculiar because that word "ordinarily" means "that the person suspected has engaged in wrongdoing." *Post,* at 2088, n. 3 (opinion concurring in judgment). We disagree. No usage of the word is more common and idiomatic than a statement such as "I have a suspicion he knows something about the crime," or even "I have a suspicion she is throwing me a surprise birthday party." The many cases cited by Justice GINSBURG, *post,* at 2088, n. 3, which use the neutral word "suspicion" *in connection with* wrongdoing, prove nothing except that searches and seizures for reasons other than suspected wrongdoing are rare.

3 The concerns of Justices GINSBURG and SOTOMAYOR about the validity of the warrant in this case are beside the point. See *post,* at 2087 – 2088 (GINSBURG, J., concurring in judgment); *post,* at 2088 (SOTOMAYOR, J., concurring in judgment). The validity of the warrant is not *our* "opening assumption," *post,* at 2088 (GINSBURG, J., concurring in judgment); it is the premise of al-Kidd's argument. Al–Kidd does not claim that Ashcroft is liable because the FBI agents failed to obtain a valid warrant. He takes the validity of the warrant as a given, and argues that his arrest nevertheless violated the Constitution because it was motivated by an illegitimate purpose. His separate Fourth Amendment and statutory claims against the FBI agents who sought the material-witness warrant, which are the focus of both concurrences, are not before us.

4 We may note in passing that al-Kidd alleges that the Attorney General authorized the use of material-witness warrants for detention of suspected terrorists, but not that he forbade the use of those warrants to detain material witnesses. Which means that if al-Kidd's inquiry into actual motive is accepted, mere determination that the Attorney General promulgated the alleged policy would not alone decide the case. Al–Kidd would also have to prove that the officials who sought his material-arrest warrant were motivated by Ashcroft's policy, not by a desire to call al-Kidd as a witness.

1 Nowhere in al-Kidd's complaint is there any concession that the warrant gained by the FBI agents was validly obtained. But cf. *ante,* at 2083, n. 3 (majority opinion).

2 Judicial officers asked to issue material witness warrants must determine whether the affidavit supporting the application shows that "the testimony of a person is material in a criminal proceeding" and that "it may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144. Even if these conditions are met, issuance of the warrant is discretionary. *Ibid.* ("judicial officer *may* order the arrest of the person" (emphasis added)). Al–Kidd's experience illustrates the importance of vigilant exercise of this checking role by the judicial officer to whom the warrant application is presented.

The affidavit used to secure al-Kidd's detention was spare; it did not state with particularity the information al-Kidd purportedly possessed, nor did it specify how al-Kidd's knowledge would be material to Sami Omar al-Hussayen's prosecution. As to impracticability, the affidavit contained only this unelaborated statement: "It is believed that if Al–Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena." App. 64. Had the Magistrate Judge insisted on more concrete showings of materiality and impracticability, al-Kidd might have been spared the entire ordeal.

3 The Court thrice states that the material witness warrant for al-Kidd's arrest was "based on individualized suspicion." *Ante,* at 2082, 2083. The word "suspicion," however, ordinarily indicates that the person suspected has engaged in wrongdoing. See Black's Law Dictionary 1585 (9th ed.2009) (defining "reasonable suspicion" to mean "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity"). Material witness status does not "involv[e] suspicion, or lack of suspicion," of the individual so identified. See *Illinois v. Lidster,* 540 U.S. 419, 424–425, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004).

This Court's decisions, until today, have uniformly used the term "individualized suspicion" to mean "individualized suspicion *of wrongdoing*." See *Indianapolis v. Edmond,* 531 U.S. 32, 37, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (emphasis added); *Chandler v. Miller,* 520 U.S. 305, 313, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (same). See also, *e.g., Brigham City v. Stuart,* 547 U.S. 398, 405, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (referring to "programmatic searches conducted without individualized suspicion—such as checkpoints to combat drunk driving or drug trafficking"); *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty.*

v. Earls, 536 U.S. 822, 830, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) ("finding of individualized suspicion may not be necessary when a school conducts drug testing"); *Whren v. United States,* 517 U.S. 806, 817–818, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (observed traffic violations give rise to individualized suspicion); *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 451, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) ("Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard."); *Maryland v. Buie,* 494 U.S. 325, 334–335, n. 2, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) ("*Terry* [*v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968),] requires reasonable, individualized suspicion before a frisk for weapons can be conducted."); *Treasury Employees v. Von Raab,* 489 U.S. 656, 668, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) ("[I]n certain limited circumstances, the Government's need to discover ... latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify [search that intrudes] on privacy ... without any measure of individualized suspicion."); *O'Connor v. Ortega,* 480 U.S. 709, 726, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) ("petitioners had an 'individualized suspicion' of misconduct by Dr. Ortega"); *United States v. Montoya de Hernandez,* 473 U.S. 531, 538, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) ("Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion ...."); *New Jersey v. T.L. O.,* 469 U.S. 325, 342, n. 8, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) ("the search of T.L. O.'s purse was based upon an individualized suspicion that she had violated school rules"); *Michigan v. Summers,* 452 U.S. 692, 699, n. 9, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) ("police executing a search warrant at a tavern could not ... frisk a patron unless the officers had individualized suspicion that the patron might be armed or dangerous").

The Court's suggestion that the term "individualized suspicion" is more commonly associated with "know[ing] something about [a] crime" or "throwing ... a surprise birthday party" than with criminal suspects, *ante,* at 2082, n. 2 (internal quotation marks omitted), is hardly credible. The import of the term in legal argot is not genuinely debatable. When the evening news reports that a murder "suspect" is on the loose, the viewer is meant to be on the lookout for the perpetrator, not the witness. Ashcroft understood the term as lawyers commonly do: He spoke of detaining material witnesses as a means to "tak[e] *suspected terrorists* off the street." App. 41 (internal quotation marks omitted).

4 The District Court determined that al-Kidd's factual allegations against FBI agents regarding their "misrepresentations and omissions in the warrant application, if true, would negate the possibility of qualified immunity [for those agents]." Memorandum Order in No. cv:05–093 (D Idaho, Sept. 27, 2006), p. 18. The agents took no appeal from this threshold denial of their qualified immunity plea.

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Estate of Reat v. Rodriguez
824 F.3d 960 (10th Cir. 2016)

824 F.3d 960
United States Court of Appeals, Tenth Circuit.

ESTATE OF Jimma Pal REAT; James Pal Reat; Rebecca Awok Diag; Ran Pal; Changkuoth Pal; and Joseph Kolong, Plaintiffs–Appellees,

v.

Juan Jesus RODRIGUEZ, individually, Defendant–Appellant.

No. 15-1001
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FILED May 31, 2016
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As Amended on Rehearing in part August 12, 2016
|
Reconsideration En Banc Denied August 12, 2016*

Synopsis

Background: Estate of automobile passenger, who was fatally shot by attackers after 911 operator told driver to return to city in which motorist and passenger were attacked, brought § 1983 action against operator. The United States District Court for the District of Colorado granted summary judgment in favor of operator on all constitutional claims except 14th Amendment substantive due process claim that was based on theory of state-created danger. Operator appealed.

The Court of Appeals, Tymkovich, Chief Judge, held that operator's conduct did not violate clearly defined contours of state-created danger doctrine, and thus operator was entitled to qualified immunity.

Reversed and remanded with instructions.

***962 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 1:12-CV-02531-REB-MEH)**

Attorneys and Law Firms

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Before TYMKOVICH, Chief Judge, MURPHY, and BACHARACH, Circuit Judges.

Opinion

TYMKOVICH, Chief Judge.

This case arises out of the fatal shooting of Jimma Pal Reat at a Denver intersection. Reat was killed after Denver 911 operator Juan Rodriguez directed him back into the path of his armed assailants. His estate sued the 911 operator, alleging civil rights claims pursuant to 42 U.S.C. § 1983 and various state law claims.

Rodriguez moved for summary judgment on all claims against him on the basis of qualified immunity. The district court granted summary judgment in his favor on all constitutional claims except for a Fourteenth Amendment substantive due process claim based on a theory of state-created ***963** danger. Under that claim, Reat's Estate contends Rodriguez used his governmental authority to subject him to the callous shooting that caused Reat's death.

We conclude the law was not clearly established such that a reasonable 911 operator would have known his conduct violated Reat's constitutional rights. Because we decide only that the law was not clearly established, we do not opine on whether Rodriguez violated Reat's constitutional rights. We therefore reverse and remand for entry of summary judgment in favor of Rodriguez.

I. Background

The facts of this case are tragic. At 4:12 a.m. on April 1, 2012, Ran Pal called 911 to report that several men had thrown a bottle and broken the rear windshield of the car he was driving. He told Operator Rodriguez that although the attack had occurred at Tenth Avenue and Sheridan Boulevard in Denver, he and his passengers had fled to safety in the nearby city of Wheat Ridge on the west side of Sheridan Boulevard.

For reasons that remain unclear, Rodriguez told Pal that because the attack had occurred in Denver, he needed to return to the city in order to receive help from the police. At first, Pal refused to return. He told Rodriguez he was in a state of shock, needed time to recover, and did not want to drive. Pal pleaded with Rodriguez to send help to his current location. Over the course of the fourteen-minute call, Pal told the operator at least six times that he was injured, in shock, and afraid. Still, Rodriguez insisted the police could not help unless he returned to Denver. About three minutes into the call, Pal finally agreed. He remained on the phone with Rodriguez as he drove.

On his way back to Denver, Pal fleshed out the details of the assault on the call. He explained that he, his brother, cousin, and a friend had been driving through Denver when a red jeep pulled up next to them. While both cars were stopped at a red light, the men in the jeep threw bottles and bottle rockets at Pal's car, breaking the windshield. Shards of glass injured Pal's hand and face. He told Rodriguez he had gotten a partial license plate number as the assailants sped off northbound on Sheridan Boulevard. Pal continued to tell the operator he was in shock. Rodriguez asked where Pal was, and Pal replied that he was crossing Sheridan on Twenty–Ninth Avenue. Rodriguez instructed him to stop there, and continued to ask questions to determine whether an ambulance was necessary. Rodriguez failed to dispatch an ambulance or the police at this time.

About eight minutes into the call, Pal revealed to Rodriguez that the assailants had brandished a gun. Rodriguez asked questions about the size, color, and type of gun. He also asked more questions about the attackers, including their race and what they had been wearing. Pal told the operator that four or five Hispanic men had gotten out of the car and hurled forty-ounce beer bottles at his vehicle. He told Rodriguez he had fled the scene when his brother urged him to do so because the attackers were armed. After questioning the victims about whether they had been drinking, Rodriguez confirmed that Pal was still at Twenty-Ninth Avenue and Sheridan Boulevard. He told Pal to pull over and wait there for the officers whom he would dispatch. Rodriguez also instructed Pal to turn on his hazard lights so that the police could easily locate the vehicle.

About ten minutes into the call, another man in the car picked up the phone. The man repeated that they were all in shock and scared, and asked whether police were on their way to provide help. Though Rodriguez indicated he had sent the police, he in fact had not. Rodriguez asked that the phone be handed back to Pal. Rodriguez then had Pal confirm that his hazard lights ***964** were on, and reiterated that Pal needed to wait at that location. He warned Pal, "if you see them come back, I need you to call us right away at 911." Aplt. App., Vol. III, at 281.

Seven seconds later, Pal shouted, "They're back, they're back[!]" *Id.* at 262. Pal handed the phone to someone else, who told Rodriguez that the men were shooting. Pal picked the phone back up to report that his brother had been shot. Over Pal's screams, Rodriguez continued to ask what was happening. Someone else picked up the phone and repeated the information. Rodriguez asked who had been shot, where they were located, and whether the attackers were still there. The speaker told Rodriguez that Reat was about to die and asked whether he could send an ambulance. Rodriguez continued to ask questions about the victim. Officers were dispatched to the scene about one minute after the shooting. Reat died of his injuries.

II. Analysis

Reat's Estate brought federal claims pursuant to 42 U.S.C. § 1983 and various state law claims against Rodriguez and the City and County of Denver. The defendants claimed they were protected by qualified immunity, arguing they did not violate Reat's rights under clearly established law. The district court dismissed the claims against the City and County. Only claims against Rodriguez proceeded.

A. Qualified Immunity

1. Clearly Established Law

Qualified immunity exists to protect government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Dodds v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). Qualified immunity is not only a defense to liability, but immunity from suit; thus, "it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Accordingly, in qualified immunity cases at the summary judgment stage, a "plaintiff must demonstrate on the facts alleged (1) that the defendant violated his constitutional or statutory rights, and (2) that the constitutional right was clearly established at the time of the alleged unlawful activity." *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1199 (10th Cir. 2009). In our review, "we need only find that the plaintiffs failed either requirement" to establish qualified immunity. *Id.* Because there are cases where we can more readily decide the law was not clearly established before reaching the more difficult question of whether there has been a constitutional violation, we may exercise discretion in deciding which prong to address first. *See Pearson*, 555 U.S. at 236, 129 S.Ct. 808.

This is such a case. We therefore confine our analysis of qualified immunity to the second prong, inquiring only whether the law at the time of the incident was "sufficiently clear that a reasonable official would have understood that his conduct violated the right." *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001).

A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) (internal quotation marks and alteration omitted). To make this determination, we consider "either if courts have previously ***965** ruled that *materially similar conduct* was unconstitutional, or if a general constitutional rule already identified in the decisional law [applies] with *obvious clarity* to the specific conduct at issue." *Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008) (emphasis added). Usually, this requires either "a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cordova v. City of Albuquerque*, 816 F.3d 645, 658 (10th Cir. 2016) (quoting *Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir. 2010)).

But an earlier decision need not be "materially factually similar or identical to the present case; instead, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Thomas*

v. Kaven, 765 F.3d 1183, 1194 (10th Cir. 2014). We look to see if "existing precedent ... placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). "The dispositive question is whether the violative nature of *particular* conduct is clearly established," *Mullenix v. Luna*, —— U.S. ——, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (emphasis in original) (internal quotation marks omitted), so that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). This investigation must be undertaken with a focus on the particular circumstances of the specific case before the court.

In sum, plaintiffs must "demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1106 (10th Cir. 2014) (quoting *Trotter v. Regents*, 219 F.3d 1179, 1184 (10th Cir. 2000)).

2. State–Created Danger

The Estate argues that Rodriguez created the danger that led to Reat's death. At the most general level, the parties agree that the state-created danger doctrine is clearly established in this circuit.

Two preconditions are necessary for the application of the state-created danger doctrine: first, the state actor took an affirmative action, and, second, that action led to private violence injuring the plaintiff. *Id.* at 1105. If these preconditions are met, a plaintiff next must show:

> (1) the charged state ... actor[ ] created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendant['s] conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Id.

Though the elements of the state-created danger test are clearly established, it also must be clear to which fact scenarios and government actors we apply the test, and what types of conduct are "conscience shocking" under the sixth factor. *Green v. Post*, 574 F.3d 1294, 1297 (10th Cir. 2009) (conscience-shocking conduct is "difficult to define and requires an assessment of the totality of the circumstances of each particular case" (internal quotation marks omitted)). But, as we explained above, the application of an established test even to a ***966** new fact pattern does not necessarily require a finding of qualified immunity. *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007).

Here, Reat's Estate alleges Rodriguez violated the Fourteenth Amendment by knowingly sending the victims, who had called 911 to report an assault, back into the path of their armed attackers. It contends Rodriguez knew the attackers last had been seen speeding northward on Sheridan Boulevard only minutes earlier, yet he instructed Pal to stop on that road. He then told Pal to pull over and activate his hazard lights at a location nineteen blocks north of the place of the assault. Even after Rodriguez knew the attackers had brandished a gun, he did not suggest that Pal relocate to a less conspicuous place, nor did he send police protection. The district court held "these factual allegations, accepted as true, are sufficiently shocking to the conscience to state a plausible claim for violation of plaintiffs' substantive due process rights under the state-created danger theory." Aplt. App., Vol. V., at 575.

For a number of reasons, we conclude Rodriguez's conduct does not violate the clearly defined contours of the state-created danger doctrine. First, Reat's Estate cannot point to a Supreme Court or Tenth Circuit case involving misconduct by 911 operators. As a general matter, we have considered the doctrine in a number of cases involving a range of state actors. For example, we have analyzed the doctrine in the context of both an off-duty police officer on personal business who crashed his police vehicle, *see Browder v. City of Albuquerque*, 787 F.3d 1076, 1083 (10th Cir. 2015), and on-duty officers engaged in high-

speed chases where "the legitimate governmental objective is so pressing that the luxury of forethought doesn't exist," *id.* at 1080; *see also Sacramento Cty. v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). We have also applied this theory of liability to other types of first responders, cloaked with government authority, reacting immediately to emergency situations. *See, e.g.*, *Perez v. Unified Gov't of Wyandotte Cty./Kansas City*, 432 F.3d 1163, 1168 (10th Cir. 2005) (applying the state-created danger doctrine to a firefighter who crashed his truck into a car, killing its occupant); *Radecki v. Barela*, 146 F.3d 1227, 1232 (10th Cir. 1998) (applying the doctrine to a deputy sheriff who caused the death of a bystander by instructing him to help physically subdue a suspect who then shot the civilian).

In other settings, we have applied the state-created danger doctrine to social workers, school officials, and hospital administrators. *See, e.g.*, *Currier*, 242 F.3d at 908 (applying the doctrine to social worker who removed a child from his mother's home and placed him with his father, who killed him); *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253 (10th Cir. 1998) (applying the doctrine to school official who suspended and sent home a special education student who subsequently killed himself); *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995) (applying the doctrine to state mental health administrators who eliminated a special unit for the criminally insane, causing the transfer of a murderer to the general hospital, where he killed his therapist).

But these cases are not particularly instructive here: as the Supreme Court noted in the case that is widely understood to be the progenitor of the state-created danger doctrine, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." ***967** *Deshaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In all of these cases where we found it appropriate to apply the doctrine of state-created danger, the victims were unable to care for themselves or had had limitations imposed on their freedom by state actors. "[In a] custodial situation [such as] a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." *Lewis*, 523 U.S. at 851, 118 S.Ct. 1708.

Rodriguez is unlike any of the defendants in our state-created danger cases. Rodriguez was not a police officer, firefighter, or other similar first responder.[1] As a 911 operator, he was not present at the scene of the attack, nor could he take physical action in response to the unfolding event. He did not impose any limitation on Reat's freedom to act. Rodriguez merely informed the victims, however incompetently, that to get help from the police, they would have to return to Denver. It cannot be said that any of Rodriguez's actions, as foolish as they were, "limited in some way the liberty of a citizen to act on his own behalf." *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 995 (10th Cir. 1994).

Furthermore, Reat is unlike the victims in other state-created danger cases. He was not in the custody of the state in the way that prisoners are, and thus was not deprived in that manner of his freedom to act. Unlike children in school or under the care of social workers, Reat and his companions were not incapable of acting in their own interest at the time of the shooting. Though the state-created danger doctrine itself may be clearly established, it is far from clear that it applies to Rodriguez's conduct in this particular situation.

In sum, all cases cited by Reat's Estate "are simply too factually distinct to speak clearly to the specific circumstances here." *Mullenix*, 136 S.Ct. at 312. No reasonable 911 operator could have known that these actions would have resulted in liability under the Fourteenth Amendment. Because we dispose of this case on the clearly established prong of the qualified immunity test, we express no opinion as to whether Rodriguez's actions violated Reat's constitutional rights. Thus, our decision does not foreclose liability for similarly-situated actors in future cases. *See Pearson*, 555 U.S. at 242-43, 129 S.Ct. 808.

B. State Law Claims

Reat's Estate also asks us to exercise supplemental jurisdiction over related state law claims against Rodriguez. When we have held defendants are entitled to summary judgment on all federal claims, we have declined to exercise our supplemental jurisdiction over issues of state law, and instead, when in the interests of comity and justice, remanded with instructions to

dismiss. *See Brooks v. Gaenzle*, 614 F.3d 1213, 1229–30 (10th Cir. 2010); *see also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Accordingly, we decline to exercise jurisdiction over the remaining state law claims.

III. Conclusion

For the foregoing reasons, we REVERSE AND REMAND with instructions to DISMISS without prejudice the state law claims.

All Citations

824 F.3d 960

Footnotes

* Judges Lucero, Hartz, Phillips and Moritz would grant the petition for en banc rehearing.

1 Only one circuit court has even considered imposing liability under the state-created danger doctrine on a 911 operator for conduct responding to an emergency call. *See Beltran v. City of El Paso*, 367 F.3d 299 (5th Cir. 2004) (finding operator was entitled to qualified immunity where she miscoded a 911 call, leading to the death of the child caller and her mother).

Estate of Reat v. Rodriguez
Petition for Writ of Certiorari
United States Supreme Court

No.

IN THE

Supreme Court of the United States

ESTATE OF JIMMA PAL REAT; JAMES PAL REAT; REBECCA AWOK DIAG; RAN PAL; CHANGKUOTH PAL; AND JOSEPH KOLONG, PETITIONERS

v.

JUAN JESUS RODRIGUEZ, INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Following the Court's analysis in *DeShaney v. Winnebago*, 489 U.S. 189 (1989), the majority of circuits have recognized a 'state created danger' doctrine under which state actors who create or increase danger to an individual can be held liable for violation of the Fourteenth Amendment. Many years later, however, the federal courts of appeals are intractably divided over the proper test for a state created danger claim, resulting in inconsistent decisions nationwide. The question presented is:

> Whether the Tenth Circuit Court of Appeals erred in reversing a Judgment denying qualified immunity to a 911 operator and holding, in accord with the Fourth and Fifth circuits, but in contrast to the Second, Sixth, Seventh, Eighth, and Ninth Circuits, that a Fourteenth Amendment state created danger claim covers only conduct by a state actor that imposes limitations on a person's freedom to act on his own behalf.

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JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Tenth Circuit that was entered on August 12, 2016. A timely petition for rehearing *en banc* was filed and was denied with an amended decision on August 12, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

42 U.S.C. § 1983 provides that:

> 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 law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress . .

U.S. CONST. AMEND. XIV.

> The Fourteenth Amendment to the United States Constitution states in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

INTRODUCTION

DeShaney set forth the general constitutional rule that the state has no duty to protect someone from injury at the hands of a third person where the state "played no part in their creation, nor did it do anything to render" an individual "more vulnerable" to danger. 489 U.S. at 201. In this case, the state actor defendant did "play[]" a "part in creating" and rendering an individual "more vulnerable" to the danger. *Id.* It therefore presents the question *DeShaney* left open: what is the scope of the so-called "state created danger" doctrine?

This case meets the Court's criteria for granting certiorari. Since 1989, the majority of Courts of Appeals have agreed that a state actor may be liable for action that creates or increases danger to an individual under *DeShaney*. But they have adopted increasingly divergent tests for "state created danger" claims and are irreconcilably divided on the question presented here – whether the plaintiff must *also* show that the

state action imposed limitations on the person's freedom to act on his own behalf. In this case, a 911 operator sent victims of a hate crime back into danger by refusing to send the police to their apartment complex, to where they had safely fled, and instead directed them to drive back to the crime scene, park their car on the side of the road, flash their hazard lights, and wait for the police – which he never sent. While parked, their assailants found them, shooting and killing Jimma Reat in front of his family.

The Tenth Circuit sided with the Fourth and Fifth Circuits in holding that the state actor must "limit[] in some way the liberty of a citizen to act on his own behalf" to bring a clearly established state created danger claim, and granted immunity to the 911 operator who did not place any such physical limitations on the plaintiffs' freedom. App. 11a-12a. The Second, Sixth, Seventh, Eighth, and Ninth Circuits, have all held to the contrary, explicitly rejecting any such freedom restriction requirement for the doctrine to apply – and instead allowing liability when the state's conduct creates or increases danger, without respect to the plaintiff's liberty.

By requiring a freedom limitation relationship, the minority approach of the Tenth, Fourth and Fifth Circuits renders any distinct danger creation exception toothless, a holding that effectively (and dangerously) immunizes all government conduct in this area absent custody or physical control. As these courts and legal scholars have pointed out in rejecting the minority view, "[s]uch a requirement decisively curbs any operative state-created danger theory" by "instead impos[ing] a special relationship prerequisite."

Christopher M. Eisenhauer, *Police Action and The State-Created Danger Doctrine: A Proposed Uniform Test*, 120 Penn St. L. Rev. 893, 902 (2016); *Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir. 2005) (finding the Fifth Circuit's freedom limitation requirement amounts to a "flat[ ] reject[ion of] the 'state-created danger' theory of liability.").

Courts of Appeals openly recognize this substantive circuit split. *See Butera v. District of Columbia*, 235 F.3d 637, 654 (D.C. Cir. 2001) (noting the "lack of clarity in the law of the circuits", which are "inconsistent in their elaborations" of danger creation claims); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) ("It is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect."); *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001) (noting the "variety of tests" in the circuits).

Legal scholars analyzing the doctrine also unvaryingly take notice of this significant conflict. *See e.g.* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV 1, 26 (2007) ("it is striking here that circuits really do have quite different tests. There is a radical difference between the law in the Ninth Circuit in this area and the law in the Fifth Circuit."). Atinuke O. Awoyomi, *The State-Created Danger Doctrine In Domestic Violence Cases: Do We Have A Solution In Okin V. Village Of Cornwall-On-Hudson Police Department*?, 20 COLUM. J. GENDER & L. 1, 3 (2011) ("At present, there is a split among circuit courts as to what constitutes state-created danger.").

Even within the circuits, judges disagree about what the test should be. Notably here, four judges on the Tenth Circuit voted to grant rehearing *en banc*. Certiorari is necessary to resolve the circuit split deepened by the Tenth Circuit's decision regarding what is sufficient to show state-created danger liability, specifically whether a person is required to show a relationship with the state amounting to a restraint on liberty.

State-created danger cases have one theme in common – they all stem from a very tragic set of facts, and they all try to balance the competing interests of affording state actors protection from every decision being second guessed, and allowing citizens to hold state actors responsible for glaring abuses of power. That seems to be the only steadfast consistency among the federal courts of appeals, which have generated directly conflicting rulings over the 27 years since *DeShaney* was decided. *See Eisenhauer*, 120 Penn St. L. Rev. 893 ("Because the U.S. Supreme Court has not addressed the issue, many variations of the state-created danger doctrine exist across the federal circuits. The resulting lack of uniformity has led to inconsistent results, promoting unfairness for litigations throughout the country.").

A national uniform set of rules for this due process doctrine is of utmost importance. Whether the Constitution allows you to sue a 911 operator for directing you back into danger after you have fled to safety (or conversely, whether 911 operators are categorically excluded from such liability for not being in the position to impose physical restrictions on a person) should not depend on whether you live in

Colorado or New York. The Court should use this case to resolve the conflict over whether a restriction on freedom must be shown in danger creation claims, a central question left open in *DeShaney* that has been percolating in the Courts of Appeals for years, with no hope for uniform resolution.

STATEMENT

A. Factual Background

The pertinent facts as found by the District Court and adopted by the Tenth Circuit are summarized as follows:

Early in the morning on April 1, 2012, 911 Operator Defendant Rodriguez received a call from Plaintiff Ran Pal, who reported on a recorded call that: he and his three passengers were previously physically assaulted by a group of Hispanic men; these assailants threw 40 ounce beer bottles through their back windshield, shattering the glass, showering and covering these young men with chards of glass; explosive "bottle rockets" were separately thrown at them, and; their assailants had brandished a gun. App. 37a-41a

Plaintiffs also told Defendant that they had successfully eluded their attackers and had reached the safety of their apartment destination in Wheat Ridge, seven 1/2 blocks outside of Denver city limits, where they planned to remain and wait for the police. Despite knowing that Plaintiffs were hurt, in shock, did not feel safe driving and wanted the police to come to their apartment, Defendant six times directed and instructed

them that police and medical assistance could not be provided unless, over their objection, they returned to Denver. As he admitted during his termination proceedings, in so acting, Mr. Rodriguez was lying to these Plaintiffs about his inability to provide assistance where they were. App. 22a.

While monitoring their return to Denver, Rodriguez then "direct[ed] plaintiffs to park in a conspicuous location on a major road on which he knew the attackers had been traveling just minutes before" and "instructed plaintiffs to activate their hazard lights, making them even more visible and obvious than they already were at that early hour of the morning." App. 22a. Rodriguez was aware that his plan put them in immediate danger and that their assailants might find them there: "Indeed, Mr. Rodriguez acknowledged during the call that the assailants might return."[1] App. 33a.

Their assailants returned and gunned down passenger Jimma Reat. Before Reat was killed, Plaintiffs protested this plan but Mr. Rodriguez repeatedly told them that the police had been sent. This fact of life and death significance he also lied about, knowing that police had not been sent, and that, in fact he had not sent them until 53 seconds after Jimma Reat was killed. Thus, the District Court found: "Most egregiously, Mr. Rodriguez did not dispatch a police officer to plaintiffs' location at any time until after Jimma Pal had been fatally shot." App. 22a.

[1] In denying summary judgment, the District Court incorporated the previous Orders and related factual findings from the denial of Defendant's Motion to Dismiss this claim. 14a.

B. Proceedings Below

On December 16, 2014, the District Court denied Defendant Rodriguez's Motion for Summary Judgment on the state created danger claim, where 911 Operator Defendant Rodriguez's actions placed Plaintiffs in a far worse, much "more vulnerable", position for third party private violence than they would have been had he "not acted at all". *DeShaney*, 489 U.S at 201. App. 13a.

The District Court held that Plaintiffs had satisfied all elements of a clearly established state created danger claim:

> Through his affirmative acts, Mr. Rodriguez sent plaintiffs from a position of relative safety back into the zone of danger from which they had escaped just minutes before. Aware that the assailants had been headed northbound on Sheridan Boulevard after the initial attack, Mr. Rodriguez instructed plaintiffs to stop their car at a major intersection less than 20 blocks north and make themselves even more conspicuous at a time of night when there was unlikely to be much other traffic on the road in any event. Most glaringly, knowing that the driver was injured and that the assailants had a gun, he failed to send help to the scene until after the tragedy was *fait accompli*. Although qualified immunity provides 'ample room for mistaken judgments', I cannot say that 'reasonable officials in the same situation as the defendant could disagree on the appropriate course of action to follow.' App. 24a.

In finding liability, Judge Blackburn agreed with the Magistrate Judge[2] that the state created danger doctrine did not require an actual limitation placed on a person's freedom:

> In the Court's view, Mr. Rodriguez's refusal to send officers to meet Ran Pal and his instructions to return to Denver plausibly constitute affirmative conduct insofar as they moved the Passenger Plaintiffs away from the safety of their apartment toward an area where they were more susceptible to being seen and re-assaulted by their assailants. *See Gillen*, 702 F.3d at 1188. As seen in *Currier* and *Briggs*, instructions need not amount to commands in order to qualify as affirmative conduct. *See Currier*, 242 F.3d at 921; *Briggs*, 274 F. App'x at 735. If discouragement is sufficient to trigger danger creation liability, the same must be true of its equally suggestive antonym. App. 58a.

The District Court followed the majority of circuits' in finding state created danger liability absent any limitation on freedom, reasoning: "even if Ran Pal was not theoretically required to follow Mr. Rodriguez's instructions to drive to Denver, park, and turn on his hazard lights", App. 58a-59a, "Mr. Rodriguez's refusal to send officers to meet Ran Pal and his instructions to return to Denver. . .moved the

[2] In his Recommendation, the Magistrate Judge also found: "A state agent's instructions to a private person qualify as 'affirmative conduct' within the danger creation framework when such instructions effectively discourage the pursuit of either public or private sources of aid" and "encourage" other action. App. 56a-57a.

Passenger Plaintiffs away from the safety of their apartment toward an area where they were more susceptible to being seen and re-assaulted by their assailants", thereby increasing the danger.[3] App. 58a.

Defendant took an interlocutory appeal in the Tenth Circuit, arguing that he was entitled to immunity because, *inter alia*, he did not physically *require* Plaintiffs to return to Denver or otherwise place any limitations on their freedom to act. As this was an interlocutory appeal of an order denying summary judgment on the basis of qualified immunity, the court below accepted the factual determinations of the District Court, and reviewed only the legal challenge to the Court's ruling on whether the facts clearly established a state created danger claim under the Fourteenth Amendment. *See Johnson v. Jones*, 515 U.S. 304, 319-320 (1995).

On May 31, 2016 (amended decision at App. 1a.), the Tenth Circuit reversed the denial of summary judgment, disagreeing with the District Court regarding the appropriate test to apply in state created danger claims, and reversing the legal finding that a state actor's conduct need not amount to physical restriction 'commands' or requirements under *DeShaney*. In finding that there was no violation of any clearly established right, the Tenth Circuit aligned itself with the Fourth and Fifth Circuits, which hold that liability under *DeShaney* requires state conduct

[3] The District Court previously dismissed the special relationship claim because Defendant did not "restrain[] plaintiffs' liberty", finding instead a state created danger violation based on affirmative actions that increased danger. Plaintiffs did not challenge that ruling.

that imposes limitations on a person's freedom to act on his own behalf:

> as the Supreme Court noted in the case that is widely understood to be the progenitor of the state-created danger doctrine, '[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Deshaney v. Winnebago Cty. Dept of Soc. Servs.*, 489 U.S. 189, 200 (1989). . . App. 10a-11a.
>
> As a 911 operator, he was not present at the scene of the attack, nor could he take physical action in response to the unfolding event. He did not impose any limitation on Reat's freedom to act. Rodriguez merely informed the victims, however incompetently, that to get help from the police, they would have to return to Denver. It cannot be said that any of Rodriguez's actions, as foolish as they were, 'limited in some way the liberty of a citizen to act on his own behalf.'" *Graham v. Indep. Sch. Dist., 22 F.3d 991, 995* (10th Cir. 1994).
>
> Furthermore, Reat is unlike the victims in other state-created danger cases. He was not in the custody of the state in the way that prisoners are, and thus was not deprived in that manner of his freedom to act. App. 11a.

Plaintiffs filed a timely Petition for Rehearing *en banc*, arguing that state created danger liability does not require any custodial relationship or show of authority amounting to a limitation of freedom.

On August 12, 2016, a majority of the Tenth Circuit denied the Petition for Rehearing *en banc*, and issued the Amended Decision challenged herein. Notably, four Judges, Judges Lucero, Hartz, Phillips and Moritz, voted to grant *en banc* rehearing. App. 78a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE IN IRRECONCILABLE CONFLICT AS TO WHETHER IN STATE-CREATED DANGER CLAIMS A STATE ACTOR MUST "LIMIT IN SOME WAY THE LIBERTY OF A CITIZEN TO ACT ON HIS OWN BEHALF".

The Tenth Circuit's danger creation test requiring a restraint on liberty squarely conflicts with other federal court of appeals decisions. Similar to the Tenth Circuit, the Fourth and Fifth Circuits have also confined liability to situations involving custodial relationships described by the Supreme Court in *DeShaney*, "which are limited to cases concerning 'incarceration, institutionalization, or other similar restraint of personal liberty.'" *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) (refusing to recognize state created danger as an independent doctrine and citing *DeShaney*, 489 U.S. at 200). *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) ("Pinder was never incarcerated, arrested, or otherwise restricted in any way. Without any such limitation imposed on her liberty, *DeShaney* indicates Pinder was due no affirmative constitutional duty of protection

from the state, and Johnson would not be charged with liability for the criminal acts of a third party."). These circuits all read *DeShaney's* language that has given rise to the special relationship exception, as also applying to liability under danger creation theory.[4]

Conversely, the Second, Sixth, Seventh, Eighth, and Ninth Circuits expressly reject the requirement that a state actor impose limitations on a persons freedom in state created danger claims. *See Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005); *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir. 2006); *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992). The majority approach instead interprets *DeShaney* as providing for two separate paths to liability: first if the individual has a special relationship with the government due to it placing limitations on their freedom, or second, if there is a state-created danger. *Id.* These circuits thus allow for state created danger liability absent limitations on freedom provided, *inter alia*, the state actor created or increased the danger to an individual. *Id.*

[4] The language giving rise to the 'special relationship' exception is: "**[i]t is the State's affirmative act of restraining and individual's freedom to act on his own behalf** – through incarceration, institutionaliziation or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protectinos of the Due Process Clause. . ." *DeShaney*, 489 U.S. at 200 (emphasis supplied). The language giving rise to state created danger comes from Justice Rehnquists finding that: "While the State may have been aware of the dangers that he faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them. *Id.* at 201.

In rejecting the Fifth Circuit's freedom limitation approach, the Second Circuit reasoned:

> Some courts have, indeed, incorporated the 'special relationship' criterion as a prerequisite to liability.[5]
>
> We, by contrast, treat special relationships and state created dangers as separate and distinct theories of liability. *See Ying Jing Gan v. City of New York*, 996 F.2d 522, 533 (2d Cir.1993). In *Dwares*, the state did not breach its duty to protect someone with whom it had a special relationship. Instead, the state itself facilitated and encouraged the private attack at issue, thus creating the danger. In *Ying Jing Gan*, we therefore placed *Dwares* in the same category as an Eighth Circuit case where a police chief instructed subordinates to ignore victim's pleas for protection from her husband, who was the chief's friend, and an Eleventh Circuit case where a town clerk was abducted by a prison inmate whom the government used for work on town hall grounds. *See id.* at 533–34 (citing *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir.1990) and *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 356–59 (11th Cir.1989),[13] *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990)); *see also Vélez–Díaz*, 421 F.3d at 79. Our distinction between these categories of cases suggests that "special relationship" liability arises from the relationship between the state and a particular

[5] Citing *inter alia Beltran*, 367 F.3d at 307.

> victim, whereas "state created danger" liability arises from the relationship between the state and the private assailant. To paraphrase *Bowers*, 686 F.2d at 618, the police officers in *Dwares* did not bring the victim to the snakes; they let loose the snakes upon the victim.

Pena, 432 F.3d at 109 (internal citations omitted) (Sack. J.)

The Sixth Circuit has similarly held that the language in *DeShaney* quoted by the Tenth Circuit for the proposition that a state actor must limit an "individual's freedom to act on his own behalf", applies only to an affirmative duty to protect due to a custodial or freedom limiting relationship, not state created danger liability. *See Stemler v. City of Florence*, 126 F.3d 856, 867–68 (6th Cir. 1997) (applying "custody" exception where state limited "individual's freedom to act on his own behalf") and *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998) (applying "state-created danger" exception without any liberty deprivation because "officers could maintain § 1983 action in absence of special relationship between city and either officers or alleged drug conspirators" where city placed undercover police officers and their family members in danger.)

Likewise, the Seventh, Eighth, and Ninth Circuits also distinguish special relationship claims, which require "custody" or "sufficient control to cut off other avenues of aid", from a claim "based on a state-created danger", where "a state can be held to have violated due process by placing a person in a position of heightened danger without cutting off other avenues of

aid." *Monfils*, 165 F.3d at 517; *Freeman*, 911 F.2d at 55 (finding that while *Deshaney* left a "grey area" in terms of when the state can be liable absent a custodial setting, the state created danger doctrine clearly applies in a setting absent physical control or limitations placed on a person's freedom.); *Grubbs*, 974 F.2d at 122 ("custody is not a prerequisite to the 'danger creation' basis for a section 1983 third party harm claim" under *DeShaney*, and while "some cases have blended the two exceptions together . . . the distinction is important.").[6]

In stark contrast to requiring a restraint on freedom, the majority approach instead holds that the relevant inquiry is whether or not the state actor created the danger or made the individual more vulnerable to harm. The Second, Sixth and Ninth Circuits evaluate whether "affirmative action" (rather than "passive" conduct) created or increased the risk of danger to the victim. *Pena*, 432 F.3d at 109–10; *Grubbs*, 974 F.2d 119; *Reynolds*, 438 F.3d at 690. The Seventh and Eighth Circuits ask whether state action changed the status quo by creating or substantially contributing to the creation of a danger or rendering a victim more vulnerable than he or she otherwise would have been absent state action. *Monfils*, 165 F.3d at 517; *Freeman*, 911 F.2d at 55 (relevant inquiry is whether the "state

[6] The Ninth Circuit explained: "*DeShaney* did not rule that custody was required where the state affirmatively causes the harm. In addition to pointing out that Joshua DeShaney was not in state custody when injured, the Court noted that '[w]hile the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*" *Grubbs*, 974 F.2d at 121 (internal citations omitted) (emphasis in original).

has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action.")

Applying these principles, these courts consistently find liability in a variety of circumstances outside any limitations on freedom, when their roles created or exposed individuals to danger they otherwise would not have faced. In *Dwares v. City of New York*, 985 F.2d 94, 99 (2nd Cir. 1993), the Second Circuit held that a state-created danger claim was allowed where the police officers letting "skinheads" know they would not be arrested unless they got totally out of control caused them to act with impunity, and thus rendered the demonstrators "more vulnerable to assaults." The Seventh Circuit in *Monfils* upheld a jury verdict against a police officer who allowed an informant's tape to be released despite his knowledge that the tape's release would result in heightened danger to the informant, who was ultimately killed, despite no physical restrictions placed on any person. In *Freeman*, the Eighth Circuit held that a police chief may be liable for damages inflicted by a third party where the refusal to enforce a restraining order against the attacker was due to the police chief's personal friendship with the attacker. In *Grubbs*, the Ninth Circuit reversed the district court's dismissal of state created danger claim "for a failure to allege a custodial relationship", holding state employees could be liable for the rape of a registered nurse because "Defendants affirmatively created the dangerous situation" by assigning nurse to work alone in the medical clinic of a

medium-security institution with a known, violent sex-offender." 974 F.2d 119.[7]

The Third Circuit has, at times, reached similar results to the majority view, and in fact has imposed liability on two 911 operators under the state created danger doctrine absent any limitation on freedom. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 243 (3d Cir. 2008) (allowing state created danger claim against two 911 operators who provided confidential personal information to fellow former call operator, who then used it to locate and murder plaintiff).[8]

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[7] *See also Hemphill v. Schott*, 141 F.3d 412 (2d Cir.1998) (state created danger claim could proceed where during drugstore robbery, police had allowed the store's manager to join them in pursuit of the suspect and then returned a gun to the manager, who then used it to shoot the plaintiff.). *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir.1990) (duty to protect citizen from former policeman who was permitted to retain his gun despite his being placed on the medical roll as mentally unfit for duty); *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006) (police officer affirmatively created a danger that plaintiff, who was later shot by neighbor, would not otherwise have faced by informing neighbor of plaintiff's allegations of child molestation without first warning her as he had promised to do).

[8] The Third Circuit has not been consistent in its approach, however, and has also at times, required a freedom limitation component in state created danger claims. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995), *cert denied*, 516 U.S. 858 (1995) (noting that there are cases in the circuit both "supporting and opposing the existence of a state-created danger theory"). It recently clarified that the person must be "a foreseeable victim of the defendant's acts" and a state actor must "affirmatively use[] his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all. *L.R. v. School District of Philadelphia*, No. 14-4640, 2016 WL 4608133, *3 (3d Cir. 2016).

Notwithstanding the majority of courts holding otherwise, the Tenth Circuit has wrongly sided with the minority view that *DeShaney* requires a show of authority amounting to a restriction of freedom in state-created danger claims. In the Second, Sixth, Seventh, Eighth, Ninth (and potentially Third) circuits, the 911 Operator in this case could be held liable for the death of Jimma Reat, where, (as found by the District Court) Rodriguez's affirmative conduct changed the status quo and increased the danger.

Until now, the Tenth Circuit has never expressly imposed any requirement that a state actor limit a person's freedom to act as part of the danger creation test, as shown by the District Court and Magistrate's interpretation of prior cases including *Currier v. Doran*. 242 F.3d 905, 922 (10th Cir. 2001) (instructions by social worker to mother of abused children to stop making allegations of abuse was sufficient affirmative conduct to state a claim). The District Court logically followed the majority view in finding clearly established state created danger liability, where Rodriguez's "affirmative acts", including "directing plaintiffs to park in a conspicuous location on a major road on which he knew the attackers had been traveling just minutes before" and instruct[ing] plaintiffs to activate their hazard lights, making them even more visible and obvious than they already were at that early hour of the morning," "sent plaintiffs from a position of relative safety back into the zone of danger from which they had escaped just minutes before." App. 22a, 24a.

The Tenth Circuit in reversing, however, made clear that it aligns itself with the minority interpretation of *DeShaney*. While the District Court

rejected the limitation freedom requirement urged by Defendant as applicable in state created danger cases, this Tenth Circuit Panel (which included the author of *Currier*) announced that prior cases involving children such as *Currier* were consistent with a custodial or freedom limitation requirement, because children are inherently "incapable of acting in their own interests" (App. 12a) and were thus similarly restrained in their "freedom to act on their own behalf."

Additionally, the Circuits are in obvious disagreement about other substantive elements necessary to assert the doctrine, and are "inconsistent in the elaborations of the concept." *Butera v. District of Columbia*, 235 F.3d at 654. While recognizing the doctrine under *DeShaney*, varying circuits have adopted different formulations. The First Circuit has examined the doctrine but never found it actionable.[9] The Sixth, Eighth and Tenth Circuit tests require a specific plaintiff to be in danger rather than the public at large, while the Ninth considers the foreseeability of harm.[10] The majority of circuits, including the Third, Eighth and Tenth, also have engrafted the "conscience shocking" due process language as an additional requirement for finding liability, while the Sixth and Ninth Circuits often use the "deliberate indifference" standard.[11]

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[9] *Frances-Colon v. Ramirez*, 107 F.3d 62 (1st Cir. 1997); *Rivera v. Rhode Island*, 402 F.3d 27, 38 (1st Cir. 2005).

[10] *Reynolds*, 438 F.3d at 690-91; *Hart v. City of Little Rock*, 432 F.3d 801, 805-06 (8th Cir. 2005); *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995); *Lawrence v. U.S.*, 340 F.3d 952, 957 (9th Cir. 2003).

[11] *See Kneipp v. Tedder*, 95 F.3d 1199, 1208-11 (3d Cir. 1996); *Hart v. City of Little Rock*, 432 F.3d at 805-06; *Uhlrig*, 64 F.3d at 574; *Foy v. City of Berea*, 58 F.3d 227, 232 (6th Cir. 1995) *quoting*

Only this Court can provide the desired uniformity of state created danger liability, and resolve the conflict among the circuits that will continue to expand absent such review.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND ESTABLISH A UNIFORM TEST TO APPLY TO STATE CREATED DANGER CLAIMS UNDER THE FOURTEENTH AMENDMENT.

The question presented merits the Court's attention. Fundamental due process claims should not result in drastically opposing outcomes depending on where you live, yet that is precisely what happened here. There can be no state created danger liability for this 911 Operator's conduct in the Fourth, Fifth and Tenth Circuits. In the Second, Sixth, Seventh, Eighth, and Ninth (and potentially Third and Eleventh) Circuits, however, these Plaintiffs could clearly sue for the death of Jimma Reat.

Or take the tragic facts of the Fourth Circuit case *Pinder*. There, a woman was threatened by her ex-boyfriend. She called the police, who came and arrested him. The woman asked the police whether they were taking him to the station and locking him up, explaining that she would not go back to work if he could come home because he might harm the children. The officer told her she could go back to work because her ex-boyfriend would be kept locked up overnight. Instead,

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Farmer v. Brennan, 511 U.S. 825 (1970); *Lawrence*, 340 F.3d at 957.

they released him immediately and he returned to the house and burned it down, killing the three children inside.

The Fourth Circuit held (as would the Fifth and Tenth) that there could be no liability for state created danger because there was no "duty to protect individuals outside of the custodial context" and the state did not place any physical limitation on her freedom. *Pinder*, 54 F.3d at 1176. As pointed out in the dissent, however, she could seek redress for this abuse of power in most other circuits. Indeed, Fourth Circuit Judge Russell argued against the minority's custodial approach, citing to the Seventh, Eighth, and Ninth Circuit cases for the proposition that *DeShaney* "did not reject the state's clearly established duty to protect an individual where the state, through its affirmative action, has created a dangerous situation or rendered the individual more vulnerable to danger." *Pinder*, 54 F.3d at 1180 (Russell, J. dissenting).

Likewise, in *McClendon*, Fifth Circuit Judge Parker sharply criticized the circuit's continuous refusal to recognize state created danger claims outside of a custodial relationship. *See McClendon v. City of Columbia*, 305 F.3d at 338 (Parker, J., dissenting) ("The Circuit's modus operandi in these cases plays like a broken record - same approach, same result, and same confusion created for the district courts, state officials, and the general public concerning the Circuit's position on this important issue. In choosing to play this broken record yet again, the majority skirts the central issue in this case: Whether the substantive component of the Due Process Clause guarantees a citizen the right to be free from acts of violence inflicted by a third party

when the state actor played an affirmative role in creating or exacerbating the dangerous situation that led to the citizen's injury. In failing to answer this fundamental question, the majority shirks its constitutional duty.").[12]

Legal scholars analyzing the doctrine widely reach the conclusion that the Court must step in to resolve this circuit conflict. Chemerinsky has commented that, "[o]ne would think, given the large volume of litigation in this area and the splits among the circuits that the Supreme Court would have stepped in." 23 TOURO L. REV. at 26. Another commentator observes that these splits are particularly troublesome for public school officials. Jeff Sanford, *The Constitutional Hall Pass: Rethinking the Gap in §1983 Liability That Schools Have Enjoyed Since DeShaney*, 91 Wash. U. L. Rev. 1633, 1640 (2014) ("But besides these broad themes, and despite over two decades of case law, there still exists nontrivial inconsistencies in the ways circuit courts analyze state-created dangers.") *see also* Laura Oren, *Some Thoughts on the State-Created Danger Doctine: DeShaney is Still Wrong and Castle Rock is More of the Same*, 16 Temple Pol. & Civ. Rts. L. Rev. 47, 63 (2006) ("As the inconsistencies and irrationalities in the special danger cases become more and more troublesome, they create dialectical contradictions . . ."); Eisenhauer, 120 PENN

[12] At times, panels in the Fifth Circuit have adopted state-created danger, only to later abandon it en banc, instead refusing to rule on its existence outside of a custodial relationship. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533 (5th Cir. 2003); *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001), *rev'd en banc*, 305 F.3d 314 (5th Cir. 2002).

ST. L. REV. at 902 ("Clouded, enormously complicated, endlessly circular, yet confined to a couple of sentences illustrating a mere afterthought in a first-year Torts textbook, the state-created danger doctrine endures. Almost a quarter of a century after *DeShaney*, circuits continue to struggle with its proper meaning and appropriate function . . . Standardization and simplification would doubtlessly help the courts with this dilemma."); Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1211 (2005) ("Unless, and until, the Supreme Court makes its pronouncement or the other circuits shake down to a remarkable degree of uniformity, each new case will face the same barrier: We do not say whether the doctrine exists, and even if it does, our not saying makes it not clearly established law.").

Further, the Tenth (and Fourth and Fifth) Circuits have created a categorical exception for 911 operators and any other government worker not in the position to physically limit a person's freedom. As 911 operators inherently are not, and will never be, in the position to impose limitations on "the liberty of a citizen to act on his own behalf", they are essentially immune from all danger creation claims under this test. Unlike, *Phillips*, *supra*, where the Third Circuit held 911 operators liable for state created danger for intentionally giving a former 911 operator confidential information allowing him to locate and kill his ex-girlfriend and her boyfriend, these 911 operators would be immune in the Tenth Circuit.

Even intentional conduct by 911 operators to harm callers' rights would be unactionable. Consider

the following: A woman badly beaten by her husband escapes her house, finds refuge at her neighbor's, and calls 911. A 911 operator who recognizes the woman as his friend's wife, purposely tells her to return home where her husband is to meet the police, knowing that he is intentionally not dispatching the police precisely because he is trying to protect his friend. The woman returns home to have her husband arrested, but the police are never sent and her husband kills her. According to the Fourth, Fifth and Tenth Circuits, there was no restraint on freedom and thus no liability. She still could have ignored his foolish instructions and stayed put. However, in the Second, Sixth, Seventh, Eighth and Ninth Circuits, this 911 operator who intentionally directed a vulnerable caller back to the place of violence while purposely withholding police would not be immune.

A state created danger doctrine that allows for any conduct, no matter how conscience shocking, no matter what type of abuse of power, as long as it doesn't amount to physical limitations on freedom leaves abuses of power completely unchecked. The Court has cautioned that immunity cannot safely be made absolute: "[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Burns v. Reed*, 500 U.S. 478, 494-95 (1991). We need a system that requires state actors like the 911 Operator in this case to "hesitate" before instructing callers from safety back into a known snake pit.

Furthermore, if a state actor must truly "limit[] in some way the liberty of a citizen to act on his own behalf," such a rule would effectively inoculate broad

categories of state actors beyond just 911 operators, including social service providers, foster care providers, educators, and others who exercise a high degree of authority in life-or-death situations. Without clarification, the state-created danger doctrine will remain either an extremely limited remedy available only within a specific custodial context, or a viable shield against a broad range of conscience-shocking governmental conduct – all depending on where an individual happens to live.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT.

This case is a particularly suitable vehicle for resolving the conflict.

First, the decision to grant immunity for lack of clearly established law was based on a fundamental legal split between the circuits in terms of whether the state can be liable for state created danger absent any restriction of freedom. This case crystallizes the problem with this "absence of consistency", which "potentially allows for behavior in one circuit to be actionable while being acceptable in another circuit." Eisenhauer, 120 Penn St. L. Rev. at 909. Intervention by the Court will provide clarity to state actors across the board with respect to what conduct would be considered unconstitutional.

Second, a decision by the Court will have a practical outcome on this litigation. The case was decided, both at the district and circuit levels, on a crisp, posited set of facts. Applying the majority approach to the doctrine, Judge Blackburn made

extensive factual findings in concluding that Rodriguez had violated Plaintiffs' clearly established right, including *inter alia*, that he committed multiple conscience shocking and egregious affirmative acts that increased their vulnerability to danger and caused Jimma Reat's death. These factual findings were not reviewed by the Tenth Circuit on the interlocutory appeal, which instead reversed based on the dispositive legal ruling that no limitation of freedom occurred as required to apply the doctrine. If the Court formally holds that state created danger liability does not require a restriction on freedom, which is consistent with both the letter and spirit of *DeShaney*, Petitioners should be entitled to proceed to trial.

Finally, the circuit split is ripe for resolution. Without such guidance, the doctrine will only grow more muddled, a reality that has led lower courts to call out for the Court's intervention. *Doe v. Covington Cnty. Sch. Dist.*, 675 F.3d 859, 871 (5th Cir. 2012) (Higginson, J., concurring) ("Dicta in *DeShaney* has contributed to twenty-three years of circuit (and intra-circuit) disharmony, and excited legions of law review articles, about whether the Constitution asserts positive or negative liberties, or regulates government action or inaction – all giving uncertain guidance to litigants and courts, as well as public officials, hence necessarily also giving uncertain guidance to citizens whom government persons cause to be subjected to injury.") (Internal citations omitted); *Butera*, 235 F.3d at 654; *Freeman*, 911 F.2d at 55.

In sum, the questions presented in this Petition are both exceptionally important as well as wide

reaching. The Court should use this case to provide uniformity in this area of federal law.

CONCLUSION

For all these reasons, this Court should grant the Estate of Jimma Pal Reat's petition.

Respectfully submitted,

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No. 15-1001.

ESTATE OF JIMMA PAL REAT; JAMES PAL REAT; REBECCA AWOK DIAG; RAN PAL; CHANGKUOTH PAL; and JOSEPH KOLONG, Plaintiffs-Appellees,

v.

JUAN JESUS RODRIGUEZ, individually, Defendant-Appellant.

United States Court of Appeals, Tenth Circuit.

Filed August 12, 2016.

Attorney(s) appearing for the Case

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 1:12-CV-02531-REB-MEH)

Before TYMKOVICH, Chief Judge, MURPHY, and BACHARACH, Circuit Judges.

TYMKOVICH, *Chief Judge*.

This case arises out of the fatal shooting of Jimma Pal Reat at a Denver intersection. Reat was killed after Denver 911 operator Juan Rodriguez directed him back into the path of his armed assailants. His estate sued the 911 operator, alleging civil rights claims pursuant to 42 U.S.C. § 1983 and various state law claims.

Rodriguez moved for summary judgment on all claims against him on the basis of qualified immunity. The district court granted summary judgment in his favor on all constitutional claims except for a Fourteenth Amendment substantive due process claim based on a theory of state-created danger. Under that claim, Reat's Estate contends Rodriguez used his governmental authority to subject him to the callous shooting that caused Reat's death.

We conclude the law was not clearly established such that a reasonable 911 operator would have known his conduct violated Reat's constitutional rights. Because we decide only that the law was not clearly established, we do not opine on whether Rodriguez violated Reat's constitutional rights. We therefore reverse and remand for entry of summary judgment in favor of Rodriguez.

I. Background

The facts of this case are tragic. At 4:12 a.m. on April 1, 2012, Ran Pal called 911 to report that several men had thrown a bottle and broken the rear windshield of the car he was driving. He told Operator Rodriguez that although the attack had occurred at Tenth Avenue and Sheridan Boulevard in Denver, he and his passengers had fled to safety in the nearby city of Wheat Ridge on the west side of Sheridan Boulevard.

For reasons that remain unclear, Rodriguez told Pal that because the attack had occurred in Denver, he needed to return to the city in order to receive help from the police. At first, Pal refused to return. He told Rodriguez he was in a state of shock, needed time to recover, and did not want to drive. Pal pleaded with Rodriguez to send help to his current location. Over the course of the fourteen-minute call, Pal told the operator at least six times that he was injured, in shock, and afraid. Still, Rodriguez insisted the police could not help unless he returned to Denver. About three minutes into the call, Pal finally agreed. He remained on the phone with Rodriguez as he drove.

On his way back to Denver, Pal fleshed out the details of the assault on the call. He explained that he, his brother, cousin, and a friend had been driving through Denver when a red jeep pulled up next to them. While both cars were stopped at a red light, the men in the jeep threw bottles and bottle rockets at Pal's car, breaking the windshield. Shards of glass injured Pal's hand and face. He told Rodriguez he had gotten a partial license plate number as the assailants sped off northbound on Sheridan Boulevard. Pal continued to tell the operator he was in shock. Rodriguez asked where Pal was, and Pal replied that he was crossing Sheridan on Twenty-Ninth Avenue. Rodriguez instructed him to stop there, and continued to ask questions to determine whether an ambulance was necessary. Rodriguez failed to dispatch an ambulance or the police at this time.

About eight minutes into the call, Pal revealed to Rodriguez that the assailants had brandished a gun. Rodriguez asked questions about the size, color, and

type of gun. He also asked more questions about the attackers, including their race and what they had been wearing. Pal told the operator that four or five Hispanic men had gotten out of the car and hurled forty-ounce beer bottles at his vehicle. He told Rodriguez he had fled the scene when his brother urged him to do so because the attackers were armed. After questioning the victims about whether they had been drinking, Rodriguez confirmed that Pal was still at Twenty-Ninth Avenue and Sheridan Boulevard. He told Pal to pull over and wait there for the officers whom he would dispatch. Rodriguez also instructed Pal to turn on his hazard lights so that the police could easily locate the vehicle.

About ten minutes into the call, another man in the car picked up the phone. The man repeated that they were all in shock and scared, and asked whether police were on their way to provide help. Though Rodriguez indicated he had sent the police, he in fact had not. Rodriguez asked that the phone be handed back to Pal. Rodriguez then had Pal confirm that his hazard lights were on, and reiterated that Pal needed to wait at that location. He warned Pal, "if you see them come back, I need you to call us right away at 911." Aplt. App., Vol. III, at 281.

Seven seconds later, Pal shouted, "They're back, they're back[!]" *Id.* at 262. Pal handed the phone to someone else, who told Rodriguez that the men were shooting. Pal picked the phone back up to report that his brother had been shot. Over Pal's screams, Rodriguez continued to ask what was happening. Someone else picked up the phone and repeated the information. Rodriguez asked who had been shot, where they were located, and

whether the attackers were still there. The speaker told Rodriguez that Reat was about to die and asked whether he could send an ambulance. Rodriguez continued to ask questions about the victim. Officers were dispatched to the scene about one minute after the shooting. Reat died of his injuries.

II. Analysis

Reat's Estate brought federal claims pursuant to 42 U.S.C. § 1983 and various state law claims against Rodriguez and the City and County of Denver. The defendants claimed they were protected by qualified immunity, arguing they did not violate Reat's rights under clearly established law. The district court dismissed the claims against the City and County. Only claims against Rodriguez proceeded.

A. Qualified Immunity

1. Clearly Established Law

Qualified immunity exists to protect government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Dodds v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Qualified immunity is not only a defense to liability, but immunity from suit; thus, "it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Accordingly, in qualified immunity cases at the summary judgment stage, a "plaintiff must demonstrate on the facts alleged (1) that the defendant violated his constitutional or statutory rights, and (2) that the constitutional right was clearly established at the time of the alleged unlawful activity." *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1199 (10th Cir. 2009). In our review, "we need only find that the plaintiffs failed either requirement" to establish qualified immunity. *Id.* Because there are cases where we can more readily decide the law was not clearly established before reaching the more difficult question of whether there has been a constitutional violation, we may exercise discretion in deciding which prong to address first. *See Pearson*, 555 U.S. at 236.

This is such a case. We therefore confine our analysis of qualified immunity to the second prong, inquiring only whether the law at the time of the incident was "sufficiently clear that a reasonable official would have understood that his conduct violated the right." *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001). A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012) (internal quotation marks and alteration omitted). To make this determination, we consider "either if courts have previously ruled that *materially similar conduct* was unconstitutional, or if a general constitutional rule already identified in the decisional law [applies] with *obvious clarity* to the specific conduct at issue." *Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008) (emphasis added). Usually, this requires either "a Supreme Court or Tenth Circuit decision on point, or

the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cordova v. City of Albuquerque*, 816 F.3d 645, 658 (10th Cir. 2016) (quoting *Clark v. Wilson*, 625 F.3d 686, 690 (10th Cir. 2010)).

But an earlier decision need not be "materially factually similar or identical to the present case; instead, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). We look to see if "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "The dispositive question is whether the violative nature of *particular* conduct is clearly established," *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (per curiam) (emphasis in original) (internal quotation marks omitted), so that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier v. Katz*, 533 U.S. 194, 202 (2001). This investigation must be undertaken with a focus on the particular circumstances of the specific case before the court.

In sum, plaintiffs must "demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1106 (10th Cir. 2014) (quoting *Trotter v. Regents*, 219 F.3d 1179, 1184 (10th Cir. 2000)).

2. State-Created Danger

The Estate argues that Rodriguez created the danger that led to Reat's death. At the most general level, the parties agree that the state-created danger doctrine is clearly established in this circuit.

Two preconditions are necessary for the application of the state-created danger doctrine: first, the state actor took an affirmative action, and, second, that action led to private violence injuring the plaintiff. *Id.* at 1105. If these preconditions are met, a plaintiff next must show:

> (1) the charged state . . . actor[] created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendant[`s] conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Id.

Though the elements of the state-created danger test are clearly established, it also must be clear to which fact scenarios and government actors we apply the test, and what types of conduct are "conscience shocking" under the sixth factor. *Green v. Post*, 574 F.3d 1294, 1297 (10th Cir. 2009) (conscience-shocking conduct is "difficult to define and requires an assessment of the totality of the circumstances of each particular case" (internal quotation marks omitted)). But, as we explained above, the application of an established test

even to a new fact pattern does not necessarily require a finding of qualified immunity. *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007).

Here, Reat's Estate alleges Rodriguez violated the Fourteenth Amendment by knowingly sending the victims, who had called 911 to report an assault, back into the path of their armed attackers. It contends Rodriguez knew the attackers last had been seen speeding northward on Sheridan Boulevard only minutes earlier, yet he instructed Pal to stop on that road. He then told Pal to pull over and activate his hazard lights at a location nineteen blocks north of the place of the assault. Even after Rodriguez knew the attackers had brandished a gun, he did not suggest that Pal relocate to a less conspicuous place, nor did he send police protection. The district court held "these factual allegations, accepted as true, are sufficiently shocking to the conscience to state a plausible claim for violation of plaintiffs' substantive due process rights under the state-created danger theory." Aplt. App., Vol. V., at 575.

For a number of reasons, we conclude Rodriguez's conduct does not violate the clearly defined contours of the state-created danger doctrine. First, Reat's Estate cannot point to a Supreme Court or Tenth Circuit case involving misconduct by 911 operators. As a general matter, we have considered the doctrine in a number of cases involving a range of state actors. For example, we have analyzed the doctrine in the context of both an off-duty police officer on personal business who crashed his police vehicle, *see Browder v. City of Albuquerque*, 787 F.3d 1076, 1083 (10th Cir. 2015), and on-duty officers engaged in high-speed chases where "the legitimate

governmental objective is so pressing that the luxury of forethought doesn't exist," *id.* at 1080; *see also Sacramento Cty. v. Lewis*, 523 U.S. 833 (1998). We have also applied this theory of liability to other types of first responders, cloaked with government authority, reacting immediately to emergency situations. *See, e.g., Perez v. Unified Gov't of Wyandotte Cty./Kansas City*, 432 F.3d 1163, 1168 (10th Cir. 2005) (applying the state-created danger doctrine to a firefighter who crashed his truck into a car, killing its occupant); *Radecki v. Barela*, 146 F.3d 1227, 1232 (10th Cir. 1998) (applying the doctrine to a deputy sheriff who caused the death of a bystander by instructing him to help physically subdue a suspect who then shot the civilian).

In other settings, we have applied the state-created danger doctrine to social workers, school officials, and hospital administrators. *See, e.g., Currier*, 242 F.3d at 908 (applying the doctrine to social worker who removed a child from his mother's home and placed him with his father, who killed him); *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253 (10th Cir. 1998) (applying the doctrine to school official who suspended and sent home a special education student who subsequently killed himself); *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995) (applying the doctrine to state mental health administrators who eliminated a special unit for the criminally insane, causing the transfer of a murderer to the general hospital, where he killed his therapist).

But these cases are not particularly instructive here: as the Supreme Court noted in the case that is widely understood to be the progenitor of the state-created danger doctrine, "[t]he affirmative duty to protect

arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Deshaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 200 (1989). In all of these cases where we found it appropriate to apply the doctrine of state-created danger, the victims were unable to care for themselves or had had limitations imposed on their freedom by state actors. "[In a] custodial situation [such as] a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." *Lewis*, 523 U.S. at 851.

Rodriguez is unlike any of the defendants in our state-created danger cases. Rodriguez was not a police officer, firefighter, or other similar first responder.[1] As a 911 operator, he was not present at the scene of the attack, nor could he take physical action in response to the unfolding event. He did not impose any limitation on Reat's freedom to act. Rodriguez merely informed the victims, however incompetently, that to get help from the police, they would have to return to Denver. It cannot be said that any of Rodriguez's actions, as foolish as they were, "limited in some way the liberty of a citizen to act on his own behalf." *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 995 (10th Cir. 1994).

Furthermore, Reat is unlike the victims in other state-created danger cases. He was not in the custody of the state in the way that prisoners are, and thus was not deprived in that manner of his freedom to act. Unlike children in school or under the care of social workers,

Reat and his companions were not incapable of acting in their own interest at the time of the shooting. Though the state-created danger doctrine itself may be clearly established, it is far from clear that it applies to Rodriguez's conduct in this particular situation.

In sum, all cases cited by Reat's Estate "are simply too factually distinct to speak clearly to the specific circumstances here." *Mullenix*, 136 S. Ct. at 312. No reasonable 911 operator could have known that these actions would have resulted in liability under the Fourteenth Amendment. Because we dispose of this case on the clearly-established prong of the qualified immunity test, we express no opinion as to whether Rodriguez's actions violated Reat's constitutional rights. Thus, our decision does not foreclose liability for similarly-situated actors in future cases. *See Pearson*, 555 U.S. at 242-43.

B. State Law Claims

Reat's Estate also asks us to exercise supplemental jurisdiction over related state law claims against Rodriguez. When we have held defendants are entitled to summary judgment on all federal claims, we have declined to exercise our supplemental jurisdiction over issues of state law, and instead, when in the interests of comity and justice, remanded with instructions to dismiss. *See Brooks v. Gaenzle*, 614 F.3d 1213, 1229-30 (10th Cir. 2010); *see also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). Accordingly, we decline to exercise jurisdiction over the remaining state law claims.

III. Conclusion

For the foregoing reasons, we REVERSE AND REMAND with instructions to DISMISS without prejudice the state law claims.

FootNotes

1. Only one circuit court has even considered imposing liability under the state-created danger doctrine on a 911 operator for conduct responding to an emergency call. *See Beltran v. City of El Paso*, 367 F.3d 299 (5th Cir. 2004) (finding operator was entitled to qualified immunity where she miscoded a 911 call, leading to the death of the child caller and her mother).

Filed 12/16/14

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO Judge Robert E. Blackburn

Civil Action No. 12–cv–02531–REB–MEH ESTATE OF JIMMA PAL REAT, et al., Plaintiffs,

v.

JUAN JESUS RODRIGUEZ, individually, Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Blackburn, J.

The matter before is defendant's Motion for Summary Judgment [#188],[1] filed September 26, 2014. I have jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 (federal question) and 1367 (supplemental jurisdiction). Having reviewed the motion and response and the apposite arguments, authorities, and evidence presented by the parties, and viewing the evidence in the light most favorable to plaintiffs, see Simms v. Oklahoma ex rel. Department of Mental Health and Substance Abuse Services, 165 F.3d 1321, 1326 (10th Cir.), cert. denied, 120 S.Ct. 53 (1999), it is apparent that there exist genuine disputes of material fact that are not appropriate for summary resolution.[2]
THEREFORE, IT IS ORDERED that defendant's Motion for Summary Judgment [#188], filed September 26, 2014, is DENIED.
Dated December 16, 2014, at Denver, Colorado.

BY THE COURT:

Footnotes

1 "[#188]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

2 The legal authority and analysis supporting my conclusion in this regard are fully expatiated in my Order Re: Recommendation of United States Magistrate Judge [#111], filed June 17, 2013, and those portions of the Recommendation of United States Magistrate Judge [#92], filed April 9, 2013, approved and adopted therein, and I therefore will not repeat them here. Suffice it to say that plaintiffs' evidence is sufficient to substantiate the allegations of their pleadings and create genuine disputes of material fact as to each element of their substantive due process claim against defendant. Defendant's motion does little more than presents his own version on the facts, which clearly is amenable to a less sanitized interpretation.

ESTATE OF JIMMA PAL REAT, JAMES PAL REAT, REBECCA AWOK DIAG, RAN PAL, CHANGKUOTH PAL, JOSEPH KOLONG,

Plaintiff,

v.

JUAN JESUS RODRIGUEZ, individually, and CITY AND COUNTY OF DENVER, Defendants.

United States District Court, D. Colorado.

June 17, 2013.

Attorney(s) appearing for the Case

Estate of Jimma Pal Reat, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

James Pal Reat, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Rebecca Awok Diag, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Ran Pal, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Changkuoth Pal, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Joseph Kolong, Plaintiff, represented by Anna C. Holland-Edwards, Holland Holland Edwards & Grossman, P.C., Erica Tick Grossman, Holland Holland Edwards & Grossman, P.C. & John R. Holland, Holland Holland Edwards & Grossman, P.C..

Juan Jesus Rodriguez, Defendant, represented by Eric Michael Ziporin, Senter Goldfarb & Rice, LLC, Jennifer Fawn Kemp, Senter Goldfarb & Rice, LLC & Thomas Sullivan Rice, Senter Goldfarb & Rice, LLC.

ORDER RE: RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

ROBERT E. BLACKBURN, District Judge.

This matters before me are (1) the Recommendation of United States Magistrate Judge [#92],[1] filed April 09, 2013; (2) Plaintiffs' Partial Objection to Recommendation of United States Magistrate Judge Dated April 9, 2013 [Document 92] [#94], filed April 22, 2013; (3) defendant the City and County of Denver's Objection in Part to Recommendation of United States

Magistrate Judge [Docket No. 92] [#96], filed April 23, 2013; (4) Defendant Rodriguez's Objection in Part to United States Magistrate Judge's Recommendation [#97], filed April 23, 2013; and (5) Plaintiffs' Request for Hearing and Oral Argument on the Parties' Objections to Magistrate Recommendations [#108], filed May 23, 2013. I find that oral argument would not materially assist the court in resolving the issues inherent to the substantive motions, and therefore deny plaintiffs' request for same. Having reviewed *de novo* all portions of the recommendation to which objections have been filed, as required by 28 U.S.C. § 636(b), and having considered carefully the recommendation, objections, and applicable caselaw, I adopt the magistrate judge's recommendation in part and respectfully reject it in part as set forth more fully herein.

The magistrate judge recommends that plaintiffs' federal due process and equal protection claims be dismissed for failure to adequately allege plausible constitutional violations. With respect to the latter, I agree, although not for the reasons stated by the magistrate judge. However, contrary to the magistrate judge's interpretation, I find and conclude that the First Amended Complaint contains allegations sufficient to plausibly suggest that Mr. Rodriguez knew that plaintiffs were African-American. *See Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269 (10th Cir. 1989) (to state equal protection claim, plaintiffs must allege that defendant was motivated by racial animus).[2] Nevertheless, it fails to assert any plausible facts (as opposed to conclusory legal allegations) to suggest that plaintiffs were treated differently from other 911 callers because of their race. *Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 696 (10th Cir. 1988). I

therefore find and conclude that both Mr. Rodriguez and the City are entitled to dismissal of this claim.

I disagree, however, with the magistrate judge's recommendation that plaintiffs' substantive due process claim be dismissed for failure to allege facts sufficient to plausibly suggest that defendant Rodriguez's actions are sufficiently shocking to the conscience to state a claim under the "state-created danger" test.[3] *See Gray v. University of Colorado Hospital Authority*, 672 F.3d 909, 921 (10th Cir. 2012). Admittedly, this standard sets a lofty bar, "requir[ing] a high level of outrageousness." *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 924 (1996). Nevertheless, reviewing the allegations of the First Amended Complaint, and cognizant of the appropriate standard of review applicable to motions under Fed. R. Civ. P. 12(b)(6),[4] I must agree with plaintiffs that they have plausibly asserted a claim for violation of their rights to substantive due process under this theory of liability.

As the magistrate judge noted, courts generally apply a standard akin to deliberate indifference in determining whether a particular course of conduct was conscience shocking. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850, 118 S.Ct. 1708, 1718, 140 L.Ed.2d 1043 (1998). Yet the Supreme Court has cautioned that this standard is fluid and fact-specific and that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another." *Id.* In particular, "[a]s the very term `deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical." *Id.* Therefore, when officials act in emergent and rapidly developing circumstances,

the level of indifference necessary to shock the conscience is concomitantly higher:

In hyperpressurized environments, an intent to cause harm is usually required. In cases, however, where deliberation is possible and officials have the time to make unhurried judgments, deliberate indifference is sufficient to show conscience shocking behavior. In between these two extremes, there are cases in which a state actor is confronted with making something less urgent than a split-second decision but more urgent than an unhurried judgment. In such circumstances where a state actor must act with hurried deliberation to reach a decision in a matter of hours or minutes, a plaintiff must show that a defendant consciously disregarded a great risk of harm.

Hoover v. Beard, 248 Fed. Appx. 393, 395 (3rd Cir. Sept. 21, 2007) (citations and internal quotation marks omitted). *See also Schnurr v. Board of County Commissioners of Jefferson County*, 189 F.Supp.2d 1105, 1130 (D. Colo 2001).

Although noting that the 911 call lasted some 11 minutes before the shooting occurred, the magistrate judge focused on the last three minutes of that critical period — after Mr. Rodriguez learned that the assailants had brandished a gun during the initial attack. The magistrate judge concluded that this period of time was so brief and so chaotic that Mr. Rodriguez did not have adequate time to deliberate. He thus found that Mr. Rodriguez's conduct did not meet the high level of outrageousness needed to state a claim where emergent circumstances exist.

I find no principled reason to artificially cabin Mr. Rodriguez's conduct in this manner in determining whether plaintiffs have stated a viable claim for relief. As set forth more fully below, Mr. Rodriguez's actions during the first eight minutes of the call allegedly created the circumstances which culminated in the subsequent tragedy. It cannot be the law that a state actor is entitled to the benefit of the heightened state of mind standard when he himself allegedly set in motion the series of events giving rise to the emergency.

Moreover, the facts alleged in the First Amended Complaint — illuminated by the transcript of the 911 call appended thereto and the disciplinary report referenced therein — plausibly suggest that Mr. Rodriguez did not subjectively believe that he was dealing with an emergency situation at any point during the call. *See Terrell v. Larson*, 396 F.3d 975, 980 (8th Cir. 2005) (key consideration in this context is defendant's subjective intent, i.e., "whether [he] subjectively believed that [he was] responding to an emergency."). *See also Burgin v. Leach*, 2012 WL 5906658 at *5 (N.D. Okla. Nov. 26, 2012). The very fact that Mr. Rodriguez did not dispatch a police officer to plaintiffs' location until *after* shots were fired supports a plausible inference that he perceived no emergency prior to that time.

Given the facts alleged in the First Amended Complaint, I find that the intermediate standard referenced above — whether Mr. Rodriguez "consciously disregarded a great risk of harm" — is the appropriate one by which to measure Mr. Rodriguez's conduct. *Hoover*, 248 Fed. Appx. at 395. These facts are sufficient to plausibly assert that this standard is met.

Plaintiffs assert that Mr. Rodriguez knew that plaintiffs had been assaulted at 10th Avenue and Sheridan Boulevard and that the attack was serious enough to have shattered the car's window. In his disciplinary report, Mr. Rodriguez acknowledged that he knew plaintiffs did not need to return to Denver in order to file a police report. Nevertheless, he sent them from their location of relative safety in Lakewood back south along Sheridan into Denver, despite having been informed that the assailants were headed northbound on Sheridan immediately after the attack. It is thus plausible to conclude from these allegations that Mr. Rodriguez's directions created a substantial risk that plaintiffs would re-encounter their attackers.[5]

The facts also plausibly suggest that Mr. Rodriguez consciously disregarded this risk. After directing plaintiffs to park in a conspicuous location on a major road on which he knew the attackers had been traveling just minutes before, Mr. Rodriguez then instructed plaintiffs to activate their hazard lights, making them even more visible and obvious than they already were at that early hour of the morning. He then learned that the attackers had brandished a gun during the initial altercation. Despite this knowledge, Mr. Rodriguez did not suggest that plaintiffs find a more discrete location, even within the city of Denver, or otherwise make their whereabouts less obvious. Most egregiously, Mr. Rodriguez did not dispatch a police officer to plaintiffs' location at any time until after Jimma Pal had been fatally shot.

I find and conclude that these factual allegations, accepted as true, are sufficiently shocking to the conscience to state a plausible claim for violation of

plaintiffs' substantive due process rights under the state-created-danger theory. My inquiry therefore must proceed to consider whether the unconstitutionality of that conduct was clearly established at the time of the underlying events. *See Novitsky v. City of Aurora*, 491 F.3d 1244, 1255-56 (10th Cir. 2007). I find that it was.

Mr. Rodriguez argues that there is no Tenth Circuit case suggesting liability under the particular facts of this case. His argument is too facile, however. "The law is clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct at issue." *Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008) (quoting

United States v. Lanier, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (internal quotation marks omitted; alteration in original)). *See also Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) ("The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.") (citation and internal quotation marks omitted). In fact, the viability of the danger creation theory of substantive due process liability has been clearly established in this Circuit for many years. *See Kuyper v. Board of County Commissioners of Weld County*, 2010 WL 1287534 at *9 (D. Colo. March 30, 2010). Thus, the relevant question for present purposes is whether "a reasonable state official would have known [at the time of the events in question] that

reckless, conscience shocking conduct that altered the status quo and placed a [plaintiff] at substantial risk of serious, immediate, and proximate harm was unconstitutional." *Currier v. Doran*, 242 F.3d 905, 924 (10th Cir.), *cert. denied*, 122 S.Ct. 543 (2001).

Based on the facts alleged in the First Amended Complaint, I find that this standard is met here. Through his affirmative acts, Mr. Rodriguez sent plaintiffs from a position of relative safety back into the zone of danger from which they had escaped just minutes before. Aware that the assailants had been headed northbound on Sheridan Boulevard after the initial attack, Mr. Rodriguez instructed plaintiffs to stop their car at a major intersection less than 20 blocks north and make themselves even more conspicuous at a time of night when there was unlikely to be much other traffic on the road in any event. Most glaringly, knowing that the driver was injured and that the assailants had a gun, he failed to send help to the scene until after the tragedy was *fait accompli*. Although qualified immunity provides "ample room for mistaken judgments," *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986), I cannot say that "reasonable officials in the same situation as the defendant[] could disagree on the appropriate course of action to follow," *Whitington v. Lawson*, 2009 WL 3497791 at *3 (D. Colo. Oct. 29, 2009), *aff'd*, 424 Fed. Appx 777 (10th Cir. June 1, 2011). I therefore reject the magistrate's judge's recommendation as to this aspect of plaintiffs' substantive due process claim and thus will deny Mr. Rodriguez's motion to dismiss that claim.[6]

Having found that plaintiffs failed to plead a constitutional injury, the magistrate judge

recommended that plaintiffs' second cause of action against the City of Denver be dismissed. *See Wilson v. Meeks*, 98 F.3d 1247, 1255 (10th Cir. 1996) ("A municipality may not be held liable where there was no underlying constitutional violation by any of its officers."). Because I have found otherwise, I must consider the City's other substantive arguments. *See Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009) (municipality cannot be held liable based merely on underlying constitutional violation by one of its officers); *see also Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011) ("Section 1983 does not authorize liability under a theory of *respondeat superior*.").

Plaintiffs assert that the First Amended Complaint states a viable claim under 42 U.S.C. § 1983 against the City for failure to train and supervise Mr. Rodriguez. Specifically, they allege that the City maintains a

longstanding widespread deliberately indifferent dangerous custom, habit, practice and/or policy for emergency communications operators to refuse to timely dispatch units where the victims are safely located, and instead direct them to go back into city limits in the proximity of where the attackers were known to have just been, or even instruct the callers to remain at scenes known to have involved crimes against persons[.]

(First Am. Compl. ¶ 169 at 31 [#59], filed December 21, 2012.) "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, ___ U.S. ___, 131 S.Ct. 1350, 1359, 179 L.Ed.2d 417 (2011). In this context, plaintiffs must allege facts sufficient to suggest

that the failure to train "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989). Deliberate indifference is established only "when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights." *Connick*, 131 S.Ct. at 1360.

Plaintiffs allege that the allegedly unconstitutional practice of the city has been in effect since "at least the 1980s" and point to three incidents in which 911 callers who had been attacked were told to return to the city limits in order to file a police report. (First Am. Compl. ¶¶ 99-105 at 18-19.) *See Connick*, 131 S.Ct. at 1360 ("A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train.") (internal citation and quotation marks omitted). To the extent that three incidents spread over a period of 20 or more years can be said to constitute a "pattern," I am unpersuaded that these incidents sufficiently allege the existence of a policy or custom such as plaintiffs suggest. In two of these incidents, although the callers allegedly were instructed to return to Denver, there is no allegation that they were specifically told to return to the scene of the attack or otherwise reenter the zone of danger.[7] In the third — a 2011 incident in which a woman reported a road range incident and protested after being told to pull over immediately to await police officers — there is no allegation suggesting that the 911 operator's directive was intended to require the caller to remain within the city limits.

This leaves plaintiffs to rely exclusively on their allegations regarding Mr. Rodriguez's own deficiencies as a 911 operator. In addition to Mr. Rodriguez's shortcomings in connection with the events underlying this case, plaintiffs allege that Mr. Rodriguez exhibited similar deficiencies in performance in relation to an incident in February 2012. In that instance, although the caller reported that he had just choked his mother's boyfriend to death, Mr. Rodriguez failed to appreciate the seriousness of the situation, asking largely irrelevant questions and failing to queue the call for over five minutes. In addition, after directing the caller to leave the house to confirm the street address, Mr. Rodriguez then directed him to return to the house to perform CPR on the victim, without any appreciation of the potential for further violence. Mr. Rodriguez received a verbal reprimand in connection with this incident. (First Am. Compl. ¶¶ 114-126 at 20-22.)

Accepting these allegations as true, I do not believe they sufficiently plead a claim that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 109 S.Ct. at 1205. For one thing, the fact that Mr. Rodriguez was reprimanded for his conduct in connection with the February 2012, call supports the inference that the City's official policy was contrary to that which plaintiffs allege. Moreover, the fact that he was reprimanded implies that he was counseled and thus aware that it was *not* the policy of the City of Denver to require 911 callers to return to the scene of the crime in order to give a report. "That a particular officer may be unsatisfactorily trained will

not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *Id.* at 1206.

Moreover, nothing alleged in the First Amended Complaint comes close to suggesting that the need for more or better training was obvious in light of Mr. Rodriguez's past lapses. There is no allegation or other indication that the February 2012, incident actually resulted in a violation of anyone's constitutional rights. Without such an allegation, the fact that Mr. Rodriguez — or any other 911 operator — sent a caller back into the City of Denver or back to the vicinity of the crime is irrelevant in terms of the deliberate indifference inquiry. A constitutional violation in the air does not make out a viable allegation of deliberate indifference. City officials could not have had actual or constructive notice that such incidents were likely to violate the constitutional rights of 911 callers.[8] *See Ross v. Town of Austin, Indiana*, 343 F.3d 915, 918 (7th Cir. 2003) ("[Section] 1983 imposes upon municipalities no constitutional duty to provide law enforcement officers with advanced, specialized training based upon a general history of criminal activity in the community. . . . [D]eliberate indifference does not equate with a lack of strategic prescience."). Plaintiffs' claim against the City therefore is properly dismissed.

THEREFORE, IT IS ORDERED as follows:

1. That the Recommendation of United States Magistrate Judge [#92], filed April 9, 2013, is ADOPTED IN PART and respectfully REJECTED IN PART as follows:

a. That the recommendation is REJECTED insofar as it recommends dismissing plaintiffs' substantive due process claims against Mr. Rodriguez under the state-created-danger theory; b. That the recommendation is REJECTED also to the extent it recommends that plaintiffs' claims against the City and County of Denver should be dismissed for failure to prove an underlying constitutional violation based on the alleged violation of plaintiffs' rights of substantive due process under a danger creation theory; and c. That in all other respects, the recommendation is APPROVED AND ADOPTED as an order of this court;

2. That Plaintiffs' Request for Hearing and Oral Argument on the Parties' Objections to Magistrate Recommendations [#108], filed May 23, 2013, is DENIED;

3. That Plaintiffs' Partial Objection to Recommendation of United States Magistrate Judge Dated April 9, 2013 [Document 92] [#94], filed April 22, 2013, is SUSTAINED IN PART and OVERRULED IN PART, as follows:

a. That the objection is SUSTAINED insofar as it is directed to the magistrate judge's recommendation that plaintiffs' substantive due process claim against Mr. Rodriguez under the danger creation theory be dismissed; and b. That in all other respects, the objection is OVERRULED;

4. That the objections stated by the defendant, the City and County of Denver, in its Objection in Part to Recommendation of United States Magistrate Judge

[Docket No. 92] [#96], filed April 23, 2013, are OVERRULED;

5. That the objections stated in Defendant Rodriguez's Objection in Part to United States Magistrate Judge's Recommendation [#97], filed April 23, 2013, are OVERRULED;

6. That defendant Rodriguez's Motion To Dismiss Substituted Amended Complaint [#66], filed January 2, 2013, is GRANTED IN PART and DENIED IN PART as follows:

a. That the motion is GRANTED with respect to plaintiffs' substantive due process claim insofar as that claim is based on the allegation of a special relationship between plaintiffs and Mr. Rodriguez; b. That the motion is GRANTED further with respect to plaintiffs' equal protection claim; and c. That in all other respects, the motion is DENIED;

7. That plaintiffs' claims for violation of their rights to equal protection and to substantive due process, insofar as that claim is based on the allegation of a special relationship between plaintiffs and Mr. Rodriguez, are DISMISSED WITHOUT PREJUDICE;

8. That defendant the City and County of Denver's Motion To Dismiss [#62], filed December 24, 2012, is GRANTED;

9. That the claims of the plaintiffs against the City and County of Denver are DISMISSED WITHOUT PREJUDICE;

10. That at the time judgment enters, judgment SHALL ENTER as follows:

a. On behalf of defendant, Juan Jesus Rodriguez, individually, against plaintiffs, Estate of Jimma Pal Reat; James Pal Reat; Rebecca Awok Diag; Ran Pal, Changkuoth Pal; and Joseph Kolong, as to plaintiffs' claims for violation of their rights to equal protection and to substantive due process, insofar as that claim is based on the allegation of a special relationship between plaintiffs and Mr. Rodriguez; provided, that the judgment as to these claims shall be without prejudice; and b. On behalf of defendant, The City and County of Denver, against plaintiffs, Estate of Jimma Pal Reat; James Pal Reat; Rebecca Awok Diag; Ran Pal, Changkuoth Pal; and Joseph Kolong, as to plaintiffs' claims against the City; provided, that the judgment as to this claim shall be without prejudice; and

11. That defendant, the City and County of Denver, is DROPPED as a named party to this action, and the case caption AMENDED accordingly.

FootNotes

1. "[#92]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

2. The magistrate judge concluded to the contrary. However, the First Amended Complaint alleges that the caller, plaintiff Ran Pal, speaks with a distinct accent that positively identifies him as African.

Although the magistrate judge noted that Ran Pal's name, phonetically, is not distinctively African (and apparently sounds like "Rand Paul"), Mr. Rodriguez asked Pal to spell his name, which he did.

3. The magistrate judge also concluded that plaintiffs failed to allege a plausible claim for violation of their substantive due process rights under the "special relationship" theory of liability. I agree with the magistrate judge's conclusion that the facts alleged in the First Amended Complaint do not set forth a plausible claim that Mr. Rodriguez restrained plaintiffs' liberty in a manner that would invoke this theory of liability. *See Armijo v. Wagon Mound Public School*, 159 F.3d 1253, 1261 (10th Cir. 1998). *See also Gray* 672 F.3d at 924 (special relationship requires proof of "state action involving force, the threat of force, or a show of authority, with the intent of exercising dominion and control over the person"). *See also Thornton v. City of Pittsburgh*, 777 F.Supp.2d 946, 953-54 (W.D. Pa. 2011); *Ireland v. Jefferson County Sheriff's Department*, 193 F.Supp.2d 1201, 1217-18 (D. Colo. 2002); *Park v. City of Atlanta*, 938 F.Supp. 836, 842-43 (N.D. Ga. 1996), *rev'd on other grounds*, 120 F.3d 1157 (11th Cir. 1997). The motion to dismiss on this basis therefore will be granted.

4. Pursuant to the dictates of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562, 127 S.Ct. 1955, 1969, 167 L.Ed.2d 929 (2007), I review the complaint to determine whether it "`contains enough facts to state a claim to relief that is plausible on its face.'" *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Twombly*, 127 S.Ct. at 1974). Although I must accept all well-pleaded factual allegations of the complaint as true, *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 997 (10th Cir. 2002), mere "labels and

conclusions or a formulaic recitation of the elements of a cause of action" will not be sufficient to defeat a motion to dismiss, *Ashcroft v. Iqbal*, 556 U.S. 662, ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citations and internal quotation marks omitted). To meet the plausibility standard, the complaint must suggest "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S.Ct. at 1949. For this reason, the complaint must allege facts sufficient to "raise a right to relief above the speculative level." *Kansas Penn Gaming v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Twombly*, 127 S.Ct. at 1965).

The nature and specificity of the allegations required to state a plausible claim will vary based on context and will "require[] the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950; *see also Kansas Penn Gaming*, 656 F.3d at 1215. Nevertheless, the standard remains a liberal one, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Dias v. City and County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting *Twombly*, 127 S.Ct. at 1965) (internal quotation marks omitted).

5. Indeed, Mr. Rodriguez acknowledged during the call that the assailants might return.

6. Concomitantly, I agree with that portion of the magistrate judge's recommendation suggesting the plaintiffs have pled facts sufficient to suggest that Mr. Rodriguez's conduct was willful and wanton, thus denying him the protections of the Colorado Governmental Immunity Act. His motion to dismiss the state law claims therefore will be denied.

7. For similar reasons, the allegation that a former Denver 911 dispatch trainer "has publicly stated that callers who are outside the city "are routinely told to go back to Denver" does not speak with sufficient specificity to the allegation that callers are told to return to city limits regardless of the danger doing so might present. (*See* First Am. Compl. ¶ 106 at 19.)

8. Nor are the factual circumstances of the two calls implicating Mr. Rodriguez, although certainly reflecting poorly on his judgment in general, sufficiently similar to assert a plausible claim that the City of Denver was deliberately indifferent for failure to train.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-02531-REB-MEH

ESTATE OF JIMMA PAL REAT;
JAMES PAL REAT;
REBECCA AWOK DIAG;
RAN PAL;
CHANGKUOTH PAL;
JOSEPH KOLONG;

Plaintiffs,

v.

JUAN JESUS RODRIGUEZ, individually, and;
CITY AND COUNTY OF DENVER;

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Pending before the Court are a Motion to Dismiss [filed December 24, 2012; docket #62] filed by Defendant City and County of Denver (hereinafter "the City") and a Motion to Dismiss Substituted

Amended Complaint [filed January 3, 2013; docket #66] filed by Defendant Juan Jesus Rodriguez (hereinafter "Mr. Rodriguez"). Pursuant to 28 U.S.C. § 636(b)(1)(B) and D.C. Colo. LCivR 72.1C, the Motions are referred to this Court for recommendation. (Dockets ## 63,67.) After the Motions were fully briefed, the Court heard oral argument on February 26, 2013. (Docket #83.) For the reasons set forth below, the Court respectfully RECOMMENDS that the City's Motion [filed December 24, 2012; docket #62] be **GRANTED** and that Mr. Rodriguez's Motion to Dismiss Substituted Amended Complaint [filed January 3, 2013; docket #66] be **GRANTED IN PART** and **DENIED IN PART** as stated herein.[1]

BACKGROUND

I. Allegations of Fact

[1] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *In re Garcia*, 347 F. App'x 381, 382-83 (10th Cir. 2009).

The following are factual allegations (as opposed to legal conclusions, bare assertions or merely conclusory allegations) made by the Plaintiffs in their Substituted First Amended Civil Rights Complaint with Request for Trial by Jury [docket #59] ("First Amended Complaint") and presented in the Transcript of Recording of 911 Operator [docket #59-1] ("the Transcript") attached to the First Amended Complaint. *See Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) (allowing courts to consider documents attached to the pleading as exhibits). Both are taken as true for analysis under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court also considers the audio recording of the 911 phone call ("the Recording") filed as conventionally submitted material in conjunction with the First Amended Complaint. (Docket #60.)

A. 911 Call

Plaintiffs' claims arise from a 911 telephone call placed by Ran Pal in the early morning hours of April 1, 2012, to report an incident of harassment. Mr. Rodriguez, a 911 operator, answered the call by asking for the address of the emergency.[2] Ran Pal told Mr. Rodriguez that he was at 10th and Sheridan when

[2] In describing the 911 call, the Court relies primarily on the Transcript provided by Plaintiffs with their First Amended Complaint. Though Plaintiffs' First Amended Complaint presents the facts in a slightly different order, the Court must assess the constitutionality of Mr. Rodriguez's conduct in light of what he knew at the time he acted or failed to act. *See DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 202 (1989) (rejecting hindsight considerations in due process analysis).

somebody had "busted [his] vehicle" and sped off. (Docket #59-1, 1.) Mr. Rodriguez asked a second time for Ran Pal's location. (*Id.*) Ran Pal stated he was trying to get home and recover because he had been "hit with a bunch of shards." (*Id.*)

Mr. Rodriguez told Ran Pal that "he need[ed] to have an officer go take a report," and asked a third time for Ran Pal's location so he could send an officer out to meet him. (*Id.*) Ran Pal provided an address in Lakewood, and Mr. Rodriguez sought further clarification regarding the location of the incident. (*Id.* at 2.) After Ran Pal reported that he had been traveling northbound on Sheridan, Mr. Rodriguez indicated that "[they] needed [Ran Pal] to be inside of Denver so [they] could send an officer out." (*Id.* at 2-3.) Ran Pal informed Mr. Rodriguez that he had just pulled in at his brother's house at 5992 West 29th Avenue, which was outside of Denver. (*Id.* at 3.) Mr. Rodriguez stated, "I need to you come back into Denver so we can make a report." (*Id.*) Ran Pal asked where he needed to go, and Mr. Rodriguez said, "as long as you're on the [] east side of Sheridan, that's Denver." (*Id.*)

Ran Pal expressed that he was in shock because he had been hit with a bottle. (*Id.*) Hoping to recover, Ran Pal told Mr. Rodriguez that he did not want to drive and asked whether Mr. Rodriguez could send someone over to his location to take the report. (*Id.*) Mr. Rodriguez reiterated "[he] needed [Ran Pal] to come into Denver to take a report because [the police] can't go outside of Denver." (*Id.* at 4.)

Once Ran Pal agreed to return to Denver, Mr. Rodriguez asked, "can you come back or do you want to--?" (*Id.*) Ran Pal stated, "Yeah, I'm gonna come back." (*Id.*) Mr. Rodriguez inquired as to whether Ran

Pal was "going to start coming back right now...or come back in a while?" (*Id.*) Ran Pal clarified that he was "coming back right now" and asked whether Mr. Rodriguez would stay on the phone with him. (*Id.*)

Approximately three minutes and thirty seconds into the phone call, Mr. Rodriguez asked Ran Pal what happened. (*Id.* at 5.) Ran Pal explained that "[they] were just driving along, just trying to come to [his] brother's house[,]...[a]nd this red Jeep pulled up next to [them] and then [they] caught up to them at [] a red light[.]" (*Id.*) Ran Pal told Mr. Rodriguez that the occupants of the red Jeep "threw a bottle right though [his] windshield, like the back one...[and] shattered it and came and hit [him] on [his] right hand -- on [his] right side...on [his] face." (*Id.*)

Mr. Rodriguez asked for a description of the vehicle, and Ran Pal described his efforts to "catch up with them and get their [] license plate." (*Id.* at 5-6.) Ran Pal explained that the red Jeep "was going through lights, heading north [] on Sheridan," and that he could not catch the last digit because "they were trying just to escape...and they were throwing -- [.]" (*Id.* at 6.) In attempting to recall what the occupants of the red Jeep were throwing, Ran Pal interjected, "[o]h, I'm in shock. I'm in shock, boy. I'm bleeding, dog." (*Id.*) Ran Pal then stated that "they were throwing bottles [and] [t]hey also threw like bottle rockets." (*Id.*)

The conversation returned to Ran Pal's location. Ran Pal told Mr. Rodriguez that he was crossing Sheridan and heading eastbound on 29th. (*Id.* at 7.) Mr. Rodriguez asked where Ran Pal was going to stop and what kind of vehicle he was driving. (*Id.*) Ran Pal told him he was driving a white Dodge Charger and would stop at the east corner of 29th and Sheridan. (*Id.*)

Once the car was parked at 29th and Sheridan, Mr. Rodriguez asked whether Ran Pal needed an ambulance. (*Id.*) Initially, Ran Pal thought he was bleeding; however, he quickly reported that what he thought was blood was actually his energy drink. (*Id.* at 7-8.) Mr. Rodriguez told Ran Pal to stay on the phone and began to gather additional information about the incident, including when it occurred, who was in the vehicle, and whether anyone else needed an ambulance. (*Id.* at 8.) Ran Pal told Mr. Rodriguez that his brother, cousin, and friend were with him, but that none of them needed medical assistance. (*Id.*)

Approximately eight minutes and five seconds into the call, while Mr. Rodriguez was confirming the license plate information, Ran Pal told him that he believed the occupants of the red Jeep had a gun. (*Id.* at 9.) Mr. Rodriguez attempted to elicit information about the gun, including its color and type. (*Id.*) Ran Pal described the weapon as a black handgun. (*Id.*) Mr. Rodriguez asked whether Ran Pal knew the occupants of the red Jeep, and Ran Pal replied that he did not. (*Id.*) Mr. Rodriguez requested a more detailed description of the occupants of the red Jeep, including their race and what they were wearing. (*Id.* at 10.) Ran Pal recalled that there were four or five Hispanic men, one of whom was wearing red. (*Id.*) Ran Pal explained that the men got out of the car and were throwing forty-ounce beer bottles when one of the men pulled out a gun. (*Id.*) Mr. Rodriguez asked whether the occupants of the red Jeep appeared to be under the influence of drugs or alcohol. (*Id.*) Ran Pal speculated that they were drunk because they were throwing beer bottles. (*Id.* at 11.) Mr. Rodriguez then inquired as to whether Ran Pal or his passengers had

been drinking or using drugs, to which Ran Pal replied, "no sir." (*Id.*)

After receiving this information, Mr. Rodriguez instructed Ran Pal to wait at the east side of 29th and Sheridan and to turn his hazard lights on so the police could find him. (*Id.*) Another person picked up the phone and asked whether anyone was coming to help them. (*Id.*) Mr. Rodriguez responded, "Yeah, we're gonna send an officer out. I'm just getting some information from Ran. Can you put him back on?" (*Id.*) The new speaker explained that Ran was in shock because "it kinda happened quick [] and [they] didn't do nothing." (*Id.*)

At ten minutes and forty-three seconds into the call, Mr. Rodriguez indicated that he "got the call up." (*Id.* at 12.) When Ran Pal picked up the phone again, Mr. Rodriguez reiterated that he was sending an officer out and that he "need[ed] [Ran Pal] to wait there." (*Id.*) At Mr. Rodriguez's request, Ran Pal confirmed that the vehicle's hazard lights were activated. (*Id.*)

Eleven minutes and four seconds into the call, Mr. Rodriguez told Ran Pal that "if [he] s[aw] them come back, [he] need[ed] [Ran Pal] to call [him] right away at 911." (*Id.*) Seven seconds later, Ran Pal exclaimed "They're back, they're back[!]" Ran Pal handed the phone over to someone else, who told Mr. Rodriguez that "they're shooting." Ran Pal picked up the phone again and said, "My brother's down, my brother's down, man, he's down...he's down." (*Id.*) Mr. Rodriguez instructed Ran Pal to get away if he could. (*Id.*) Ran Pal repeated, "My brother's down, my brother's down...they hit Jimma, they hit Jimma...[t]hey hit Jimma." (*Id.* at 13.)

Amidst Ran Pal's shrieks, Mr. Rodriguez asked what was happening and indicated he could not hear him. (*Id.*) Ran Pal told Mr. Rodriguez that "they shot Jimma" and then turned the phone over to someone else who repeated the information. (*Id.* at 13-14) Mr. Rodriguez asked where they were, who had been shot, and whether the red Jeep was still there. (*Id.* at 14.) The speaker indicated that his friend was about to die and asked whether Mr. Rodriguez would send an ambulance. (*Id.*) Mr. Rodriguez continued to ask questions regarding the identity of the victim and whether he was awake or breathing. (*Id.* at 16-17.)

Approximately fourteen minutes into the call, the speaker reported that police had arrived. (*Id.* at 17.) Mr. Rodriguez reiterated that help was coming and directed the speaker to talk to the police. (*Id.*) The call was terminated at fourteen minutes and forty-two seconds. (*Id.*) Thereafter, Ran Pal cradled Jimma Reat as he died. (Docket #59 at ¶ 74.)

B. Media Coverage

The City and County of Denver Police Department ("the Department"), through Captain Ron Saunier, initially told the Denver Post that "we're not sure what caused [the shooting]," but "at one point, riders from both vehicles were in the street exchanging words." (*Id.* at ¶ 90.) Captain Saunier further reported that he "[did]n't know if you would say it was a fight." (*Id.*) Plaintiffs believe these statements characterized the shooting as gang-related, and that Mr. Rodriguez may have "plant[ed] the idea of gang activity" in Captain Saunier's mind to divert attention away from his own misconduct. (*Id.* at ¶ 91.)

Less than a day later, the City began publicly apologizing in all media outlets for the 911 conduct of Mr. Rodriguez. (*Id.* at ¶ 92.) Captain Saunier, on behalf the Department, categorically renounced speculation that the shooting was gang-related. (*Id.*) The Denver Post quoted Captain Saunier as stating, "There is no indication that the Sunday shooting was gang- related ... and none of those in the car that was fired on were gang members." (*Id.*) In a news release after the shooting, the Department indicated that Mr. Rodriguez was aware of the gun during the call by stating, "One of the occupants of the Jeep threw a bottle at the rental vehicle, breaking the rear window and one brandished a gun." (*Id.* at ¶ 93.)

C. Disciplinary Action

1. *April 1, 2012 Incident*

In addition to publicly apologizing, the City also acted internally to discipline and ultimately terminate Mr. Rodriguez. The termination documents authored by 911 Director Carl Simpson detail the various problems with Mr. Rodriguez's conduct during the call, including his instructions to Ran Pal and his communications with dispatch. As set forth in the First Amended Complaint, Director Simpson found that:

> [Mr Rodriguez] directed the caller to return to the city. The male caller then, reluctantly, drove back within Denver City limits, parked his vehicle with hazard lights on, at 29th and [S]heridan, [and] waited for officers to arrive. While the caller and the passengers in his car

> waited, per [Mr. Rodriguez's] instructions, the other vehicle involved in the altercation passed though the intersection, saw the caller's vehicle and opened fire, shooting and killing the caller's brother.

(*Id.* at ¶ 60.) Along with Director Simpson's findings, the Manager of Safety's office created a time line documenting Mr. Rodriguez's communications with dispatch. The time line shows that, despite learning of the damaged vehicle and the caller's injury and shock within the first three minutes of the call, Mr. Rodriguez did not send the call to the dispatch queue until seven minutes and nineteen seconds had elapsed. Mr. Rodriguez improperly coded the call as "Criminal Mischief." (*Id.* at ¶ 69.) In light of Mr. Rodriguez's knowledge of the injuries sustained by the caller, Mr. Rodriguez should have initially categorized the call as a criminal assault. (*Id.*)

Approximately a minute after sending the call to the queue, Mr. Rodriguez learned that a gun was involved; however, he did not update the report with this information. (*Id.* at ¶¶ 69, 80.) According to the City, there was an existing incident under investigation by the Department at 10th and Sheridan with officers deployed from a "Shots Fired" call while Mr. Rodriguez was on the phone with Ran Pal. (*Id.* at ¶ 82.) Mr. Rodriguez did not append the call. (*Id.*) The first police unit was not assigned until approximately one minute after the shooting occurred. (*Id.* At ¶ 69.) The ambulance was dispatched three minutes after the police unit was assigned and arrived on the scene about six minutes later. (*Id.*)

In discussing the failures with Mr. Rodriguez, Director Simpson observed that "during the first seven minutes of the call, the caller stated six separate times that he was injured, in shock, didn't want to drive, and needed to recover." (*Id.* at ¶ 84.) Though Mr. Rodriguez acknowledged that he understood, he "did not ask the caller to pull over, send him an ambulance and triage the call per the EMD protocol policy." (*Id.*) Mr. Rodriguez also admitted that he knew the assailants "were throwing bottle rockets at them" and that Ran Pal reported that "he was covered in shards of glass." (*Id.* at ¶ 87.)

Ultimately, Director Simpson concluded that Mr. Rodriguez "showed a blatant disregard for the caller's health and safety in [his] quest to have the caller return to Denver city limits, when he actually parked at one point only seven and a half blocks outside the city limits." (*Id.* ¶ 94.) As a result, Mr. Rodriguez "wasted crucial minutes and compromised public safety by instructing the caller to return to the city." (*Id.*) Director Simpson went on to criticize Mr. Rodriguez's delay in queuing the call for dispatch, noting that "[i]t was only after the caller told [Mr. Rodriguez] that he was at 29th and Sheridan and on the east side of the intersection that [he] created an incident for dispatch," while "all the while discounting any injuries to the occupants of the caller's vehicle by [his] failure to enter comments in the CAD incident relating to the assault and injury." (*Id.*)

2. *February 2012 Incident*

Upon announcing Mr. Rodriguez's dismissal, Director Simpson noted that the precipitating call was

not the first Mr. Rodriguez had mishandled. (*Id.* at ¶ 113.) In February 2012, Mr. Rodriguez received a 911 call from a person who claimed he may have choked his mother's boyfriend to death after the boyfriend had been violent toward the caller's mother. (*Id.* at ¶ 115.) Specifically, the February 2012 caller stated, "I choked him out and I think I killed him ... I think he is deceased." (*Id.* at ¶ 116.) The caller explained that he was "in a really, really stressed situation" and that "his mind [was] racing really fast..." (*Id.* at ¶ 117.) Despite these statements, Mr. Rodriguez directed the caller to go out into the street to get the exact address. (*Id.* at ¶ 118.) According to the City, this instruction was unnecessary since Mr. Rodriguez already had enough information with the intersections to complete the address verification. (*Id.*)

The City further found that Mr. Rodriguez "did not demonstrate any urgency to process that information," and that the call should have been sent to the dispatch queue within 60 seconds. (*Id.* at ¶ 119.) Instead, it took Mr. Rodriguez over five minutes to process the call. (*Id.*) As stated by the City, "[w]ithout acknowledging the criminality of the statement," Mr. Rodriguez "embarked on the medical triage aspect of the interview" by asking a number of questions about the victim and directing the caller to "perform CPR." (*Id.* at ¶ 120.) The City found that "[a]t no point in the conversation did [Mr. Rodriguez] actively listen to what the caller had to say or appear to understand that a homicide had occurred and that scene safety was paramount." (*Id.* at ¶ 121.) Instead, Mr. Rodriguez "repeatedly harangued the caller with questions and appeared to have no appreciation for the caller's environment and his effort to assist [Mr. Rodriguez] with processing the call." (*Id.*)

In a disciplinary warning statement issued two months before the April 2012 incident, the City found that, in handling the February 2012 incident, Mr. Rodriguez "failed to address scene safety and the integrity of a crime scene ... Allowing the caller to return to the apartment could have resulted in further violence ...." (*Id.* at ¶ 122.) Though the City took no formal action against Mr. Rodriguez beyond a verbal reprimand, it informed Mr. Rodriguez that "[his] handling of [the February 2012] call demonstrates an inability to discern, based on [his] caller's comments, what type of situation [he] [was] dealing with when processing the call." (*Id.* at ¶ 123.) The City further noted that "in [Mr. Rodriguez's] attempt to get an exact location, [he] failed to demonstrate any urgency in finding out what happened, and in the process, dismissed the confession [he] [was] provided and failed to recognize the potential consequences of sending the caller back into the crime scene." (*Id.*)

D. The City's Policies and Practices

Plaintiffs assert that Mr. Rodriguez received no formal training or discipline following the February 2012 incident. They also allege that the City has failed to provide proper training to other 911 operators, resulting in the widespread mishandling of calls. Plaintiffs identify three such instances.

The first incident occurred "in the 1980s" when Denver 911 operators allegedly instructed several young boys who had been attacked in a McDonald's restaurant to return to Denver to meet with officers after the boys had reached a point of safety in Lakewood. (*Id.* at ¶ 99.) Similarly, in 2004, a woman called 911 to report an incident in which two men

pulled up next to her, threw things in her car, and used a baseball bat to hit her back windshield. (*Id.* at ¶ 100.) Though the woman was "hysterical," 911 operators directed her to return to Denver to make a report. (*Id.*) In describing the 2004 incident to the media, the City explained that if the caller is outside the city limits, "they will be told to return to make a report." (*Id.* at ¶ 101.) The third incident occurred last year, when a female called 911 to report a road rage confrontation wherein another driver "physically threatened [her] and reached into the car after he stopped at a green light." (*Id.* at ¶ 102.) The 911 operator told the caller to "pull over and wait for a Denver police officer." (*Id.* at ¶ 103.) The caller objected to the instruction "because the road rager could see [her] parked and [she] was in great danger." (*Id.* at ¶ 104.) Though the caller provided the license plate number and description of her attacker, the Denver 911 operator "was firm that this was [the] procedure." (*Id.* at ¶ 105.)

These incidents are underscored by remarks from former 911 dispatch trainer Lenny Rubner, who publicly stated that callers who are outside the city "are routinely told to go back to Denver ... [as] the overall policy is for them to go back into the jurisdiction to make a report." (*Id.* at ¶ 106.) According to CBS4, the City "has no specific policy about when to send a caller back to Denver when a crime has occurred." (*Id.* at ¶ 107.) Plaintiffs believe that Mr. Rodriguez's admitted failure to "put the call up regardless and have dispatchers or officers decide if they were going to go out there or not" is further evidence of the confusion created by Denver's policy, or lack thereof. (*Id.* at ¶¶ 110-110.) According to Mr.

Rodriguez, he "just got stuck on them being outside of Denver." (*Id.* at ¶ 112.)

II. Procedural History

Plaintiffs initiated this action pursuant to 28 U.S.C. § 1983 against Mr. Rodriguez and the City on September 24, 2012. The following day, the Court granted a joint motion to stay the action through October 3, 2012, pending settlement negotiations. (Docket #13.) In the interim, Plaintiffs filed an amended complaint[3] asserting five claims for relief: (1) violation of due process and equal protection under the Fourteenth Amendment against Mr. Rodriguez; (2) deliberately indifferent policies, practices, customs, training, supervision, ratification, and acquiescence against the City; (3) wrongful death against Mr. Rodriguez; (4) negligent infliction of emotional distress against Mr. Rodriguez; and (5) intentional infliction of emotional distress against Mr. Rodriguez. Plaintiffs Ran Pal, the Estate of Jimma Reat, Changkouth Pal, and Joseph Kolong ("the Passenger Plaintiffs") join in the first and second claims based on their status as passengers in the vehicle on April 1, 2012. Plaintiffs James Pal Reat and Rebecca Awok Diag are Jimma Reat's parents, and as such, participate only in the wrongful death claim. Ran Pal, Joseph Kolong, and Changkouth Pal assert the remaining claims as survivors of the April 1, 2012 attack.

Unable to reach an agreement during settlement negotiations, Defendants each moved to

[3] Due to the sensitive nature of the Transcript, Plaintiffs filed the pleading and exhibit under seal at Restriction Level 1. (Dockets ##31, 33.)

dismiss Plaintiffs' amended complaint on November 30, 2012. (Dockets ##45, 47.) In conjunction with their respective motions to dismiss, Defendants moved to stay discovery.[4] (Docket #46.) Shortly thereafter, Plaintiffs filed a Substituted First Amended Complaint, which differed from the amended complaint only in its unrestricted designation. (*See* docket #59 at 1, n.1.) In the interest of clarity, the Court accepted the pleading as filed and denied Defendants' motions to dismiss as moot. (Docket #61.)

Pursuant to the Court's instructions, the City filed the present Motion to Dismiss on December 24, 2012, and Mr. Rodriguez did likewise on January 3, 2013.[5] (Dockets ##62, 66.) Both motions were referred to this Court for recommendation. (Dockets ##63, 67.) Mr. Rodriguez's Motion to Dismiss asserts an entitlement to qualified immunity regarding Passenger Plaintiffs' Fourteenth Amendment claim and invokes the protections of the Colorado Governmental Immunity Act ("the CGIA") regarding Plaintiffs' state law claims. In its motion, the City contends that Plaintiffs have failed to state a claim for municipal liability.

APPLICABLE LEGAL STANDARD

[4] In its order on Defendants' motion to stay, the Court determined that (1) Plaintiffs could not seek any discovery from Mr. Rodriguez; and (2) Plaintiffs could seek limited discovery from the City pending the District Court's resolution of the Motions to Dismiss. (Docket #77.) Judge Blackburn overruled Mr. Rodriguez's partial objection to the Court's order on April 3, 2013. (Docket #89.)

[5] As permitted by the Court's December 21, 2012 minute order, the renewed Motions to Dismiss incorporate the original motions by reference. (*See* docket #61.)

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pled facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* *Twombly* requires a two-prong analysis. First, a court must identify "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 678-80. Second, the Court must consider the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. "Thus, in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kansas Penn Gaming, LLC*, 656 F.3d at 1215. Thus, while the Rule 12(b)(6) standard does not require that a plaintiff establish a

prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim. *Khalik*, 671 F.3d at 1191.

ANALYSIS

As noted above, Mr. Rodriguez asserts an entitlement to (1) qualified immunity regarding Passenger Plaintiffs' Fourteenth Amendment claim; and (2) sovereign immunity under the CGIA regarding Plaintiffs' state law claims. The Court will consider each category of claims in turn. After assessing the sufficiency of Plaintiffs' claims against Mr. Rodriguez and the strength of Mr. Rodriguez's corresponding immunity, the Court will determine whether Plaintiffs have stated a viable claim for municipal liability against the City.

I. Qualified Immunity

Though singularly asserted, Passenger Plaintiffs' first claim seeks relief under both the due process and equal protection provisions of the Fourteenth Amendment. Mr. Rodriguez contends that he is entitled to qualified immunity under all constitutional theories of recovery articulated in the First Amended Complaint.

Qualified immunity protects from litigation a public official whose possible violation of a plaintiff's civil rights was not clearly a violation at the time of the official's actions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is an entitlement not to stand trial or face the other burdens of litigation. *Ahmad v. Furlong*, 435 F.3d 1196, 1198 (10th Cir. 2006) (internal

quotations and citations omitted). The privilege is an immunity from suit rather than a mere defense to liability. *Id.* When a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff to overcome the asserted immunity. *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009). "The plaintiff must demonstrate on the facts alleged both that the defendant violated his constitutional or statutory rights, and that the right was clearly established at the time of the alleged unlawful activity." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 818 (2009)).

The Supreme Court has discarded a review process that required courts to examine the elements of qualified immunity sequentially, first considering whether a right had been violated, and then second - if the court concluded a right had been violated - whether that right was clearly established at the time of the alleged violation. *Pearson,* 129 S. Ct. at 816-22. *Pearson* retired this process, instead affording courts the discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818.

For purposes of dismissal under Fed. R. Civ. P. 12(b)(6), a right is clearly established if, at the time of the alleged violation, "the contours of the right were sufficiently clear that a reasonable officer would understand that what he [or she] is doing violates that right." *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009) (citations and internal quotations omitted). In the Tenth Circuit, "[a] plaintiff can demonstrate a constitutional right is clearly established by references to cases from the Supreme Court, the Tenth Circuit, or the weight of

authority from other circuits." *Id.* This standard is not satisfied simply by identifying generalized constitutional principles. *Kerns v. Bader*, 663 F.3d 1173, 1182 (10th Cir. 2011). Although a plaintiff need not present a case "directly on point," a district court may not deny immunity "unless existing precedent has placed the statutory or constitutional question *beyond* debate." *Id.* (emphasis in original).

The Court will consider first whether Passenger Plaintiffs have plausibly alleged a constitutional violation under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Upon so finding, the Court will assess whether Passenger Plaintiffs' corresponding rights were clearly established at the time of the alleged violation.

A. Due Process Claim

As a general rule, the government's failure to provide protection "against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. Nor does "[a] constitutional duty to protect on the part of the State [] arise 'from the State's knowledge of the individual's predicament or from its expressions of intent to help him.'" *Gray v. Univ. Colo. Hosp. Auth.*, 672 F.3d 909, 918 (10th Cir. 2012) (quoting *DeShaney*, 489 U.S. at 200). Though the State may impose duties upon its agents through common law tort principles, "the Due Process Clause of the Fourteenth Amendment ... does not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S. at 202.

Relying on the Supreme Court's discussion in *DeShaney*, the Tenth Circuit has articulated two

exceptions to the general rule established therein. The first exception, known as the danger creation theory, provides for liability "where the State creates a dangerous situation for citizens of the free world or renders them more vulnerable to danger." *Gray*, 672 F.3d at 916 (citing *Graham v. Indep. Sch. Dist. No. 1-89*, 22 F.3d 991, 995 (10th Cir. 1994)). The second exception, known as the special relationship theory, recognizes that "when a the State takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Gray*, 672 F.3d at 916-17 (quoting *DeShaney*, 489 U.S. at 199-200). Passenger Plaintiffs seek relief under both theories of liability.

1. *Danger Creation Theory*

As established in *Graham* and reiterated in *Gray*, "th[e] state-created danger doctrine *necessarily involves affirmative conduct* on the part of the state in placing the plaintiff in danger." *Gray*, 672 F.3d at 909 (quoting *Graham*, 22 F.3d at 995) (emphasis in *Gray*). The affirmative act requirement is a necessary precondition, but it does not end the inquiry. In the Tenth Circuit, a plaintiff alleging a due process violation under the danger creation theory must additionally demonstrate that (1) he or she was a member of a limited and specifically definable group; (2) the defendant's conduct put the plaintiff at risk of serious, immediate, and proximate harm; (3) the risk was obvious or known; (4) the defendant acted recklessly in conscious disregard of that risk; (5) such conduct, when viewed in total, is conscious-shocking; and (6) the defendant created the danger or increased

the plaintiff's vulnerability to the danger in some way. *Gray*, 672 F.3d at 921 (citing *DeAnzona v. City & Cnty. of Denver*, 222 F.3d 1229,1235 (10th Cir. 2000)) (explaining that the affirmative act and private violence requirements must not be supplanted by the six-part test). Essentially, "the key to the state-created danger cases ... lies in the state actor's culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of aid." *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1263 (10th Cir. 1998).

As a threshold matter, Mr. Rodriguez denies that he engaged in any affirmative conduct that rendered the Passenger Plaintiffs more vulnerable to attack. In response, Passenger Plaintiffs identify what appear to be two categories of affirmative conduct: (1) Mr. Rodriguez's instructions to Ran Pal during the phone call; and (2) Mr. Rodriguez's alleged misrepresentations regarding forthcoming assistance from police. Because these are the same categories of conduct contemplated in and refuted by Mr. Rodriguez's Motion to Dismiss, the Court will focus its analysis on whether either or both constitute affirmative conduct.

A state agent's instructions to a private person qualify as "affirmative conduct" within the danger creation framework when such instructions effectively discourage the pursuit of either public or private sources of aid. *See Currier v. Doran*, 242 F.3d 905, 921 (10th Cir. 2001) (finding affirmative conduct where social worker instructed mother of abused children to "stop making allegations of abuse" such that mother declined to seek help from either child

protective services or the police). *Cf. Briggs v. Johnson*, 274 F. App'x 730, 735 (10th Cir. 2008) (concluding that "discouraging" reports of child abuse also qualifies as affirmative conduct). The same holds true when state officials instruct a person to seek help elsewhere or refuse to accept evidence of a crime. *See Estate of B.I.C. v. Gillen*, 702 F.3d 1182, 1188 (10th Cir. 2012) (affirming district court's recognition of "at least two affirmative acts" where social worker instructed grandparents of abused children to contact the police for information and refused to accept a CD of photographs showing the children's injuries). As the Tenth Circuit noted in *Gillen*, "a refusal is more than a mere failure to act." *Id.*

Mr. Rodriguez contends that his statements to Ran Pal and others do not qualify as affirmative acts because he gave Ran Pal the option of returning to Denver immediately or "com[ing] back in a while" to file the police report. (*See* docket #59-1 at 4.) According to Mr. Rodriguez, this sort of equivocation undermines Passenger Plaintiffs' contention that he acted affirmatively to bring them into Denver. Because Ran Pal knew he had the option of returning later and, nevertheless, chose to return immediately, Mr. Rodriguez disclaims any responsibility for the danger Passenger Plaintiffs subsequently encountered.

Passenger Plaintiffs proffer that Ran Pal was particularly inclined to follow instructions from authority figures in light of his upbringing and status as a refugee. While this may be true, the law does not account for these subjective factors. However, the Court sees sufficient objective reasons why a reasonable person in Ran Pal's position would have wanted to file a police report as soon as possible. As

the Court observed during oral argument, one of the primary objectives of a police report is to enable police to "catch the bad guys." As time passes, the likelihood of locating and apprehending the perpetrators decreases exponentially. In a case such as this where there has been property damage, a person's interests in locating the wrongdoer is especially strong. Beyond seeking compensation for the property damage, Ran Pal also had a reasonable interest in police intervention to prevent any ongoing violence. In either case, Ran Pal's urgency can be inferred from his request that Mr. Rodriguez send officers to his location in Lakewood. (*Id.* at 3.) When Mr. Rodriguez foreclosed this possibility, Ran Pal was theoretically left with two choices: to return immediately or "come back later." Given the host of circumstances described above, the latter choice was, at a minimum, considerably less appealing. In this sense, it is plausible that Mr. Rodriguez's decision to "cut off" the option of local assistance effectively channeled Ran Pal and the Passenger Plaintiffs back to Denver.

In the Court's view, Mr. Rodriguez's refusal to send officers to meet Ran Pal and his instructions to return to Denver plausibly constitute affirmative conduct insofar as they moved the Passenger Plaintiffs away from the safety of their apartment toward an area where they were more susceptible to being seen and re-assaulted by their assailants. *See Gillen*, 702 F.3d at 1188. As seen in *Currier* and *Briggs*, instructions need not amount to commands in order to qualify as affirmative conduct. *See Currier*, 242 F.3d at 921; *Briggs*, 274 F. App'x at 735. If discouragement is sufficient to trigger danger creation liability, the same must be true of its equally suggestive antonym. *See id.* Thus, even if Ran Pal was not theoretically

required to follow Mr. Rodriguez's instructions to drive to Denver, park, and turn on his hazard lights, the fact that Mr. Rodriguez encouraged him to do so is enough to plausibly satisfy the affirmative conduct requirement of Passenger Plaintiffs' danger creation theory.

Passenger Plaintiffs also allege affirmative conduct arising from Mr. Rodriguez's representations that the police had been sent to meet Passenger Plaintiffs at 10th and Sheridan. In so arguing, Passenger Plaintiffs rely heavily on Judge Brimmer's decision in *Kuyper v. Board of County Commissioners of Weld County*, No. 09-cv-00342-PAB-MEH, 2010 WL 1287534 (D. Colo. March 30, 2010), wherein Judge Brimmer declined to dismiss the danger creation claim of a parent whose child was sexually assaulted by a foster child after the state misrepresented the foster child's history of sexual misconduct. In the Court's view, this reliance is misplaced.

First, to the extent *Kuyper* stands for the proposition that a state official may be liable for misrepresentations which create or increase the danger of private citizens, it would nevertheless fail to provide Mr. Rodriguez with sufficient notice that his conduct violated clearly established law. *See Christensen*, 554 F.3d at 1278. More significantly, the Court questions the persuasive value of *Kuyper* in this case in light of the Tenth Circuit's decision in *Gray*. In *Gray*, the Tenth Circuit held that misrepresentations regarding the provision of government services, *even when made as a matter of policy*, do not violate the Constitution. 672 F.3d at 925 (finding "no constitutional implications" and no affirmative conduct where state actors are "aware of the risk, expressly promise[] to eliminate the risk, and fail[] to do so..."); *see also Thornton v. City of Pittsburgh*, 777 F. Supp. 2d 946, 954 (W.D. Pa. 2011) (citing *Ye v. United States*, 484 F.3d 634, 641 (3d Cir. 2007) (finding no danger creation claim where plaintiff relied on 911 operator's assurances that help was coming because "assurances of help cannot satisfy the affirmative act element."). In the Court's view, *Gray* undermines Passenger Plaintiffs' argument that Mr. Rodriguez's promises to dispatch police, even if false, constitute affirmative conduct on his part. However, because Passenger Plaintiffs have alleged other acts of affirmative conduct (Mr. Rodriguez's instructions), the Court proceeds to consider the remaining elements of their danger creation claim.

Mr. Rodriguez also disputes, to varying degrees, five other elements of Passenger Plaintiffs' danger creation claim: (1) Passenger Plaintiffs' membership in a limited and specifically definable group; (2) whether his conduct created a substantial risk of serious, immediate, and proximate harm; (3) whether the risk was known or obvious; (4) the recklessness of his conduct in light of the risk; and (5) whether his conduct is conscience-shocking. The Court will consider the elements in sequence.

Beginning with the first element, Mr. Rodriguez contends that the Passenger Plaintiffs were not members of a specific and definable group because, with the exception of Ran Pal, their identities were not known to Mr. Rodriguez. The Court finds this argument unconvincing. Even if Mr. Rodriguez did not know the names of Ran Pal's passengers, he knew that the vehicle in which Ran Pal was traveling contained other persons. Logically, then, Mr. Rodriguez knew or should have known that his instructions would impact each person in the vehicle

and only those persons in the vehicle. By virtue of the fact that the Passenger Plaintiffs were occupants of the vehicle which Mr. Rodriguez directed into Denver, the Court finds that they have plausibly established membership in a limited and definable group as required by the first danger creation element.

With respect to the second element, Mr. Rodriguez denies that he put the Passenger Plaintiffs at risk of serious, immediate, and proximate harm. Mr. Rodriguez posits that the assailants could have just as easily located the Passenger Plaintiffs at their apartment and, thus, his instructions did not affect their risk of being attacked. In the Court's view, this hypothetical ignores the facts alleged in the First Amended Complaint and the procedural posture of his Motion to Dismiss. At this stage, the Court is tasked with determining whether the facts alleged by Plaintiffs plausibly demonstrate that Mr. Rodriguez increased the risk of harm. As noted above, Plaintiffs allege that Mr. Rodriguez instructed Passenger Plaintiffs to drive back to Denver, turn on their hazard lights, park along a major thoroughfare and wait for the police to arrive. Taken together, the Court finds that Mr. Rodriguez's conduct during the 911 call plausibly placed the Passenger Plaintiffs at risk of serious, immediate, and proximate harm in satisfaction of the second element.

The third element, Mr. Rodriguez's knowledge of the risk, is complicated by the evolving nature of the information he received. At the time Mr. Rodriguez refused to send police outside of Denver, he knew that bottles were thrown at the vehicle, that Ran Pal had been hit with shards, and that Ran Pal was in shock and did not want to drive. In the Court's view, this was not enough information plausibly apprise Mr.

Rodriguez of the risk that Passenger Plaintiffs would encounter gunfire upon returning to Denver. Mr. Rodriguez learned of the gun approximately eight minutes into the call, at which time he also knew that the assailants had temporarily exited the vehicle while it was parked, thrown bottles and bottle rockets, flashed a gun at Passenger Plaintiffs, and were possibly under the influence of alcohol. These alleged facts indicate highly aggressive behavior on the part of the assailants, rendering more obvious the risk that the assailants would continue their assault and potentially escalate their use of force. But Passenger Plaintiffs need not rely only the appearance of the risk, as Mr. Rodriguez's statements demonstrate his knowledge of it. Shortly after Mr. Rodriguez instructed Ran Pal to park at 29th and Sheridan and turn his hazard lights on, Mr. Rodriguez verbally recognized that the assailants might return. (Docket #59-1 at 12.) (Rodriguez: "if you see them come back, I need you to call us right away at 911.") In the Court's view, Passenger Plaintiffs have plausibly alleged that the risk of harm was both obvious and known at the time Mr. Rodriguez instructed Ran Pal to wait in the parking lot and activate his hazard lights.

With respect to the fourth element, Mr. Rodriguez argues that his conduct was not reckless, because he was not duly informed of the risk and, in fact, had reason to question the extent of it. Pointing to the Transcript, Mr. Rodriguez notes that Ran Pal claimed he tried to "catch up with them and get their ... license plate" but that the assailants "were just trying to escape ...[.]" (*Id.* at 5-6.) Though Passenger Plaintiffs do not (and cannot) dispute Ran Pal's admission that he briefly pursued his assailants to obtain their license plate information, his statement

does not undermine his repeated expressions of shock or the information he conveyed regarding his assailants' aggressive conduct and their display of a firearm. As explained above, the aggregate facts allegedly known to Mr. Rodriguez approximately eight minutes into the phone call plausibly demonstrate a serious risk that Passenger Plaintiffs could be identified and attacked by the assailants. Mr. Rodriguez acknowledged this precise risk during the phone call, and nonetheless instructed Ran Pal to stop, park, and wait on a major thoroughfare, and to illuminate the hazard lights of his damaged vehicle. In the Court's view, Passenger Plaintiffs have plausibly alleged that Mr. Rodriguez acted in reckless disregard of the obvious and known risk that Passenger Plaintiffs would encounter further violence as a result of his instructions.

Lastly, the Court considers whether Mr. Rodriguez's alleged conduct during the 911 call, when viewed in its totality, is conscious-shocking. In evaluating this element of the danger creation theory, the Court must remain mindful of three guiding principles of substantive due process jurisprudence: (1) "the need for restraint" in defining the scope of substantive due process claims; (2) "the concern that § 1983 not replace state tort law;" and (3) "the need for deference to local policymaking bodies in making decisions impacting public safety." *Schwartz v. Booker*, 702 F.3d 573, 583 (10th Cir. 2012) (quoting *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995)). While "conscious-shocking behavior evades precise definition" and "evolves over time, " *id.*, the Tenth Circuit has made clear that "the 'shock the conscious' standard requires a high level of

outrageousness ...." *Armijo*, 159 F.3d at 1262 (quoting *Uhlrig*, 64 F.3d at 574).

In the absence of more explicit Tenth Circuit guidance, courts in this district have derived a test for conscious-shocking conduct from the Supreme Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *See Sanders v. Bd. of Jefferson Cnty. Comm'r of the Cnty. of Jefferson Colo.*, 192 F. Supp. 2d 1094, 1113 (D. Colo. 2001). As described in *Sanders*, "*Lewis* can be read to translate the *Uhlrig* principles into a sound framework ... for analyzing those myriad situations involving law enforcement and governmental workers deployed in emergency situations." *Id. Lewis* established a "culpability spectrum" along which conscious- shocking behavior is more likely to be found where "there is an intent to do harm that is not justified by any government interest." *Id.* (quoting *Lewis*, 523 U.S. at 849). In the middle range of the spectrum, "where the conduct is more than negligent but less than intentional," some conduct may be "egregious enough to state a substantive due process claim." *Id.* At the far end of the spectrum lies negligent conduct, which will never support a cause of action under Section 1983. *See id.*

Importing a concept from Eighth Amendment jurisprudence, the *Lewis* Court characterized the mid-level intent of substantive due process as something akin to deliberate indifference. *Lewis*, 523 U.S. at 849-50. Given the need for greater fluidity in the substantive due process realm, the Court added this important caveat: "As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical." *Id.* at 851. As Judge Babcock noted in *Sanders*, the opportunity for such deliberation is considerably

diminished in emergency situations where state officials are forced to make "split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." 192 F. Supp. 2d at 1114 (citing *Lewis*, 532 U.S. at 853).

As reasoned in *Sanders*, emergency situations are more aptly characterized by circumstances rather than timing. *See id.* at 1114-15; *see also Schnurr v. Bd. of Jefferson Cnty. Comm'rs of Jefferson Cnty.*, 189 F. Supp. 2d 1105, 1132 (D. Colo. 2001) (court "[did] not measure 'conscious shocking' by use of a clock."). Where law enforcement officials are gathering information and have not yet ascertained the nature or extent of the risk, "unless an intent to harm a victim is alleged, there can be no liability under the Fourteenth Amendment redressible by an action under § 1983." *Sanders*, 192 F. Supp. 2d at 1114-15. Thus, the *Sanders* court found that officials were not capable of meaningful deliberation in the hour and fifteen minutes before they learned that the shooters had committed suicide. *Id.* Though officials gained the ability to deliberate "at some point" in the three hours and thirty minutes that followed, Judge Babcock declined to "say precisely at what moment" such culpability attached. *Id.*

Passenger Plaintiffs invite the Court to "sit[] quietly for 11 minutes" in order to see that the duration of the phone call "provided a substantial amount of time affording much opportunity to think and deliberate." (Docket #172 at 25 n.24.) The Court finds this characterization inaccurate and misleading. In the eleven minutes leading up to the shooting, there was hardly one second of silence. For the first eight minutes of the call, Mr. Rodriguez continued to receive critical information regarding the nature of

the events that had transpired. By the time he had been fully informed of the risk, he had only three minutes in which to properly instruct Ran Pal as to the safest course of action. In the Court's view, instructing Ran Pal to park, wait, and activate his hazard lights plausibly amounts to recklessness. But the Court cannot say that three minutes, under these circumstances, provided Mr. Rodriguez with a meaningful opportunity to deliberate regarding the wisdom of this particular course of action. *Cf. Sanders*, 192 F. Supp. 2d at 1115; *see also Schnurr*, 189 F. Supp. 2d at 1132 (finding that "mere minutes" in rapidly evolving situation did not afford sufficient time to deliberate). Considering, as it must, the circumstances in which Mr. Rodriguez acted, the Court finds Passenger Plaintiffs have failed to plausibly demonstrate that his decisions, though perhaps unwise, meet the "high level of outrageousness" required to shock the conscious of a federal court. *See Armijo*, 159 F.3d at 1262.

Though Passenger Plaintiffs have plausibly established affirmative conduct and five of the six required elements, in the absence of conscious-shocking behavior, they cannot sustain a due process claim under a danger creation theory. *See Gillen*, 702 F.3d at 1189 ("In order to succeed on a danger creation claim a plaintiff must meet all elements of [the] six-part test."); *see also Schnurr*, 189 F. Supp. 2d at 1132 (dismissing danger creation claim under *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) where plaintiffs' allegations "fail[ed] to shock the conscience of [the] court in the constitutional substantive due process sense."). To the extent Passenger Plaintiffs have asserted such a claim, the Court recommends it be dismissed.

2. *Special Relationship Theory*

As articulated in *Armijo*, "if the state restrains an individual's freedom to act to protect himself or herself through restraint on that individual's personal liberty, the state may thereby enter into a 'special relationship' during such restraint to protect that individual from violent acts inflicted by others." 159 F.3d at 1261. Under this theory, due process protections arise from "the State's affirmative act of restraining the individual's freedom to act on his own behalf through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause ...." *Id.* A plaintiff proceeding on a special relationship claim must show "state action involving force, the threat of force, or a show of authority, with the intent of exercising dominion and control over the person." *Gray*, 672 F.3d at 924. As the *Gray* court explained, this is a "demanding standard." *Id.*

No special relationship exists where a person is "free to do whatever he want[s]." *See Armijo*, 159 F.3d at 1261. Even where state officials make assurances of safety upon which a person relies, there can be no special relationship where the officials "did not force [the person] against his will to become dependent on them." *Gray*, 672 F.3d at 924. In such circumstances, although the state actors may have played "some causal role" in the ultimate injury, "they did so only because the person 'voluntarily availed himself' of their services." *Id.* (quoting *Monahan v. Dorchester Counseling Ctr.*, 961 F.2d 987, 993 (1st Cir. 1992)). The State's false assurances "even if in some way responsible for the tragic result" do not

create a special relationship giving rise to liability under the Due Process Clause. *Id.*

In support of their special relationship theory, Passenger Plaintiffs contend that Mr. Rodriguez exerted control over them by giving them instructions throughout the 911 call on what to do if they wanted to file a police report. Citing *Sanders*, Passenger Plaintiffs characterize this as "impos[ing] limitations upon [Plaintiffs'] freedom to act on [their] own behalf." *Sanders*, 192 F. Supp. 2d at 1118. Plaintiffs also emphasize Mr. Rodriguez's false assurances that help was coming even though the police had not been dispatched.

Passenger Plaintiffs' reliance on *Sanders* invites the same challenges as *Kuyper*. Like *Kuyper*, Plaintiffs may not rely on the district court's decision in *Sanders* to establish the parameters of the special relationship doctrine for purposes of overcoming qualified immunity. *See Christensen*, 554 F.3d at 1278. Additionally, the Tenth Circuit's decision in *Gray* provides a more recent and authoritative expression of the law in this area. Arguably, *Gray*'s holding alters *Sanders*' emphasis on the defendants' false assurances that help was coming. *Compare Gray*, 672 F.3d at 924, *with Sanders*, 192 F. Supp. 2d at 1117.

These deficiencies aside, *Sanders* lacks persuasive value here because its facts are widely distinguishable from those presented to the Court in this case. Notably, the defendants in *Sanders* explicitly prohibited the students and teachers from leaving the classroom or evacuating Mr. Sanders to safety. *Sanders*, 192 F. Supp. 2d at 1117-18. On one occasion, someone attempting to seek outside help was physically restrained from doing so. *Id.* at 1117.

In this case, however, Mr. Rodriguez indicated that Ran Pal could either return to Denver immediately or come back at a later time. Moreover, the consequence of disregarding Mr. Rodriguez's instructions was relatively minor compared to *Sanders*. In *Sanders*, defendants threatened that if the students broke the window to move Mr. Sanders, the shooters (whom the defendants knew were deceased) would see or hear the glass breaking and come find them. *Id.* Comparing this consequence to Plaintiffs' inability to immediately file a police report, the Court is not convinced that Mr. Rodriguez's instructions rose to the level of commands or that the circumstances were sufficiently severe to undermine the voluntariness of Ran Pal's decision to return to Denver. The Court's finding is underscored by disparity of information between Passenger Plaintiffs and Mr. Rodriguez. Unlike *Sanders* wherein defendants had a wealth of information and the students had none, Passenger Plaintiffs knew far more about the situation than Mr. Rodriguez. In this way, Mr. Rodriguez was not able to exert the same degree of control over Passenger Plaintiffs as the defendants in *Sanders*. Most importantly, the Court cannot overlook that Passenger Plaintiffs voluntarily availed themselves of Mr. Rodriguez's services by dialing 911 that evening. *See Gray*, 672 F.3d at 924. Though the Passenger Plaintiffs' interest in immediate assistance was compelling enough to translate Mr. Rodriguez's refusal and instructions into affirmative conduct for purposes of danger creation, it is not enough, in the Court's view, to restrain their liberty. Because the Court is not persuaded that Mr. Rodriguez restrained Passenger Plaintiffs' liberty or prevented them from pursuing a safer alternative (i.e., coming back in the

morning, calling a different police department, etc.), the Court does not find that Passenger Plaintiffs have plausibly alleged the existence of a special relationship sufficient to support a due process claim. Therefore, the Court recommends dismissing the Passenger Plaintiffs' first claim to the extent it is premised on this theory of recovery.

B. Equal Protection Claim

In order to state a claim under the Equal Protection Clause for discrimination on the basis of race, "[a] plaintiff must sufficiently allege that defendants were motivated by racial animus." *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269 (10th Cir. 1989) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). "Mere differences in race do not, by themselves, support an inference of racial animus." *Green v. Corr. Corp. of Am.*, 401 F. App'x 371, 376 (10th Cir. 2010). Nor are conclusory allegations of racial motivation sufficient to state a claim upon which relief can be granted. *Id.*

The selective enforcement of police policies, without more, does not violate the equal protection clause. *See United States v. Borrego*, 66 F. App'x 797, 800-01 (10th Cir. 2003) ("As a matter of law, long-standing equal protection jurisprudence has recognized that some measure of selectivity in the law enforcement arena is constitutionally permissible."). In *Borrengo*, the Tenth Circuit rejected an equal protection argument premised on race discrimination where the officer testified that, although the stop was somewhat random, he did not know race of the person when he decided to pull him over. *Id.* Other courts have also recognized that knowledge of a

person's race is a necessary element of an equal protection claim premised on race discrimination. *See Phillips v. City of Los Angeles*, 171 F. App'x 54 (9th Cir. 2006) (affirming summary judgment on equal protection claim where defendant had no knowledge of plaintiff's race); *see also Kelly v. Rice*, 375 F. Supp. 2d 203, 210 (plaintiff failed to adequately allege equal protection claim where officer issued a parking ticket to black motorist before knowing her race).

Mr. Rodriguez argues that Passenger Plaintiffs have failed to plead sufficient facts demonstrating that he even knew their race during the phone call, much less that his decisions were motivated by racial animus. Passenger Plaintiffs respond that their status as racial minorities was evident in several ways: (1) Ran Pal's accent; (2) Ran Pal's name; and (3) the use of the term "dog" during the conversation. Additionally, they contend that Mr. Rodriguez's questions regarding whether they had done drugs or were involved with a gang, as well as his decision to categorize the call as pertaining to property destruction, reveal that he considered Passenger Plaintiffs to be black gang members unworthy of police protection.

Having read the Transcript and listened to the Recording of the call, the Court agrees with Mr. Rodriguez that there is little to identify the Passenger Plaintiffs as members of any particular race. Ran Pal's name is phonetically similar to Caucasian presidential candidate Ron Paul, and as such, does not plausibly reveal his identity as a person of African decent. Similarly, Ran Pal's use of the slang terms "dog" and "boy" are by no means distinctively African American.

The Court is likewise unconvinced that Mr. Rodriguez's questions regarding drug use or gang affiliation reflect a bias of any sort. In reality, gang affiliation is a common motive for acts of violence between groups of young men. Drugs or alcohol are similarly likely to contribute to unruly behavior amongst individuals out at such an early hour in the morning. Though there is nothing in the record to suggest any wrongdoing by Passenger Plaintiffs, Mr. Rodriguez's attempt to gather facts does not plausibly demonstrate preconceived racial stereotypes, but rather a reasonable attempt to rule out common causes of the conduct described to him over the phone. Moreover, even if Mr. Rodriguez did believe the Passenger Plaintiffs were members of a gang, gang membership is not limited to any particular race and is certainly not a suspect class of its own. *See David K. v. Lane*, 839 F.2d 1265, 1271-72 (7th Cir. 1988) (upholding policy targeting gang activity where plaintiffs failed to establish policy was implemented "*because of* the effect it would have on the allegedly suspect class" of white inmates) (emphasis in original).

In the Court's view, Passenger Plaintiffs have failed to plausibly allege that Mr. Rodriguez even knew their race during the phone call. Such knowledge is a logical precondition to racial animus, and without it, Passenger Plaintiffs cannot plausibly demonstrate that Mr. Rodriguez acted because of their race. To the extent Passenger Plaintiffs' first claim seeks recovery under the Equal Protection Clause, the Court recommends the claim be dismissed.

Finding that Passenger Plaintiffs have failed to plausibly allege a constitutional violation under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment, the Court believes that Mr.

Rodriguez is entitled to qualified immunity with respect to Claim One. Thus, the Court need not determine whether the law was clearly established at the time of the alleged injury. In the absence of a viable theory of recovery against Mr. Rodriguez, the Court recommends Claim One be dismissed in its entirety.

II. State Law Claims

As noted above, the First Amended Complaint asserts three causes of action under state law: (1) wrongful death on behalf of James Pal Reat and Rebecca Awok Diag; (2) negligent infliction of emotional distress on behalf of the Passenger Plaintiffs; and (3) outrageous conduct on behalf of the Passenger Plaintiffs. Mr. Rodriguez's Motion does not address whether these claims are plausibly stated, but instead asserts immunity under the CGIA. Plaintiffs' First Amended Complaint alleges that immunity is unavailable to Mr. Rodriguez because his actions were willful and wanton within the meaning of Colo. Rev. Stat. §§ 24-10-105(1) and 24-10-118.

The Colorado Supreme Court has not adopted a controlling interpretation of the phrase "willful and wanton" for purposes of the GGIA. *See Gray v. Univ. of Colo. Hosp. Auth.*, 284 P.3d 191, 198 (Colo. App. 2012). However, the most recent case from the Colorado Court of Appeals holds a plaintiff alleging willful and wanton conduct must show that the defendant was (1) consciously aware that his acts or omissions created a danger or risk to the safety of others; and (2) then acted or failed to act without regard to that danger or risk. *Id.* Ordinarily, willful and wanton conduct is treated as a question of fact

which is not appropriately dismissed early in the litigation. *Id.* ("'[T]he willful and wanton standard'...mandates a fact-based determination... [which] is not susceptible to resolution at an early stage in the litigation process before significant discovery has been undertaken *unless there are no disputed issues of fact*.") (emphasis in original).

This case is somewhat unique in that Plaintiffs' First Amended Complaint and the Transcript attached thereto contain a tremendous amount of detail. In this sense, it is difficult to find disputed issues of fact that would preclude the early resolution of this claim, were it lacking in plausibility. However, as the Court noted above, Plaintiffs have alleged ample facts to support a finding that Mr. Rodriguez acted recklessly under the circumstances. During the 911 call, Mr. Rodriguez verbally acknowledged the risk that the assailants might return to harm the Passenger Plaintiffs. Despite his awareness of this risk, Mr. Rodriguez directed Ran Pal to park next to a major thoroughfare, illuminate his hazard lights, and wait for police to arrive. In the Court's view, Plaintiffs have plausibly satisfied the requirements of willful and wanton conduct with regard to each of their state law claims. The Court recommends the District Court deny Mr. Rodriguez's request for immunity under the CGIA.

III. Municipal Liability

As its first line of defense, the City contends that in the absence of a plausible constitutional claim against Mr. Rodriguez, there is no basis for municipal liability. Plaintiffs' response assumes the Court will find an underlying constitutional violation on the part of Mr. Rodriguez, and thus, provides little argument

concerning the viability of a stand-alone § 1983 claim against the City. Though the parties' subsequent contentions raise a number of interesting questions regarding the applicability of danger creation analysis to claims against an entity, it is unnecessary to explore this territory in the case at hand.

The Tenth Circuit has consistently found that "[a] municipality may not be held liable where there was no underlying constitutional violation by any of its officers." *Wilson v. Meeks*, 98 F.3d 1247, 1255 (10th Cir. 1996) (citing *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993)). During oral argument, Plaintiffs correctly asserted that qualified immunity does not preclude municipal liability where it is premised on the murky state of the law. *See Hinton*, 997 F.2d at 783. However, where an officer is entitled to qualified immunity because the officer's conduct did not violate the law, "such a finding is equivalent to a decision on the merits of the plaintiff's claim," and thus, "may preclude the imposition of municipal liability." *Id.*

As described above, the Court has found that the facts alleged in Plaintiffs' First Amended Complaint, taken as true, do not support a plausible claim under the Fourteenth Amendment against Mr. Rodriguez. Because Plaintiffs have not established a constitutional injury caused by Mr. Rodriguez or identified any other government official who is independently liable, the Court need not further consider adequacy of the City's customs, polices, practices, training, or supervision. The Court recommends the District Court dismiss Plaintiffs' claim against the City, accordingly.

CONCLUSION

The events that befell Plaintiffs on April 1, 2012, are nothing short of tragic. There is no doubt that Mr. Rodriguez played a role in that tragedy through his affirmative conduct; however, his conduct does not render him constitutionally culpable in light of the circumstances he confronted during the 911 call.[6] The Court recommends the District Court find Mr. Rodriguez is entitled to qualified immunity for all theories of liability advanced in Claim One. In the absence of a valid constitutional claim, the Court likewise recommends the dismissal of Claim Two against the City. With respect to the remaining claims, the Court finds that Plaintiffs' assertions of willful and wanton conduct are well supported by the facts alleged in the First Amended Complaint. The Court recommends the District Court decline to dismiss such claims under the CGIA. Accordingly, the Court respectfully **RECOMMENDS** the City's Motion to Dismiss [filed December 24, 2012; docket #62] be **GRANTED** and Mr. Rodriguez's Motion to Dismiss Substituted Amended Complaint [filed January 3, 2013; docket #66] be **GRANTED IN PART** and **DENIED IN PART** as stated herein. In the event the District Court accepts this Court's recommendation, this Court takes no position on whether the District Court should retain supplemental

[6] In so finding, the Court echoes the sentiment expressed in *Beck v. Calvillo*, 671 F. Supp. 1555, 1563 (D. Kan. 1987) by recognizing that "nothing will compensate [P]laintiffs for their loss and grief." It is likewise "unfortunate the law does not lessen the pain by providing a [constitutional] remedy for the [P]laintiffs' claims." *See id.* Yet "this [C]ourt is without the power to create a remedy where none exists." *See id.*

jurisdiction over Plaintiffs' state law claims as permitted by 28 U.S.C. § 1367(c)(3).

Dated and entered this 9th day of April, 2013, in Denver, Colorado.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge

No. 15-1001.

ESTATE OF JIMMA PAL REAT; JAMES PAL REAT; REBECCA AWOK DIAG; RAN PAL; CHANGKUOTH PAL; and JOSEPH KOLONG,
Plaintiffs-Appellees,

v.

JUAN JESUS RODRIGUEZ, individually, Defendant-Appellant.

United States Court of Appeals, Tenth Circuit.

Filed August 12, 2016.

Before **TYMKOVICH**, Chief Judge, **KELLY**, **BRISCOE**, **LUCERO**, **HARTZ**, **GORSUCH**, **HOLMES**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

ORDER

This matter is before the court on the appellees' *Petition for Panel Rehearing or Rehearing En Banc.* We also have a response from the appellant.

Upon consideration, the request for panel rehearing is granted in part and to the extent of the changes made in the attached amended decision. The request for panel rehearing is otherwise denied.

Both the appellees' petition and the amended panel decision were also circulated to all the active judges of the court. A poll was called and a majority voted to

deny the request for en banc reconsideration. *See* Fed. R. App. P. 35(a). Consequently, the en banc petition is denied. Judges Lucero, Hartz, Phillips and Moritz would grant the petition for en banc rehearing.

The clerk of court is directed to file the amended panel decision effective the date of this order.

Bill H.R. 7085

116th Congress

2d Session

June 4, 2020

I

116TH CONGRESS
2D SESSION

H. R. 7085

To amend the Revised Statutes to remove the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 4, 2020

Mr. AMASH (for himself, Ms. PRESSLEY, Ms. OMAR, Ms. DEGETTE, Mr. GARCÍA of Illinois, Mr. BLUMENAUER, Mr. MCGOVERN, Ms. PINGREE, Ms. OCASIO-CORTEZ, Mr. ESPAILLAT, Mr. MEEKS, Ms. VELÁZQUEZ, Ms. NORTON, Ms. LEE of California, Mr. TAKANO, Mr. CARSON of Indiana, Mrs. CAROLYN B. MALONEY of New York, and Mr. KENNEDY) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Revised Statutes to remove the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Ending Qualified Immunity Act''.

SEC. 2. FINDINGS.

The Congress finds as follows:

(1) In 1871, Congress passed the Ku Klux Klan Act to combat rampant violations of civil and constitutionally secured rights across the Nation, particularly in the post-Civil War South.

(2) Included in the act was a provision, now codified at section 1983 of title 42, United States Code, which provides a cause of action for individuals to file lawsuits against State and local officials who violate their legal and constitutionally secured rights.

(3) Section 1983 has never included a defense or immunity for government officials who act in good faith when violating rights, nor has it ever had a defense or immunity based on whether the right was ''clearly established'' at the time of the violation.

(4) From the law's beginning in 1871, through the 1960s, government actors were not afforded qualified immunity for violating rights.

(5) In 1967, the Supreme Court in Pierson v. Ray, 386 U.S. 547, suddenly found that government actors had a good faith defense for making arrests under unconstitutional statutes based on a common law defense for the tort of false arrest.

(6) The Court later extended this beyond false arrests, turning it into a general good faith defense for government officials.

(7) Finally, in Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court found the subjective search for good faith in the government actor unnecessary, and replaced it with an ''objective reasonableness'' standard that requires that the right be ''clearly established'' at the time of the violation for the defendant to be liable.

(8) This doctrine of qualified immunity has severely limited the ability of many plaintiffs to recover damages under section 1983 when their rights have been violated by State and local officials. As a result, the intent of Congress in passing the law has been frustrated, and Americans' rights secured by the Constitution have not been appropriately protected.

SEC. 3. SENSE OF THE CONGRESS.

It is the sense of the Congress that we must correct the erroneous interpretation of section 1983 which provides for qualified immunity, and reiterate the standard found on the face of the statute, which does not limit liability on the basis of the defendant's good faith beliefs

or on the basis that the right was not ''clearly established'' at the time of the violation.

SEC. 4. REMOVAL OF QUALIFIED IMMUNITY.

Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by adding at the end the following: ''It shall not be a defense or immunity to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the Constitution or laws were not clearly established at the time of their deprivation by the defendant, or that the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.''.

○

Baxter v. Bracey

Case No. 18-1287

June 15, 2020

SUPREME COURT OF THE UNITED STATES

ALEXANDER L. BAXTER *v.* BRAD BRACEY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18–1287. Decided June 15, 2020

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting from the denial of certiorari.

Petitioner Alexander Baxter was caught in the act of burgling a house. It is undisputed that police officers released a dog to apprehend him and that the dog bit him. Petitioner alleged that he had already surrendered when the dog was released. He sought damages from two officers under Rev. Stat. §1979, 42 U. S. C. §1983, alleging excessive force and failure to intervene, in violation of the Fourth Amendment. Applying our qualified immunity precedents, the Sixth Circuit held that even if the officers' conduct violated the Constitution, they were not liable because their conduct did not violate a clearly established right. Petitioner asked this Court to reconsider the precedents that the Sixth Circuit applied.

I have previously expressed my doubts about our qualified immunity jurisprudence. See *Ziglar* v. *Abbasi*, 582 U. S. ___, ___–___ (2017) (THOMAS, J., concurring in part and concurring in judgment) (slip op., at 2–6). Because our §1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition.

I

A

In the wake of the Civil War, Republicans set out to secure certain individual rights against abuse by the States. Between 1865 and 1870, Congress proposed, and the States ratified, the Thirteenth, Fourteenth, and Fifteenth Amendments. These Amendments protect certain rights and gave

Congress the power to enforce those rights against the States.

Armed with its new enforcement powers, Congress sought to respond to "the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States." *Briscoe* v. *LaHue*, 460 U. S. 325, 337 (1983). Congress passed a statute variously known as the Ku Klux Act of 1871, the Civil Rights Act of 1871, and the Enforcement Act of 1871. Section 1, now codified, as amended, at 42 U. S. C. §1983, provided that

> "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . ." Act of Apr. 20, 1871, §1, 17 Stat. 13.

Put in simpler terms, §1 gave individuals a right to sue state officers for damages to remedy certain violations of their constitutional rights.

B

The text of §1983 "ma[kes] no mention of defenses or immunities." *Ziglar*, *supra*, at ___ (opinion of THOMAS, J.) (slip op., at 2). Instead, it applies categorically to the deprivation of constitutional rights under color of state law.

For the first century of the law's existence, the Court did not recognize an immunity under §1983 for good-faith official conduct. Although the Court did not squarely deny the availability of a good-faith defense, it did reject an argument that plaintiffs must prove malice to recover. *Myers* v. *Anderson*, 238 U. S. 368, 378–379 (1915) (imposing liability); *id.,* at 371 (argument by counsel that malice was an

essential element). No other case appears to have established a good-faith immunity.

In the 1950s, this Court began to "as[k] whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under §1983." *Ziglar*, *supra*, at ___ (opinion of THOMAS, J.) (slip op., at 4). The Court, for example, recognized absolute immunity for legislators because it concluded Congress had not "impinge[d] on a tradition [of legislative immunity] so well grounded in history and reason by covert inclusion in the general language" of §1983. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951). The Court also extended a qualified defense of good faith and probable cause to police officers sued for unconstitutional arrest and detention. *Pierson* v. *Ray*, 386 U. S. 547, 557 (1967). The Court derived this defense from "the background of tort liabilit[y] in the case of police officers making an arrest." *Id.,* at 556–557. These decisions were confined to certain circumstances based on specific analogies to the common law.

Almost immediately, the Court abandoned this approach. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), without considering the common law, the Court remanded for the application of qualified immunity doctrine to state executive officials, National Guard members, and a university president, *id.,* at 234–235. It based the availability of immunity on practical considerations about "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based," *id.,* at 247, rather than the liability of officers for analogous common-law torts in 1871. The Court soon dispensed entirely with context-specific analysis, extending qualified immunity to a hospital superintendent sued for deprivation of the right to liberty. *O'Connor* v. *Donaldson*, 422 U. S. 563, 577 (1975); see also *Procunier* v. *Navarette*, 434 U. S. 555, 561 (1978) (prison officials and officers).

Then, in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), the Court eliminated from the qualified immunity inquiry any subjective analysis of good faith to facilitate summary judgment and avoid the "substantial costs [that] attend the litigation of" subjective intent, *id.,* at 816. Although *Harlow* involved an implied constitutional cause of action against federal officials, not a §1983 action, the Court extended its holding to §1983 without pausing to consider the statute's text because "it would be 'untenable to draw a distinction for purposes of immunity law.'" *Id.,* at 818, n. 30 (quoting *Butz* v. *Economou*, 438 U. S. 478, 504 (1978)). The Court has subsequently applied this objective test in §1983 cases. See, *e.g., Ziglar*, 582 U. S., at ___ (majority opinion) (slip op., at 28).[1]

II

In several different respects, it appears that "our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act." *Id.*, at ___ (opinion of THOMAS, J.) (slip op., at 5).

There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this "clearly established law" test. Indeed, the Court adopted the test not because of "'general principles of tort immunities and defenses,'" *Malley* v. *Briggs*, 475 U. S. 335, 339 (1986), but because of a "balancing of competing values" about litigation costs and efficiency, *Harlow*, *supra*, at 816.

There also may be no justification for a one-size-fits-all, subjective immunity based on good faith. Nineteenth-century officials sometimes avoided liability because they exercised their discretion in good faith. See, *e.g., Wilkes* v.

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[1]I express no opinion on qualified immunity in the context of implied constitutional causes of action against federal officials. See, *e.g., Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

Dinsman, 7 How. 89, 130–131 (1849); see also Nielson & Walker, A Qualified Defense of Qualified Immunity, 93 Notre Dame L. Rev. 1853, 1864–1868 (2018); Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 57 (2018); Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 48–55 (1972). But officials were not *always* immune from liability for their good-faith conduct. See, *e.g., Little* v. *Barreme*, 2 Cranch 170, 179 (1804) (Marshall, C. J.); *Miller* v. *Horton*, 152 Mass. 540, 548, 26 N. E. 100, 103 (1891) (Holmes, J.); see also Baude, *supra,* at 55–58; Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 414–422 (1986); Engdahl, *supra*, at 14–21.

Although I express no definitive view on this question, the defense for good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. See, *e.g., Wilkes*, *supra*, at 130; T. Cooley, Law of Torts 688–689 (1880); J. Bishop, Commentaries on Non-Contract Law §773, p. 360 (1889). An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense.

Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity "was 'historically accorded the relevant official' in an analogous situation 'at common law.'" *Ziglar*, *supra*, at ___ (opinion of THOMAS, J.) (slip op., at 3) (quoting *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976)). The Court has continued to conduct this inquiry in absolute immunity cases, even after the sea change in qualified immunity doctrine. See *Burns* v. *Reed*, 500 U. S. 478, 489–492 (1991). We should do so in qualified immunity cases as well.[2]

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[2] Qualified immunity is not the only doctrine that affects the scope of relief under §1983. In *Monroe* v. *Pape*, 365 U. S. 167 (1961), the Court held that an officer acts "'under color of any statute, ordinance, regulation, custom, or usage of any State'" even when state law did not authorize his action, *id.*, at 183. Scholars have debated whether this holding is

* * *

I continue to have strong doubts about our §1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.

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correct. Compare Zagrans, "Under Color of" *What* Law: A Reconstructed Model of Section 1983 Liability, 71 Va. L. Rev. 499, 559 (1985), with Winter, The Meaning of "Under Color of" Law, 91 Mich. L. Rev. 323, 341–361 (1992), and Achtenberg, A "Milder Measure of Villainy": The Unknown History of 42 U. S. C. §1983 and the Meaning of "Under Color of" Law, 1999 Utah L. Rev. 1, 56–60. Although concern about revisiting one doctrine but not the other is understandable, see *Crawford-El* v. *Britton*, 523 U. S. 574, 611 (1998) (Scalia, J., joined by THOMAS, J., dissenting), respondents—like many defendants in §1983 actions—have not challenged *Monroe*.