BOOK REVIEW

by JONATHAN M. HYMAN*

CIVIL RIGHTS, by Charles S. Abernathy. Mineola, New York: West Publishing Co., 1979, pp. xi + 660, index. $19.95.

CIVIL RIGHTS LEGISLATION, by Theodore Eisenberg. Charlottesville, Va.: Michie Co., 1981, pp. xxxviii + 925, appendix & index. $25.00.

CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, by Sheldon Nahmod. Colorado Springs, Colo.: Sheppards McGraw-Hill, 1979, pp. 265, appendices, tables, index, & supplement. $65.00.

Introduction

With the publication of these three books, section 1983[1] appears to be established as a separate pillar in the temple of the law. Professors Eisenberg and Abernathy have prepared traditional casebooks devoted primarily to cases and notes concerning the myriad aspects of section 1983 and other civil rights litigation.[2] Professor Nahmod has written a small treatise describing the cases and providing some judicious comment where he thinks the courts have strayed.[3] In casebook style, the former two works are filled with questions. The latter work has answers, but, being a practical hornbook, it does not attempt to answer the questions set forth in the casebooks.

All three works are extremely useful contributions to the field. Section 1983 lurks in the wings of law school courses on constitutional law, civil rights and liberties, and federal jurisdiction. To students of those courses, section 1983 appears in some mysterious way to provide the mechanism by which concepts are turned into real cases, but how that mechanism operates may remain a mystery. Graduation from law school seldom brings enlightenment. Practitioners and judges who litigate or decide section 1983 cases can obtain from these books much-

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1. 42 U.S.C. § 1983 (Supp. III 1979).

2. C. ABERNATHY, CIVIL RIGHTS (1979); T. EISENBERG, CIVIL RIGHTS LEGISLATION (1979).

3. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (1979).

needed help in coping with an immense, bewildering, and expanding body of case law. Faculty or students who wish to understand section 1983 can organize a course on the basis of the casebooks, or can use the hornbook or the casebooks as background reference for other courses. The casebooks, particularly the one by Professor Eisenberg, are comprehensive enough to serve both as references and as ways to locate key cases and identify governing concepts.

As helpful as they are, these books do not provide the fundamental conceptual reorganization that the field needs. This shortcoming can hardly be considered the fault of the authors, however. It is the federal courts, not the scholars, who have lurched through the two decades since *Monroe v. Pape*[4] in a seemingly haphazard way, trying to balance the claims of those harmed by governmental action against the claims of the government and its agents to governmental immunity. It would be foolhardy for the authors to attempt a synthesis that the courts have avoided, particularly if the authors aim to instruct students, practitioners, and judges in the law as it is applied. The consequence, however, is that these books may become dated before the current decade is out. As is discussed more fully below, the courts may be changing the terrain on which the conflicting principles of federalism will be played out.

The following sections first describe the material covered by the books and then note some areas where developing section 1983 law apparently has been simplified and moved beyond the books' coverage. The last section points out that the simplification may be more apparent than real.

I. The Scope of the Books

All three books separate and detail the fundamental problems involved in section 1983 litigation. All address the question of whether or not section 1983 imposes a distinct standard of care.[5] Each has separate chapters regarding the amount of and circumstances for awarding damages.[6] The books all provide the necessary detail on the many varieties of immunity that have become critical to section 1983 litigation, distinguishing absolute immunity, qualified immunity of individuals, and immunity of organizations.[7] All give separate treatment to the procedural doctrines that control relationships between state and fed-

4. 365 U.S. 167 (1961).

5. C. ABERNATHY, *supra* note 2, at ch. I, § B; T. EISENBERG, *supra* note 2, at ch. 2, § B; S. NAHMOD, *supra* note 3, at ch. 3.

6. C. ABERNATHY, *supra* note 2, at ch. I, § E(1); T. EISENBERG, *supra* note 2, at ch. 6, § A; S. NAHMOD, *supra* note 3, at ch. 4.

7. C. ABERNATHY, *supra* note 2, at ch. I, §§ C, F(2); T. EISENBERG, *supra* note 2, at chs. 3-4; S. NAHMOD, *supra* note 3, at chs. 6-8.

eral courts, including exhaustion of administrative remedies, abstention, and *res judicata*.[8]

The casebooks depart from the treatise and go substantially beyond it in their treatment of equitable relief and in their consideration of civil rights statutes other than section 1983. Professor Nahmod's treatise is subtitled, "A Guide to Section 1983," but would more accurately be denominated "A Guide to Damages Under Section 1983." Equitable relief is covered only in passing, in the context of jurisdictional questions.[9] *Milliken v. Bradley*,[10] for instance, a critical case for establishing the breadth of equitable relief available in a section 1983 action, is not mentioned. The focus on damage remedies also explains why Nahmod's discussion of the Eleventh Amendment appears under equitable relief, rather than in conjunction with immunity issues. As a logical matter, it makes more sense to consider the Eleventh Amendment, as the two casebooks do, as part of a larger discussion of the immunity of governmental institutions. For practical purposes, however, the Eleventh Amendment issue primarily concerns equitable relief, and since Nahmod gives little attention to the problems of governmental immunity, he cannot be faulted for treating the Eleventh Amendment in a separate and cursory fashion. In his introduction to the chapter on equitable relief, he warns the reader that each of the jurisdictional topics treated could be the subject of a book or substantial chapter.[11]

The two casebooks also extend substantially beyond the treatise in their coverage of protective civil rights statutes other than section 1983. Both contain extensive treatments of 42 U.S.C. sections 1981, 1982, and 1985(c), provisions which apply to private as well as state action.[12] Both casebooks cover Titles VI and VII of the 1964 Civil Rights Act,[13] dealing with discrimination in governmentally funded programs and employment discrimination respectively,[14] and the Voting Rights Act of 1965.[15] Both briefly cover the use of the commerce clause to protect persons from racial discrimination (via Title II of the 1964 Civil Rights

8. C. ABERNATHY, *supra* note 2, at ch. I, § F(1); T. EISENBERG, *supra* note 2, at ch. 5; S. NAHMOD, *supra* note 3, at ch. 5.

9. S. NAHMOD, *supra* note 3, at ch. 5.

10. 433 U.S. 267 (1977).

11. S. NAHMOD, *supra* note 3, at 131.

12. C. ABERNATHY, *supra* note 2, at chs. II-III; T. EISENBERG, *supra* note 2, at chs. 8, § A, 9.

13. 42 U.S.C. §§ 1971, 2000d-2000e (1976).

14. C. ABERNATHY, *supra* note 2, at chs. V, VII; T. EISENBERG, *supra* note 2, at chs. 7, § 4, 10, 12.

15. 42 U.S.C. § 1973 (1976); C. ABERNATHY, *supra* note 2, at ch. VIII; T. EISENBERG, *supra* note 2, at ch. 11.

Act).[16] Professor Eisenberg also includes a brief treatment of a number of recent statutes prohibiting discrimination based on sex, age, and handicap.[17]

This extended coverage is useful for a student attempting to comprehend the dimensions of judicial protection of civil rights. It is also useful for a practitioner seeking to determine whether or not a client has reasonable grounds for relief. Professor Nahmod does not cover these matters, but extended treatment in his treatise is probably unnecessary. Employment discrimination is already a specialized field with large treatises and specialized reporting services. Other matters, such as voting rights, are the concern of institutional litigation and of the specialized lawyers who practice it. If Professor Nahmod had included a list and brief summary of the various relevant statutory provisions, his book would have been more useful to a lawyer who must represent a client claiming a violation of his civil rights.

In addition to discussing substantive matters such as standards of care and defenses, each book draws together in one chapter the varied jurisdictional problems of coordinating federal and state proceedings. These doctrines overlap so much that many jurisdictional problems can be resolved by employing more than one of them. As a pedagogical matter, it is helpful to have them juxtaposed and cross-referred in close proximity. Such organization is more logical than the organization of the fundamental casebook/treatise on federal jurisdiction by Professors Hart and Wechsler,[18] which scatters these issues through many different chapters, giving the superficial impression that each issue represents a simple logical derivation from separate doctrines.[19]

Professor Eisenberg provides the richest and fullest treatment of the jurisdictional problems, starting with *habeas corpus*, and proceeding through exhaustion of remedies, *res judicata*, abstention, *Younger* abstention, and finally, civil rights removal.[20] One could start, however, with any one of these doctrines. Professor Abernathy, for instance, begins with exhaustion of administrative remedies and shrinks consideration of *habeas corpus* to a note. A chronological approach might begin with *Pullman* abstention. A sociopolitical approach focusing on the civil rights struggles of the 1960s, which gave such impetus

16. 42 U.S.C. § 2000a (1976); C. ABERNATHY, *supra* note 2, at ch. VI; T. EISENBERG, *supra* note 2, at ch. 7, § B(3).

17. T. EISENBERG, *supra* note 2, at ch. 12, §§ B-E.

18. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

19. Of course, any sustained consideration of these matters by someone using HART & WECHSLER, *id.*, would dispel this impression in favor of the "seamless web" of federal jurisdictional problems that Professor Abernathy invokes. C. ABERNATHY, *supra* note 2, at 115.

20. T. EISENBERG, *supra* note 2, at ch. 5.

to the development of these areas of law, might start with civil rights removal, since that marked the first major rejection of an approach civil rights activists sought to use for access to federal courts.[21] Professor Eisenberg makes his particular ordering clear and logical. Through his notes, he is able to draw more connections between the doctrines than does Professor Nahmod with his rather cursory, episodic approach.

Professor Eisenberg's close ordering of the doctrines produces some interesting insights. In his notes on exhaustion, for instance, he refers to a line of cases in which the plaintiffs claimed that the defendants took property in violation of state law.[22] The plaintiffs framed these cases as due process violations. Federal courts often refuse to hear such cases on the grounds that the plaintiffs have not first sought compensation in a state forum and thus have not exhausted their state remedies. Professor Eisenberg develops a way to justify this result without inventing an exhaustion requirement. Because the deprivation is in violation of state law and nothing more, the deprivation itself does not violate due process under the Fourteenth Amendment—only the denial of a state remedy would. Resort to federal court prior to the state denial of a remedy would be premature because no violation of due process has yet occurred. Professor Eisenberg thus suggests that the exhaustion doctrine has erroneously been developed to resolve problems that are better resolved through a definition of constitutional due process. To avoid reliance on exhaustion promotes coherence in the field of federal jurisdiction, since that doctrine, an ill-defined, judge-made exception to federal jurisdiction, threatens to swallow the statutory grant of jurisdiction to the federal courts.[23]

The coverage of the casebooks is so broad that it would be extremely difficult to finish them in a semester. Professor Eisenberg suggests that two separate semesters, at three to four hours per semester,[24] would be necessary to do his book justice, and from the richness of his notes and the number of his cases and article extracts, I am inclined to agree. Professor Abernathy notes that others have used only part of his materials but that he has been able to cover the entire book in one two-

21. *See* Georgia v. Rachel, 384 U.S. 780 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966).

22. T. EISENBERG, *supra* note 2, at 273-76.

23. *But see* Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 88 (1981).

The Supreme Court has recently embraced an approach similar to that perceived by Professor Eisenberg. In Parratt v. Taylor, 451 U.S. 527 (1981), it found that the state prison's negligent loss of the plaintiff's property did not violate due process because the state had a procedure to provide compensation. The Court could have reached the same result by requiring the plaintiff first to exhaust the state's compensation mechanism before he came to federal court. It chose instead to construct a modified definition of due process.

24. T. EISENBERG, *supra* note 2, at vii.

credit-hour semester,[25] an accomplishment which must be a *tour de force* of vigorous teaching.

Professor Abernathy's pedagogical interest in tying all his material together for one course may explain the somewhat surprising placement in his casebook of the appropriate standard of proof in equal protection cases. He begins by addressing whether or not section 1983 imposes a special standard of care. Since section 1983 covers a range of constitutional and statutory claims, he has a wide field from which to choose. Instead, he moves directly from *Whirl v. Kern*,[26] a provocative Fifth Circuit section 1983 case imposing liability on a sheriff who mistakenly let a prisoner languish in jail beyond his time, to a set of cases involving the standard of care required by the Constitution itself: *Hawkins v. Town of Shaw*,[27] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[28] and *Washington v. Davis*.[29] This compilation appears to confuse the analysis of a statute with an analysis of the Constitution.

Professor Abernathy has a reason for this. He juxtaposes *Whirl* against the equal protection cases in order to propose an interesting theory for a section 1983 standard of care. He suggests that the courts should treat section 1983 differently, depending on the constitutional right which is at stake. When a violation of due process is the gravamen of the federal complaint, the courts should read into section 1983 the standard of care of the most analogous state tort law; when equal protection is at issue, the courts should adopt a specifically federal standard.[30] As will be discussed below,[31] this brief approach does not fully illuminate the complex intermingling of federal and state law inherent in constitutional damage litigation.

The abrupt introduction of the equal protection cases, however, does permit Professor Abernathy to tie the beginning of the book to its end. The intentional discrimination standard in constitutional employment matters adopted in *Washington v. Davis*, contrasts vividly with the disparate impact standard adopted as a statutory matter in *Griggs v. Duke Power Co.*,[32] which commences Abernathy's later treatment of Title VII.

This comparison of the books should not conclude without mentioning an important feature unique to Professor Eisenberg's work: a

25. C. ABERNATHY, *supra* note 2, at xviii.

26. 407 F.2d 781 (5th Cir. 1969).

27. 437 F.2d 1286 (5th Cir. 1971), *aff'd*, 461 F.2d 1171 (5th Cir. 1972).

28. 429 U.S. 252 (1977).

29. 426 U.S. 229 (1976). *Washington v. Davis*, of course, was not brought under § 1983, since the District of Columbia is not a state and its officers are not subject to that statute.

30. C. ABERNATHY, *supra* note 2, at 20.

31. *See* text accompanying notes 63-70 *infra*.

32. 401 U.S. 424 (1971).

section devoted to the Reconstruction origins of civil rights federalism.[33] Professor Eisenberg begins with a number of descriptions and analyses of the origins of the Thirteenth and Fourteenth Amendments, sets out *United States v. Rhodes*[34] (an 1866 case upholding the 1866 Civil Rights Act), the *Slaughter-House Cases*,[35] and the *Civil Rights Cases*,[36] and in the appendix reprints in full the original versions of the Reconstruction Acts.[37] This information is not absolutely necessary to understand current civil rights law or to develop skills in using the law to advance clients' interests. Current civil rights law, particularly as it extends beyond racial discrimination, probably owes more to the notions of federal judicial protection of cognizable individual liberties developed in the 1930's[38] than it does to the Civil War. Moreover, the modern doctrines of public official immunity and judicial abandonment of jurisdiction depend more on the current ideological and political climate than on any rules of federalism developed between 1865 and 1875. The historical material, however, adds an important resonance to the book. Professor Eisenberg does not let the historical material rest as an embalmed backdrop; rather, he vigorously raises the questions about federalism and the proper role of courts that permeate the rest of his book. Pointing out roads not taken and solutions ignored from the very beginning, Professor Eisenberg sharpens the reader's attitude toward civil rights litigation. The reader can come away from the material with a renewed conviction that current civil rights law requires the courts to pick up the ball that was dropped through a judicial failure of will or by an unprincipled political compromise after Reconstruction. Alternatively, the reader can find the basis for a renewed pessimism (or cynicism) about the Court's fundamental inability to develop clear, straightforward, and effective rules for resolving civil rights claims.

II. The Limits of Section 1983 as a Separate Body of Law

All three books contain law that has evolved greatly during the last decade; the books are filled with recent cases. Indeed, the major weakness of Professor Abernathy's casebook is that it was published two years ago, prior to a substantial number of important recent decisions.[39] This weakness can be corrected by a judicious distribution of

33. T. EISENBERG, *supra* note 2, at ch. 1.

34. 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).

35. 83 U.S. (16 Wall.) 36 (1873).

36. 109 U.S. 3 (1883).

37. T. EISENBERG, *supra* note 2, at 941-60.

38. *See, e.g.*, United States v. Classic, 313 U.S. 299 (1941); Hague v. C.I.O., 307 U.S. 496 (1939). *See* Bixby, *The Roosevelt Court, Democratic Ideology and Minority Rights: Another Look at* United States v. Classic, 90 YALE L.J. 741 (1981).

39. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (punitive dam-

supplemental materials when teaching from Professor Abernathy's book. But the vast and rapid development of the law in the last two years demonstrates that all three books may quickly become outdated. Even though Professor Nahmod's book is supplemented on a regular basis, the supplement soon may overrun the book.

The recent changes cast some doubt on whether or not it is useful to consider section 1983 as a separate legal subject. The Supreme Court finally seems to have adopted the position that section 1983 is merely a conduit for the application of substantive law and does not by itself embody any substantive legal standards.[40] In doing so, the Court has embraced the suggestion made by Professor Nahmod seven years ago.[41] One might think that this position would resolve the issues of federalism that have plagued attempts to establish a separate standard of proof for section 1983. If section 1983 operates simply as a conduit, it provides no special reason, such as deference to state interests, for the federal courts to withhold relief. Section 1983, it seems, no longer has anything to add to the substantive analysis of constitutional and other federal remedies.

Adoption of the conduit theory, however, is hardly that simple. The Court has merely transferred difficult questions of federalism from an analysis of section 1983 to an analysis of underlying federal constitutional and statutory law, making it necessary to define with particularity such constitutional terms as liberty and due process. This is, of course, no easy task. As developed by the Court, liberty includes the right not to be accused of being a drunk and thereby be denied drink[42] and the right not to be accused of being mentally ill,[43] but does not

ages not available against municipal defendants); Middlesex County Sewerage Auth. v. National Sea Clammers Assoc., 453 U.S. 1 (1981) (suggesting standards for excluding federal statutes from the § 1983 cause of action); Parratt v. Taylor, 451 U.S. 527 (1981) (negligent deprivation of property does not violate due process when a state has a compensatory system); City of Memphis v. Greene, 451 U.S. 100 (1981) (treating 42 U.S.C. § 1982 and the Thirteenth Amendment); Maine v. Thiboutot, 448 U.S. 1 (1980) (violation of Social Security Act, and by implication many federal statutes, gives rise to a cause of action under § 1983); Owen v. City of Independence, 445 U.S. 622 (1980) (qualified immunity not available to municipal defendants; liberty interest implicated in defamatory statements coupled with firing).

40. Parratt v. Taylor, 451 U.S. 527 (1981). The Court has from time to time suggested that the immunities provided to defendants sued under § 1983 are a matter of congressional intent, specific to that statute, *see, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951), but more recently appears to have recognized that immunity is a judge-made doctrine to which § 1983 itself adds nothing, *see* Butz v. Economou, 438 U.S. 478 (1978). *But see* Polk County v. Dodson, 102 S. Ct. 445, 451 n.12 (1981) (questioning whether or not "under color of state law" in § 1983 merely incorporates the state action standard of the Fourteenth Amendment).

41. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974).

42. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

43. Vitek v. Jones, 445 U.S. 480 (1980).

include the right not to be accused of being a known shoplifter.[44] It may include the right to be free from a severe beating by a school teacher, but may not include the right to be free from a moderate beating.[45] It may not include the right to stay out of jail.[46] Sometimes due process is satisfied if the state provides a remedy for the deprivation of property or liberty,[47] but sometimes it is not.[48]

The complexity of this analysis extends to the enforcement of federal statutory laws through section 1983 as well as to the enforcement of constitutional rights. Although section 1983 may be a conduit for the enforcement of federal statutes, it does not provide a remedy for the violation of every federal law, but only for those laws that create "rights."[49] The use of section 1983 may also be precluded if the underlying federal law contains a remedy intended by Congress to supplant those provided by section 1983.[50]

The most substantial weakness in these books is that they provide only the briefest introduction to such issues, giving little more than an indication that they exist. Of course, if the authors were to provide a thorough examination of the meaning of substantive constitutional and statutory law in the context of remedies, they would have to rewrite their books as casebooks or as treatises on constitutional law, civil rights, and civil liberties. They cannot be faulted for writing the books as they did. It is uncertain, however, whether the books will be useful ten years from now without substantial revision. Professor Nahmod does attempt to collect cases according to various provisions of the Bill of Rights and does list "Important Constitutional Cases," each with a parenthetical phrase describing the holding. These collections, however, are much too short to provide anything but a bare introduction to research.[51]

The books also skirt another issue that will be quite important in

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44. Paul v. Davis, 424 U.S. 693 (1976).

45. Ingraham v. Wright, 430 U.S. 651 (1977).

46. Baker v. McCollan, 443 U.S. 137 (1979).

47. Parratt v. Taylor, 451 U.S. 527 (1981). *See* Ingraham v. Wright, 430 U.S. 651 (1977).

48. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

49. Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981).

50. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Preiser v. Rodriguez, 411 U.S. 475 (1973).

51. The section on the First Amendment cause of action, for instance, does not cite Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), a leading First Amendment damages case, in the context of a cause of action, but only in the context of measure of damages and qualified immunity.

An example of the limits of a treatise on § 1983 after the adoption of the conduit theory occurred to me recently. I wished to research the question of the damages liability of prison officials for conducting a mass body cavity search of women inmates in an attempt to find lost or stolen cash. Professor Nahmod's treatise, despite its hundreds of citations, was of very little help. The most relevant cases were the Fourth Amendment decisions regarding

the coming decade. As does any tort theory, the conduit theory of section 1983 requires some causation standard. Section 1983 itself extends its coverage beyond those persons who "deprive" another of rights to include those who "cause" another's rights to be deprived. The casebooks raise the causation problem in treating the issue of liability of superior officers.[52] They do not provide a definite causation standard, as indeed they cannot. What constitutes a sufficient causal nexus will be developed on a case-by-case basis over the next few years.

Professor Nahmod, however, suggests that the problem is a false one. He takes the Supreme Court to task for analyzing in terms of causation the liability of municipalities and of individuals who are only indirectly involved in harmful conduct.[53] Instead, he suggests that the Court abandon proximate causation as a standard and replace it with a substantive standard of care. He does not, however, articulate what that standard of care might be. *Martinez v. California*[54] provides an example of some of the difficulties in substituting a standard of care for causation as the determinant of liability. The Court held that parole board members were not liable for a murder caused by a parolee because there was an insufficient nexus between the parole release decision and the crime, which happened five months later. Rather than invoking proximate cause, the Court could have adopted Professor Nahmod's approach and decided that the parole board members owed no duty of care to the victim and thus had not violated due process. But what definition of due process is to control? Does it violate due process to release a prisoner with the intent that he attack some third party? With wilful and wanton disregard of a substantial known risk that he will do so? With negligent ignorance of a risk that would have been known had the parole board studied the file more carefully? Should it make a difference, as it did in *Parratt v. Taylor*,[55] whether or

strip searches and body cavity searches by customs officials at border crossings, which his treatise did not cover.

52. T. EISENBERG, *supra* note 2, at 100-06. Nahmod's discussion of the liability of superior officers is scattered throughout his book, appearing most fully in his discussion of when a municipality will be liable under Monell v. Department of Social Services, 436 U.S. 658 (1978), for its officers' acts. S. NAHMOD, *supra* note 3, at 178-79. It probably would have been clearer to discuss the matter in a separate section. It is not apparent that the scope of one individual's liability for acts of another is or should be the same as a municipality's liability for the acts of its officers. Neither is vicariously responsible under § 1983 on the basis of *respondeat superior*. Both *can* be responsible when they cause a deprivation of rights, even if they do not commit the very act that constitutes the deprivation. The kind of relationship between the immediate actor and the secondary actor sought to be made responsible is quite different when two individuals are involved than when an individual and his or her employer are involved. It clouds the issues of causation and duty to equate fellow wrongdoers or superior officers with government entities.

53. S. NAHMOD, *supra* note 3, at 178-79 and 1981 cumulative supplement at 66-67.

54. 444 U.S. 277 (1980).

55. 451 U.S. 527 (1981).

not the state provides a remedy for such wrongs?[56] This list includes some of the same factors that the Court thought relevant to determining proximate cause,[57] and Professor Nahmod does not attempt to specify which factors should count in an analysis of due process. This similarity in the factors underlying both a finding of proximate cause and a finding of due process should not be surprising. Regardless of whether proximate cause or due process is used in section 1983 cases, the courts must resolve the difficult underlying question of who should bear the loss resulting from harmful conduct, compounded by the perceived problem of having federal courts impose liability on state officers.

Because the concepts of due process and causation are both too vague to resolve without considering the difficult question of liability, it may sometimes be as appropriate to resolve these questions through causation as through due process. To be sure, unless one remains sensitive to the considerations buried within causation, use of that standard sometimes obscures the best grounds for making a decision, but the same can be said of substituting due process as the catchword upon which the analysis will depend. Indeed, if one were forced to choose between them, causation may be a better shorthand method than due process. Lawyers and judges commonly apply notions of causation in tort cases, a practice that can provide some guidance in determining the limits of section 1983 liability. Moreover, despite its technical attributes in law, causation is a concept (or concepts) that appears in ordinary language, giving it some plausibility as a theory by which a court can justify its decisions. Due process, on the other hand, has little specific meaning apart from its legal context, allowing litigants to pour into it almost any substantive content they wish. It is no accident that due process is often invoked but commonly mistrusted as a standard for substantive constitutional law.

Despite the adoption of the conduit approach to section 1983 and its implications for due process and causation, there is one portion of section 1983 law that retains a distinctive standard—the doctrine of qualified immunity. Whatever standard of care might be derived from the constitutional provisions and federal statutory law that underlie a section 1983 suit, as a practical matter the application of the qualified immunity doctrine turns the liability issue into a question of the reasonableness of the defendant's actions. That doctrine excuses an official who mistakenly breaks the law so long as she was reasonable in her belief that she acted in accordance with the law.[58] She is excused

56. In *Martinez*, the Court held that it did not violate due process for California to provide absolute immunity for parole release decisions. 444 U.S. at 281.

57. *See* text accompanying notes 42-50 *supra*.

58. Wood v. Strickland, 420 U.S. 308 (1975).

whether she reasonably mistook what the formal doctrine of law required or whether she reasonably mistook the application of a clear legal doctrine to the facts of the case.[59]

These books cover qualified immunity in some detail. They neither attempt to reformulate the doctrine[60] nor, because the doctrine is so tied to reasonableness, can they provide much insight into its day-to-day application. As with the application of any reasonableness test, the outcome of a case will be heavily dependent on the facts peculiar to that case. The casebooks suffer from the inherent limitations of the casebook format. Since they use decisions in completed cases, they neither provide students with experience in anticipating and developing pertinent facts through informal investigation and formal discovery, nor expose students to the critical task of sorting facts in order to separate the silk purses from the sows' ears. Given the flexible nature of the qualified immunity doctrine, a plaintiff's lawyer, as a practical matter, must discover the specific telling facts showing the defendant was either a fool or was driven by malice. Professor Nahmod's work provides a start in this direction by giving numerous examples of cases in which qualified immunity was or was not found.[61] His collection is only the tip of the proverbial iceberg, however, and no attorney with a case should consider his legal research finished until he has collected more cases than has Professor Nahmod.[62]

III. The Persistence of Complexities

It may appear from the foregoing discussion that a number of the major questions of section 1983 have been resolved in the last decade. For example, the Court has determined that section 1983 carries no distinct standard of care and has created a relatively coherent body of immunity law. This apparent conclusion, in turn, suggests that the Court has chosen to confront the pervasive problem of federal court control over state conduct in terms of the substantive constitutional and statutory standards involved rather than through arcane jurisdictional and quasi-jurisdictional manipulations of section 1983. Such apparent simplification of jurisdictional issues may also be seen in the ascen-

59. Procunier v. Navarette, 434 U.S. 555, 562 (1978); Beard v. Mitchell, 604 F.2d 485 (7th Cir. 1979).

60. For my own attempt to critique qualified immunity and to suggest a revised basis for the doctrine, see Hyman, *Qualified Immunity Reconsidered*, 27 WAYNE L. REV. 1409 (1981).

61. S. NAHMOD, *supra* note 3, at 229-63 and 1981 cumulative supplement at 140-50.

62. M. AVERY & D. RUDOVSKY, POLICE MISCONDUCT, LAW AND LITIGATION (2d ed. 1981) is an excellent treatise/handbook that contains additional case citations, although it has a narrower scope than does Professor Nahmod's work.

dancy of the claim that parity exists between federal and state courts.[63] The doctrine of parity assumes that state courts are as fully qualified to resolve federal issues as are federal courts. A number of striking conclusions about the relationship of federal and state courts have recently been drawn from that premise. The doctrine has authorized federal courts to refuse to decide matters properly within their jurisdiction if the same or a closely related issue is pending in a state court.[64] It has also led to a mechanical and all-encompassing application of collateral estoppel to the litigation in federal court of matters already resolved in a state forum, even if the federal plaintiff did not freely choose the state forum and even if the plaintiff is thereby denied a federal jury.[65] The doctrine naturally encourages the use of state courts as forums for the litigation of section 1983 claims.[66]

Despite this development, it would be premature and misguided to conclude that we have entered an era of substantial simplification of federal-state jurisdictional issues. The doctrine of parity coexists with conflicting assumptions that the federal judicial system is preeminent and that federal courts should use jurisdictional grounds to defer to substantive state interests. The logical simplicity of the parity idea will not be sufficient to overcome those competing views of federal courts.

The *Pullman* abstention doctrine provides an example of how the parity doctrine will be constrained by these competing views. If parity is to be fully accepted, *Pullman*[67] should be overruled. *Pullman* requires a federal court to abstain from deciding a case that presents an unclear issue of state law, when a resolution of the state law issue would make it unnecessary for the federal court to decide a constitutional matter presented to it. The doctrine prohibits a federal court from deciding an unclear issue of state law because the highest state court, not the federal court, is the authoritative expounder of state law. A federal court decision different from that of the state court would be wrong. The key step in the logic of *Pullman* is the next one: If the federal court might decide the issue of state law wrongly, it should avoid decision. This fear that federal courts would err grows out of an assumption that the federal courts are preeminent. If there were indeed parity between state and federal courts, there would be no need for a federal court to abstain from deciding an unclear issue of state law. A federal court that wrongly decides a state law issue is little different from the lower state courts, which are often "wrong" until they are "corrected" by the state's highest court. *Pullman* abstention can be de-

63. *See, e.g.*, Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

64. *See* Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978).

65. *See* Allen v. McCurry, 449 U.S. 90 (1980).

66. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980).

67. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

fended only on the theory that it is worse for a federal court than for a state court to be found "wrong" on an issue of state law. That assumption, in turn, depends on the premise that federal courts are more prestigious than state courts or that their decisions are of greater consequence.[68]

Another example of how the notion of federal court preeminence flourishes, even in a garden overgrown with parity and federal court abandonment of jurisdiction, appears in a recent comment by Justice O'Connor, written while she was still a state court judge.[69] She adopts the assumption that state court judges are as competent and judicious as are federal judges and that they are equally free of subtle influences when called upon to adjudicate claims against state and local officials.[70] Curiously, however, she concludes from this assumption that the states

68. There is a procedural difference between error by a state court and error by a federal court. A state court's decision can be appealed to the highest state court for an authoritative determination of the question, but the decision of the federal court cannot. There are simple procedural ways to deal with this problem, however, without resort to abstention. Although this procedure has not been used, the state's highest court could preserve its authority by refusing to give collateral estoppel effect to the state law question "erroneously" decided by the federal court. Old law suggests that state courts are required to give collateral estoppel effect to federal court judgments, Embry v. Palmer, 107 U.S. 3 (1882), but this rule appears to be a judge-made one, constructed before the judge-made development of pendent federal court jurisdiction. *See* Degnan, *Federalized Res Judicata*, 85 YALE L. J. 741 (1976). Since it is pendent jurisdiction over state law claims that gives rise to the *Pullman* problem, there is nothing inappropriate about solving the problem through the collateral estoppel doctrine rather than through the ungainly partial surrender of federal jurisdiction in *Pullman*. It would be more consistent to resolve such conflicts through modification of the collateral estoppel doctrine rather than through continued adherence to the *Pullman* doctrine.

If *Pullman* were abandoned, the federal court would of course have the statutory power to impose its judgment on the state court system by way of an injunction, despite the state court's recalcitrance. The Anti-Injunction Act, 28 U.S.C. § 2283 (1976), would present no obstacle, either because the federal suit would have been brought under § 1983, which is an express exception to the Anti-Injunction Act, Mitchum v. Foster, 407 U.S. 225 (1972), or because the injunction would be to protect or effectuate its prior judgment. In such a situation, however, the federal court could properly stay its hand. It might, for instance, in facts similar to *Pullman*, enjoin the enforcement of the Railroad Commission order unless and until the Texas Supreme Court has determined that the Commission had the power under state law to issue the order. It may appear somewhat demeaning to the federal court to make its injunction dependent on a subsequent state court decision; that impression, however, only results from the view that the federal court is special and should not be subject to reversal on state law issues by a state court, even though state courts are subject to reversal on federal issues by the United States Supreme Court.

69. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

70. She adheres to the latter assumptions despite the fact that state judges may be tied more closely than federal judges to the local and state governmental powers by the necessity of reelection or reappointment, or by their residence or venue, or by the court assignment practices within the local judiciary. *See generally* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

should align their judicial procedures with those used in federal court by adopting rules of procedure and evidence similar to the federal rules. Here, again, a notion of parity is undermined by an assumption of federal court preeminence. There is nothing in parity that makes the federal rules of evidence and procedure preferable to the state rules simply because they are federal. Parity implies that federal and state judicial systems can be equivalent, or equally just, even when they are different in many respects. Of course, maintaining different federal and state court systems inevitably leads to forum shopping and potential jurisdictional conflicts, as parties perceive advantages in one form or another, but that hardly seems to be so serious a problem that it must be solved by turning state courts into federal mimics. Federalism is as much damaged when state courts automatically try to ape federal standards and federal procedures as when federal courts exceed the statutory or residual constitutional authority given to them to enforce federal law.

Conclusion

On balance, it is not a drawback to these books that section 1983 law has in some respects moved beyond their coverage. The field of federal remedies for state wrongs has been and will continue to be filled with malleable concepts and unresolved tensions precisely because the section 1983 action has been the form by which major social and moral concerns have been presented to the federal courts for resolution. Students using these casebooks will be forced to review, in a slightly different context, the dilemmas of federalism they confront in constitutional law, civil rights, and federal jurisdiction courses. At its best, such analysis will generate a more coherent approach to the field. It should produce at least a greater sophistication in the manipulation of the crosscurrents in this area.