LIABILITY FOR CONSTITUTIONAL TORTS AND THE RISK-averse PUBLIC SCHOOL OFFICIAL

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Our Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example.†

First Alcalde: 'Might I know the point of all this rigamarole?'

The Secretary: 'It's intended to get them used to that touch of obscurity which gives all government regulations their peculiar charm and efficacy. The less these people understand, the better they'll behave. You get my point?'tt

Bertrand Russell once said that "to endure uncertainty is difficult, but so are most of the other virtues. For the learning of every virtue there is an appropriate discipline, and for the learning of suspended judgment the best discipline is philosophy."1 If Russell is right, federal courts scholars are among the most virtuous men and women in the legal profession, for in the world of federal question jurisdiction, diversity, jurisdictional amounts, three-judge courts, and injunctions against state proceedings ambiguity is a way of life. This ambiguity is fostered not

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† Olmstead v. United States, 277 U.S. 438, 485 (Brandeis, J., dissenting).
†† A. Camus, State of Siege, in Caligula and 3 Other Plays 165 (1958).
only by the vagaries of federal court opinions, but even more often by what is not said. The treatment of federal court issues often appears quixotic as matters which were not addressed in a myriad of earlier opinions suddenly become the stuff of a new case for the Hart and Wechsler casebook. Nowhere is this ambiguity better exemplified than with respect to the largely judge-made law that has developed in relation to section 1983 suits against public officials of state and local governments for the alleged deprivation of constitutional rights.\(^2\) Whether injunctive relief or damages are sought, the careful lawyer must learn to manipulate the many rules governing recovery if he is to protect his client—no matter how illogical and ill-defined the rules may appear.

This Article will explore some of these section 1983 problems in

2. The statute which is central to the discussion in this Article provides in full 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 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.


light of *Wood v. Strickland*, the recent Supreme Court opinion in which a closely divided Court set forth guidelines for damage recoveries against school officials who deny students their constitutional rights. Despite the *Wood* Court's careful disclaimer that it was setting the standard only "in the specific context of school discipline," it may be assumed that *Wood* will apply, at a minimum, to all manner of unconstitutional actions taken by public school officials against students and teachers (at the elementary, secondary, and university levels) and its application will not be limited to disciplinary measures or to the penalties of suspension or expulsion.

The facts of the *Wood* case were innocuous enough. Two sixteen-year-old girls were expelled from high school for spiking the punch served at the meeting of an extracurricular organization attended by parents and students. In pouring two 12-ounce bottles of Right Time malt liquor into the punch bowl, they had violated a school rule barring "the use of intoxicating beverage(s) or possession of the same at school or at a school sponsored activity." The students admitted their involvement in the incident. Nevertheless, they asserted that the imposition of the sanction of expulsion, under the circumstances, violated their substantive and procedural due process rights, and brought an action in federal district court under section 1983 to redress their grievance. While the substantive due process claim was quite confused, it apparently involved allegations that the punishment was too severe for the infraction and that the word "intoxicating" referred to beverages with an alcoholic content exceeding 5 percent (as defined by Arkansas law) and that there was "no evidence" that Right Time malt

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4. *See, e.g.*, the following post-*Wood* cases: Sullivan v. Meade Independent School Dist. No. 101, 530 F.2d 799 (8th Cir. 1976); Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975); Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329, 1332 (6th Cir. 1975) (teacher pregnancy case); Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975) (dismissal of students from their positions as editors of a university newspaper); Hutchison v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. 1975) (teacher action for failure of school board to grant sick leave benefits for normal pregnancy); Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975) (student challenge to disciplinary action taken in response to publication of letter in school newspaper); Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600, 608 (3d Cir. 1975) (Rosenn, J., concurring and dissenting) (exclusion of student from soccer team for noncompliance with school rule regulating hair length); Sapp v. Renfroe, 511 F.2d 172 (5th Cir. 1975) (exclusion from a public high school for failure to complete ROTC program). *Cf.* O'Connor v. Donaldson, 422 U.S. 563, 570-72 (1975); Morris v. Travisono, 528 F.2d 856 (1st Cir. 1976); Sebastian v. United States, 531 F.2d 900 (8th Cir. 1976); Glasson v. Louisville, 518 F.2d 899 (6th Cir. 1975).
liquor met this definition. The other claim was premised on the alleged procedural defects in the two hearings held by the school board to determine whether the students had violated a school rule and to impose a penalty.

In their original complaint, plaintiffs sought only injunctive and declaratory relief against the members of the school board, two school administrators (the principal and superintendent), and the school district itself. In what was apparently an effort to put more pressure on school authorities to re-admit the girls, plaintiffs amended their complaint to add a prayer for compensatory and punitive damages. The case was tried before a jury. After the jury failed to reach a verdict, the district court declared a mistrial and directed verdicts in favor of the defendants on the ground that they "were immune from damage suits absent proof of malice in the sense of ill will towards" the plaintiffs.

The court of appeals, holding that the plaintiffs' rights to "substantive due process" had been violated, reversed the district court and remanded the case for appropriate injunctive relief and for a new trial on the question of damages. That court also held that the lower court's instruction and directed verdicts regarding damages were erroneous. According to the circuit court, malicious intent to deprive pupils of their constitutional rights was not necessary to maintain an action under section 1983. "It need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a subjective one." A petition for rehearing en banc was denied by the Eighth Circuit, three judges dissenting, and certiorari was granted.

When the Supreme Court agreed to hear Wood, there was wide speculation in the civil rights community that the Court was anxious to overturn the substantive due process rationale of the appellate court decision. The notion that federal courts were empowered to review school punishments for their severity, to overturn school board decisions on the basis of insufficiency of the evidence, and to interpret school rules

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7. 348 F. Supp. 244, 250 (W.D. Ark. 1972). Although the matter is less than clear, the district court apparently confused Arkansas law with federal constitutional law and held that malice was a requirement for both injunctive relief and damages. Wood v. Strickland, 420 U.S. 308, 314-15 n.6 (1975).
8. 485 F.2d 186, 191 (8th Cir. 1973).
9. Id. at 191.
10. Id. at 191-92.
in a fashion contrary to a reasonable administrative interpretation, was thought to be simply too much for the Court to swallow. In short, \textit{Wood} was looked upon as a sure loser.

Against this background, the Childhood and Government Project filed an amicus brief, arguing that the court of appeals had overlooked the procedural due process issues raised by the case, and that the Court should remand for consideration of those issues. Put somewhat more bluntly, the authors of the brief were trying to say politely:

When you overturn the judgment on substantive due process grounds, please remand the case on the procedural issues so that your decision will not be misconstrued by lower federal courts as a holding that the due process clause has very limited or no application to elementary and secondary public school students.

The brief devoted very little space to the question of damages under section 1983, for it was thought that an outright reversal or a remand on the constitutional issues would allow the Court to sidestep the problem. Without a finding of constitutional deprivation, one of the elements essential to recovery under section 1983 would be absent. Thus, there would be no need to address the complexities of the immunity of school officials from damages under that statute.

So much for the prognostications. Apparently the advice of Pudd'nhead Wilson had been taken too seriously: "Behold the fool saith, 'Put not all thine eggs in the one basket' . . . but the wise man saith, 'Put all your eggs in the one basket and—WATCH THAT BASKET.' " The Supreme Court unanimously held that greater weight should have been given to the school board's interpretation of the word "intoxicating" in the school rule. If properly construed to apply

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12. The Court's willingness to hear Goss v. Lopez, 419 U.S. 565 (1975), a case raising purely procedural due process issues in the school discipline context, supported this hypothesis. The two cases were to be argued on the same day, and the feeling was rampant that the Court would take the opportunity to define carefully the appropriate extent of judicial intervention in the public schools under the due process clause. It was thought that as in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), an appropriate due process standard would be articulated and then applied to reach different results in the two cases.


15. M. Twain, \textit{Pudd'nhead Wilson} 145 (1899 ed.).
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to all alcoholic beverages, "there was no absence of evidence before the
school board to prove the charge against respondents." Trial testi-
mony showed that the malt liquor had an alcoholic content, and indeed, the
plaintiffs had admitted spiking the punch. The Court held that it
need not reach the question of the applicability of the Thompson v. City
of Louisville18 "no evidence" rule in the light of its determination that
the lower court had misconstrued the rule under which plaintiffs were
suspended.10 At this point, the Court footnoted a response to the fears
expressed in the amicus brief:

That is not to say that the requirements of procedural due process
do not attach to expulsions. Over the past 13 years the courts of
appeals have without exception held that procedural due process
requirements must be satisfied if a student is to be expelled.20

The Court unanimously vacated the judgment of the court of appeals,
and in two brief paragraphs discussed the procedural issues and then
remanded the case for consideration of those issues.21 But the real
bombshell was that more than half of the opinion was devoted to the
immunity of school officials from liability under section 1983, an issue
poorly briefed and hardly raised in oral argument. On this question the
Court divided five to four.

The majority opinion, written by Justice White, noted that there
was general agreement among lower courts "on the existence of a 'good
faith' immunity" for school officials under section 1983, but stressed
that "the courts have either emphasized different factors as elements of
good faith or have not given specific content to the good-faith stan-
dard."22 After discussing prior cases which dealt with the scope of

17. Id. at 313, 325-26.
18. 362 U.S. 199 (1960). See also cases cited in Wood v. Strickland, 420 U.S. 308,
21. Id. at 326-27. On remand, the court of appeals held that the "plaintiffs' right
to procedural due process was violated and [remanded] the cause to the District Court
for further proceedings." Strickland v. Inlow, 519 F.2d 744, 745 (8th Cir. 1975). The
court found that an initial meeting held by the school board to consider the matter had
been procedurally inadequate because the students "were not given notice of its time or
place" and the parents received no notification at all. Id. A second board meeting, held
less than 2 weeks later, did not cure the prior procedural defects, despite the fact that
timely notice was given and an opportunity afforded to present evidence. Id. at 746-47.
See also Brief of the Childhood and Government Project as Amicus Curiae in Support of
immunity of government officials under section 1983, the Court concluded that the question of immunity was largely one of statutory construction, and that Congress had never intended to abolish the traditional absolute and limited governmental immunities for damages. Weighing the need to avoid the intimidation of school officials who must have discretion to make decisions and hence the privilege of mistake against the need to preserve constitutionally protected interests, the Court struck a balance in Wood: it extended to school board members (and presumably to school administrators and teachers at all levels) a "qualified good-faith immunity" from liability under section 1983 for constitutional torts:

The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's

Lossee, 485 F.2d 334, 344 (10th Cir. 1973) (en banc), cert. denied, 417 U.S. 908 (1974); McLaughlin v. Tilendis, 398 F.2d 287, 290-91 (7th Cir. 1968). Despite the fact that § 1983 was originally enacted in 1871 as § 1 of the Civil Rights Act of that year, the question of whether good faith constitutes a defense to such an action received little judicial analysis until the period just prior to the Supreme Court's landmark decision in Monroe v. Pape, 365 U.S. 167 (1961). Before that time, actions brought under § 1983 for damages apparently were quite rare. See K. Davis, Administrative Law Text 491-92 (1959); McManis, supra note 2, at 834-35.


24. 420 U.S. at 316-22. The Court relied heavily on Scheuer v. Rhodes, 416 U.S. 232 (1974), where it was held that a state governor, National Guard officers, and the president of a state university were not absolutely immune from liability for damages under § 1983:

[In varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon 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. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.


For discussions of the traditions of sovereign immunity in the state courts, see K. Davis, Administrative Law Text 466-93 (3d ed. 1972); W. Prosser, Handbook of the Law of Torts 970 et seq. (4th ed. 1971); Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209 (1963); James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610 (1955); McManis, supra note 2, at 822.
constitutional rights, a school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic constitutional rights of his charges. . . . Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student . . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.25

The ultimate impact of the Wood decision on school officials and the operation of public educational institutions will be a function of a number of legal questions, many of which have not been resolved by the courts. In an attempt to anticipate the possible impact of Wood, this Article will discuss the possible meanings of the "good faith" and "settled law" approach to immunity from damages under section 1983, and the alternatives available to lower courts in resolving controversies over whether school officials should have known the applicable law. In addition, the Article will consider the risk and magnitude of damage recoveries in situations where it is held that the immunity is unavailable. Distinctions will be drawn between recoveries against the educational entities themselves and recoveries against individual school officials. Some consideration must also be given to the economic and policy justifications for damage recoveries for "constitutional torts," and this analysis of remedies will form the basis for consideration of risk-management devices such as insurance and indemnification. Finally, the last section of the Article will attempt to weigh the implications of

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25. 420 U.S. at 321-22. One commentator has described the interests to be accommodated in the following terms:

The standard of strict liability suggested by section 1983's categorical language has seemed unjust to officials who make honest mistakes of judgment; in addition, courts and commentators have thought that such liability might lead officials to be hesitant in carrying out their responsibilities and might deter qualified persons from entering public service. On the other hand, a grant of absolute immunity has appeared to conflict with the policies underlying section 1983—compensation of persons deprived of constitutional rights and deterrence of official violations of these rights.

1974 Term, supra note 2, at 219-20. See also Dellinger, supra note 2, at 1555-56; Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 223-24 (1963); Note, Damage Remedies Against Municipalities, supra note 2, at 956.
section 1983 liability for the operation of public schools, including a discussion of the "defensive" measures that educators are likely to take. This section, of necessity, is highly speculative and seeks to draw on the analogy to "defensive medicine." The explicit assumption made is that the impact of Wood is more dependent on the way in which school people are likely to perceive the prospect of damages recoveries than on some legalistic rendition of case holdings. These perceptions cannot be adequately treated unless one takes into account the due process revolution in the public schools, and, indeed, the movement over the last 20 years toward the legalization of dispute resolution in educational systems.

I. THE "GOOD FAITH" STANDARD AND "IGNORANCE OF SETTLED, INDISPUTABLE LAW"

A. "Good Faith"
The "good faith" test for official immunity propounded by the Wood majority combines elements of negligence ("reasonably should have known") and intentional or wanton misconduct ("knew," "malicious intention") in the specification of what constitutes an adequate defense to liability for a constitutional tort. The standard is both subjective, relating to the actual state of mind of a particular defendant, and objective, holding the board member to the knowledge of a reasonable board member under the particular circumstances. Even the dissenting opinion of Justice Powell did not challenge the majority's assertion that school board members were entitled to only a qualified statutory immunity, nor did it really challenge its conclusion that good faith was the appropriate test. The dissent quoted with approval language from Scheuer v. Rhodes stating that government officials were immune from section 1983 damage actions only if there were reasonable grounds for the belief on the part of the officials taking a particular action that they were not violating the constitutional rights of others. Thus all

28. 420 U.S. at 327 (Powell, J., concurring and dissenting).
30. 420 U.S. at 330.
nine Justices accepted the need for a combination of objective and subjective standards to determine good faith.

The point of departure for the dissent was the majority's assertion that ignorance of "settled, indisputable law" is equatable with the absence of good faith or with "actual malice."\(^{31}\) The dissent questioned whether lay-school officials could reasonably be expected to be so familiar with constitutional law, and further argued that the recognition of settled principles was a hazardous process in view of the Court's recognition of evolving concepts and its frequent 5-to-4 splits on major school-law issues.\(^{32}\)

While, admittedly, the whole tenor of the majority opinion is that school officials, whatever their actual knowledge, are charged with the knowledge of settled constitutional principles, the majority opinion is not without ambiguity. The chief ambiguity in the majority opinion concerns the burden which a school administrator must carry to take advantage of the good-faith immunity. It is possible that an administrator is charged with knowledge of the constitutional rights of his students; actions in violation of those rights could never be in good faith. Alternatively, administrators may be allowed the good-faith immunity if their actions reflect a reasonable school administrator's knowledge of students' constitutional rights. The language which suggests that the Wood standard is one of imputed knowledge of constitutional rights is weakened by the phrases "reasonably should have known" and "such disregard." These phrases suggest a standard of carelessness or negligence. The distinction is not without importance. For example, a constitutional issue may have been dispositively addressed by the Supreme Court on day one, and a school official may have violated the Court's newly established rule on day three. If knowledge is imputed as a matter of law, then subsequent liability for damages under section 1983 is permissible since good-faith immunity is not available. Under a negligence interpretation of good faith, however, if the law is settled and yet it is unreasonable to conclude that a school official had a sufficient

31. *Id.* at 321.
32. *Id.* at 329 (Powell, J., concurring and dissenting).

The Court states the standard of required knowledge in two cryptic phrases: "settled, indisputable law" and "unquestioned constitutional rights." Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional law scholars—much less the average school board member. One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are "unquestioned constitutional rights."

*Id.* See also Sapp v. Renfroe, 511 F.2d 172, 176 (5th Cir. 1975).
opportunity to acquaint himself with the new standard, the qualified good-faith immunity would preclude liability. Perhaps, as the dissent notes, a more likely situation is that a school official may receive inadequate legal counseling as to the state of the law. Under such circumstances, the imputed-knowledge approach would yield the opposite result unless the school official had "shopped" for favorable legal advice. Under circumstances where the defendants failed to seek legal advice and had ample opportunity to do so, the failure to abide by settled constitutional principles would deprive them of their qualified immunity under either test.

The imputed-knowledge versus negligence ambiguity is further complicated by the Court's silence on the allocation of roles between judge and jury (assuming that jury trials are mandatory if requested). It can probably be assumed that the determination as to what is settled law is for the judge because the matter requires "special legal competence." It would seem that under the constructive bad-faith view the conclusion that the law is "settled" would foreclose the good-faith defense. The jury would only be required to decide whether plaintiffs' constitutional rights were violated and to determine the amount of the damages. If the judge instructed the jury that the law was not settled,

33. 420 U.S. 308, 329 n.2 (Powell, J., concurring and dissenting).
35. See Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975).
36. It seems clear that jury trials may be demanded in § 1983 actions between students and school authorities. Cf. Wood v. Strickland, 420 U.S. 308 (1975); Burt v. Board of Trustees of Edgefield City School Dist., 521 F.2d 1201, 1206 (4th Cir. 1975) (per curiam). But see Lawton v. Nightingale, 345 F. Supp. 683 (N.D. Ohio 1972). Claims based on time missed from school as a result of unconstitutional suspension or expulsion, failure to provide a hearing which meets due process standards, or the injury occasioned by denial of established first amendment rights closely resemble traditional actions for damages. This is not to say that plaintiffs will be enthusiastic about giving juries the power to decide factual and damage issues in the § 1983 context. Juries may be unsympathetic to minority points of view, and there will be ample opportunity for jury nullification of constitutional rights and of standards of official immunity.
37. 1974 Term, supra note 2, at 219, 222.
38. Where defendants are insured, it may be necessary to submit a special issue to the jury as to whether defendants, in fact, knew that they were depriving plaintiffs of their constitutional rights. Actual knowledge, accompanied by the voluntary commission of the impermissible act, may support the conclusion that defendants acted with malice or deliberately intended to deprive others of their rights. Such constitutional torts may not be within the scope of general liability insurance policies, or, even if they are,
then the general question of whether defendants acted reasonably and in
good faith would still be for the jury. Under the negligence approach,
the state of the law would not be dispositive of good faith, but would be
only one factor entering into the jury's determination whether the de-
fendants acted reasonably.\textsuperscript{39}

Thus, imputed knowledge and its accompanying special duty to
discover the current state of constitutional law\textsuperscript{40} would take many cases
from juries, thereby reducing their ability to take account of special
circumstances which may make excusable the ignorance of settled legal
principles. So too, a jury may be more likely to ask itself whether a
well-informed lay person would have known that the law was settled,
while a judge may be more inclined to take a more scholarly, lawyer's
approach to the problem. In short, the opportunity for jury nullifica-
tion or, less pejoratively, for jury amelioration of the possible harshness
of the qualified immunity in individual cases, is reduced by the imputed-
knowledge standard.\textsuperscript{41}

The applicability of the special duty or the negligence standard to
the school administrator's knowledge of constitutional law is clouded
further by the Court's recent decision in \textit{O'Connor v. Donaldson}.\textsuperscript{42} In
that case, a patient who was not a danger to himself or others was
committed to a state mental institution. He received no treatment from
the institution, and asserted that he was being unconstitutionally denied
his liberty. He brought an action against the hospital administrator
under section 1983. The Court, with eight Justices concurring, af-
firmed the lower court's decision in favor of plaintiff and remanded for
reconsideration of the damage issue. In so doing, the Court strongly

recovery against the insured may be precluded as a matter of public policy. See text
accompanying notes 225-71 \textit{infra}.

\textsuperscript{39} Obviously, as in any jury case, if the facts bearing on good faith are so clear
that reasonable persons cannot differ, the judge can so instruct the jury. See text
accompanying note 49 \textit{infra}. This further complicates the matter since a judicial
determination of good faith "as a matter of law" may mean one of two things: (1) the
question of good faith is for the judge in all cases, at least to the extent of imputing
knowledge on the basis of settled law; or (2) the facts are so clear that the matter is for
the judge in this case. See Sapp v. Renfroe, 511 F.2d 172, 178 (5th Cir. 1975). Some
commentators fail to discern this distinction. See 1974 \textit{Term}, supra note 2, at 219, 222.

\textsuperscript{40} This special duty of care, as in the tort law examples of innkeepers and
common carriers, may, in effect, be a form of strict liability. Since the phrase "strict
liability," however, carries a good deal of judicial and scholarly baggage, I have generally
avoided its use in the text.

\textsuperscript{41} The jury, of course, has ample additional opportunities to nullify the legal rules
as to § 1983 immunities—particularly in the assessment of damages.

\textsuperscript{42} 422 U.S. 563 (1975).
indicated that the issue of good faith as a defense in a section 1983 suit was for the jury:

Under [the *Wood*] decision, the relevant question *for the jury* is whether [the defendant] "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff] . . . . For purposes of this question, an official has, of course, no duty to anticipate unforeseeable constitutional developments."

It is difficult to know whether the reference to good faith as a jury question in *Donaldson*, and the failure to recite the settled-law, imputed-knowledge notion articulated in *Wood* is purposeful, or simply indicates a degree of carelessness on the Court's part. One possible interpretation of the language is that the Court considered the deprivation of liberty issues raised by *Donaldson* to be unsettled, precluding application of the imputed-knowledge doctrine; hence it only remained for the jury to pass on the general question of good faith. The sentence which states that there is "no duty to anticipate unforeseeable constitutional developments" would support this reading. But once again, the phrase "reasonably should have known" sharply undercuts this construction, for it appears to indicate that questions of actual and imputed knowledge are still to be decided by the jury upon remand. If this is the case, the Court may be saying that it is the jury, and not the judge, that determines when the law is settled and what the settled law is. While this would be an incredible allocation of functions between judge and jury, taking away from the judge the very issues that he is most competent to decide, it is broadly consistent with the theory that the question of reasonableness or good faith is for the jury. Such an interpretation would resolve the ambiguity in *Wood*, giving the power to the jury to decide whether the defendant was "reasonable" in being ignorant of settled law. If this is correct, the distinctions between the majority and dissenting positions in *Wood* have largely evaporated.

One commentator has suggested, despite the *Donaldson* opinion, that the judge should decide whether the law is settled, and if he so finds, the jury would still be empowered to decide whether the "official's actions were unreasonable under the circumstances." But this ignores

44. *1974 Term*, supra note 2, at 219, 222.
the thrust of the *Wood* majority opinion, for the Court indicated, at least at one point, that a determination that the law was settled and indisputable was also dispositive as to the issue of constructive bad faith. Nonetheless, this allocation of judge and jury functions is sensible in terms of their relative competence, and would allow school officials some leeway where the law was settled but could not reasonably have been known by them at the time that they acted. The price would be the greater potential for jury nullification of the "promise" of section 1983. *Donaldson* does not affirmatively support this allocation of power, but certainly it may be read consistently with this view, if only for the reason that the decision makes no mention of the settled-law principle.

Perhaps this brief exegesis on the meaning of the various catchwords and phrases employed by the Court in *Wood* and *Donaldson* gives force to Susanne Langer's famous observation: "[W]ords . . . have no value except as symbols (or signs); in themselves they are completely trivial." It seems apparent that the majority in *Wood*, despite the vagaries of its language, intended to heighten the school official's awareness of students' rights. If the constitutional rights of students are to be observed, school officials must familiarize themselves with the law and act accordingly. Constructive bad faith through a special duty-of-care standard and the prospect of damage recoveries are more forceful means of achieving this end than traditional injunctive remedies. This is particularly true if one looks beyond the parties in a specific case and seeks the goal of general administrative compliance with Court decisions in public school districts and universities across the country that are not yet parties to such litigation. "Any lesser standard would deny much of the promise of §1983." While some school officials may receive and rely upon inadequate counselling, and while some may—at least at present—not have the means or capacity to stay abreast of settled constitutional principles, in the end the *Wood* majority is saying that these costs do not outweigh the individual and public interest in curbing unconstitutional lawlessness in the public schools.

The dissenters, on the other hand, attach greater weight to these costs, and are more sanguine about the impact of the threat of equitable enforcement.

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45. S. LANGER, PHILOSOPHY IN A NEW KEY 75 (3d ed. 1957).
46. See Damage Remedies Against Municipalities, supra note 2, at 927.
47. Moreover, an award of damages does not involve the problems of enforcement and day-to-day supervision of other branches of government which have made the courts reluctant to issue sweeping injunctions prohibiting unconstitutional action.

relief on the willingness of educators to respect the constitutional rights of their charges. They are also genuinely alarmed that the prospect of extensive money judgments against public officials, who often serve with little or no compensation, will paralyze their decisionmaking and encourage them to return to private life. From this perspective, it is unlikely that the casual wording of the remand in Donaldson was intended to alter this fundamental division between the majority and dissent in Wood.

In terms of the policy basis of the majority opinion in Wood, the operant question is whether the law regarding a particular action by a school official is settled and indisputable. If it is, then bad faith must be imputed. Donaldson indicates that this is a jury question since it is merely subsidiary to the general problem of determining reasonableness and good faith. As a practical matter, however, judges will decide this issue in nearly all cases. If reasonable persons could not differ (that is, if it is clear to the judge that the law is settled), then under traditional rules for limiting jury discretion the judge must so instruct the jury. If the judge believes that reasonable persons could differ, then, due to the nature of the rule, he must instruct the jury that the law is not settled. In the latter case, the jury must decide, within the more general framework, whether the defendant acted reasonably and in good faith. If it determines that good faith is absent, the jury must then decide whether defendant violated plaintiff's constitutional rights and the appropriate amount of damages, if any.

All of the confusion generated by the search in Wood for an appropriate standard of fault and duty of care may appear to argue for the adoption of a far simpler standard—strict liability. The sheer

49. See Bertot v. School Dist. No. 1, 522 F.2d 1171, 1184-85 (10th Cir. 1975). The jury may determine that defendant school officials neither knew nor should have known, that they were violating the constitutional rights of students, yet that the defendants were not acting in good faith. Good faith may be lacking if the defendants "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." Wood v. Strickland, 420 U.S. 308, 322. While the line is fuzzy, apparently the Court assumes that liability is appropriate if defendants deliberately attempt to deprive someone of their constitutional rights, even if the nature of those rights is unsettled. A generalized intention to do someone in suffices, in constitutional terms. On the other hand, the "or other injury" language is puzzling. If an official intentionally wishes to injure a student—physically or emotionally—but is not motivated by a desire to deprive him of his constitutional rights, it is difficult to understand why the qualified immunity should fall. Under state tort law, it may be desirable to deter intentionally inflicted injuries. But such is not the policy behind § 1983, which speaks to deterrence of unconstitutional conduct. See text accompanying notes 170-224 infra.
difficulty in applying a fault standard and the uncertainty that it generates have led a number of tort scholars to advocate the abandonment of the principle in some or all tort cases. With respect to constitutional deprivations, the argument has great appeal since one may feel that a victim should be compensated regardless of the state of mind of the wrongdoer. Maliciousness, intent, and negligence are surely relevant to the problem of deterrence, but perhaps they should be irrelevant in terms of compensation. In the case of individual defendants, however, there are problems in constitutional litigations not generally present in the run-of-the-mill tort case. As Justice Brennan noted in Adickes v. S. H. Kress & Co., far-reaching, individual liability for constitutional wrongs may seriously impede the ability of an office-holder to exercise discretion in the carrying out of his duties and "deter his willingness to execute his office with the decisiveness and the judgment required by the public good." Further, as the Wood dissent emphasized, public school officials may decline to continue in their positions of public trust, particularly where they are not compensated for their endeavors. Thus, some standard of fault is appropriate to balance the conflict between the vindication of constitutional rights and the public interest in having public officials conscientiously perform their duties.

These arguments against strict liability do not carry much weight where recovery is sought against the governmental entity itself. In the context of suits against municipalities, a recent Harvard Law Review Note ably summarized the reasons for holding government units to a higher standard:

First, it hardly seems unfair to hold liable a government which has demonstrably abused its powers to the injury of an individual victim. Indeed, in many cases... the responsibility for the wrong is diffused throughout various parts of the government rather than attributable to the particular individual who operates most directly upon the victim. On a more practical level, it seems fair that the costs of unconstitutional government action should be spread among the taxpayers, who reap the benefits of their government and who are ultimately responsible for it. Second, the risk that imposing liability unqualified by an immunity or good faith defense upon municipalities would deter their officials from conscientiously executing their public duties seems much more attenuated than the risk attendant to imposing such liability upon the officials them-

selves. While it is possible that damage awards against municipalities might lead to administrative sanctions against the responsible officials, it seems likely that municipal administrators would refrain from imposing sanctions upon officials who appear to have been acting reasonably or in good faith. . . .

Perhaps additional safeguards may be necessary where large class actions threaten the financial stability of school districts or other government entities, but, on the whole, law and policy would be better served by a standard of strict liability where the entity itself is sued for committing constitutional violations. Such a standard would dispose of many of the ambiguities of the Wood fault standard, at least where individuals were not the defendants. And "where the policies favoring immunity are inapplicable, the balance should be struck" in the direction of "compensating the victims of unconstitutional government action." 

B. "IGNORANCE OF SETTLED, INDISPUTABLE LAW"

Another central dilemma posed by the Wood immunity standard relates to the means of identifying "settled, indisputable law." Whether resolved by judge or jury, this issue must be faced. For the hardnosed legal realist, this problem might overwhelm all others, for legal rules are, by their nature, cavernous and vague. Pat generalizations often obscure the ad hoc realities, and deny the significance of factual variations. But if one rejects this "nothing is for sure" attitude in favor of more plausible notions of probability, there are still practical problems. One problem is determining the appropriate source of settled law. Unless the Supreme Court has definitely decided a constitutional question in the school context (and the Court takes few school cases other than litigation involving racial integration and church-state relations), the appropriate source of "settled, indisputable law" may be in great doubt. Perhaps the greatest degree of certainty would attach to a "definitive" court of appeals decision (ideally, en banc), where Supreme Court review has been denied. But how should school authorities view

52. Damage Remedies Against Municipalities, supra note 2, at 956-57.
53. Id. at 958.
54. Id.
56. See note 58 infra.
57. One court has gone so far as to hold that the "law may be settled without there having been a specific prior case with identical facts." Picha v. Wieglos, 44 U.S.L.W. 2434-35 (N.D. Ill. 1976).
decisions of courts of appeal and district courts having no jurisdiction over their school district? What of a district court order which is in the process of being appealed? Presumably, the order must be obeyed with regard to the actual students involved in the litigation, but do school officials risk damage liability if they do not abide the decision in relation to nonlitigant students in the school system? What of the decisions of neighboring district courts?

Even where there is agreement as to the source of the applicable law, litigants must contend with the vagaries of the judicial process. How should dicta be treated in determining whether a particular legal issue is settled or indisputable? What of older precedents, particularly those relying upon discredited legal doctrines? How should the

58. In the context of a case involving exclusion of a student from a soccer team for failing to abide a regulation regarding hair length, Judge Rosenn denied a § 1983 recovery under the Wood rule:
The tortuous history of this case . . . obviously indicates that [plaintiff's] exclusion from the soccer team was not in violation of his clearly established constitutional rights. As Judge Aldisert observes [writing for the plurality], the circuit courts are divided almost evenly on whether hair cases in a school context implicate constitutional values, and the Supreme Court has not addressed itself to the question. The issue here perhaps is more sophisticated and complex since [plaintiff's] complaint is predicated on his exclusion, not from school, but only from the soccer team. Under these circumstances and under the state of the law as it existed when the Donegal School Board took its action, the right asserted by [plaintiff] was not clearly established and unquestioned under the Constitution.

Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600, 609 (3d Cir. 1975) (en banc) (Rosenn, J., concurring). It is noteworthy that Judge Rosenn reached this conclusion despite the fact that the Third Circuit had twice before invalidated long hair regulations. Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); Gere v. Stanley, 453 F.2d 205 (3d Cir. 1971). Apparently, the need for en banc consideration of Zeller was triggered by the refusal of the original panel to follow the earlier precedents. Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d at 602 (plurality opinion of Aldisert, J., designated as "Opinion of the Court"). Thus, the "rule" in the Third Circuit appears to be that the law is "settled" only after en banc consideration by the Court of Appeals.


60. In Cox v. Cook, 420 U.S. 734 (1975), a case involving the due process rights of prisoners, the Court unanimously denied a monetary recovery "against prison officials acting in good faith reliance on a pre-existing procedure." Id. at 736, citing Pierson v. Ray, 386 U.S. 547 (1967). In a footnote, the Court stated that We do not regard the uncertain dicta in Landman v. Peyton, 370 F.2d 135 (CA 4 1966), which did predate the discipline determinations involved here, as laying down a rule binding on petitioners prior to the later decision in Langman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971). These dicta were not mentioned or relied on by the Court of Appeals or respondent. Id. at 737 n.3.

Supreme Court’s affirmation of three-judge court decisions be treated in the absence of oral argument or written opinion? What of a reasonable belief that the Supreme Court may reverse the decisional law of the circuit? Possibly all of these elements will be weighed by the court (or jury) in each case to determine whether the law is settled. But such ad hoc determinations would bring a degree of uncertainty to damage recoveries which is belied by the Supreme Court’s formulation of the immunity standard. It seems more likely that per se rules will be developed by the courts of appeal—for example, that the law is settled only when there is a definitive appellate decision directly applicable to the geographical area in question—in order to facilitate application of the Wood doctrine.

Another difficulty with the “settled, indisputable law” approach relates to its application to particular facts. Administrators may know the rule of law but find it difficult to understand how it operates in particular circumstances and what the appropriate course of conduct is. There are some relatively straightforward constitutional principles which can be viewed as settled and readily intelligible. A public school or university may not require or permit students to engage in daily prayer on the school campus, and it may not make the flag salute compulsory. Pregnant students may not be expelled from public educational institutions. Certainly, any proven case of racial discrimination would easily come within the purview of the Wood rule. Even in these “straightforward” situations, however, there is room for endless argument. Is preschool prayer impermissible? What of silence periods? May a student not only decline to salute the flag, but also remain seated in the room during the pledge of allegiance? May pregnant

of due process, defendants should have anticipated these changes in the law. The Court simply held that Wolff should not be applied retroactively “in the context of a request for the expungement of the records of prison discipline determinations,” and “a fortiori” the result should be the same for monetary claims. 420 U.S. at 736. See also Sullivan v. Meade Independent School Dist. No. 101, 530 F.2d 799, 806 (8th Cir. 1976); Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329 (6th Cir. 1975).


students be assigned to separate classes?\textsuperscript{67} When are apparently neutral criteria racially discriminatory?\textsuperscript{68} At the fringes, even the most well-settled doctrines lapse into vagueness and unpredictability. Other issues which administrators will face in applying \textit{Wood} are even more complex. What constitutes a reasonable and permissible search of a dormitory room or locker is largely unsettled.\textsuperscript{69} What constitutional limits, if any, are applicable to school intelligence gathering activities, for example, paid undercover agents posing as students?\textsuperscript{70} Pornographic, obscene, or libelous student publications may not be entitled to first amendment protection,\textsuperscript{71} yet it is often difficult for the courts, having months to deliberate, to determine what is pornographic or libelous. The school administrator may have only hours.

Probably the best example of the ambiguous meaning of \textit{Wood} and of the problems of interpretation which school officials will face in applying the "settled, indisputable law" formulation is \textit{Tinker v. Des Moines},\textsuperscript{72} a 1969 Supreme Court decision, and its progeny.\textsuperscript{73} To greatly oversimplify, in that case the Court held that public school students were entitled to the protections of the first and fourteenth amendments, so long as their expression would not "materially and

\textsuperscript{67} See generally Comment, \textit{Marriage, Pregnancy, and the Right To Go to School}, 50 TEXAS L. REV. 1196 (1972).


\textsuperscript{70} See \textit{Brest, Intelligence Gathering on the Campus}, in \textit{LAW AND DISCIPLINE ON CAMPUS} 197 (G. Holmes ed. 1971).


\textsuperscript{72} 393 U.S. 503 (1969).

substantially interfere" with the operations of the public school.\textsuperscript{74} A reasonable forecast of disruption would be sufficient to justify suppression of student expression; school authorities need not actually tolerate a significant interference with the educational process before acting.\textsuperscript{75} The problem is that the \textit{Tinker} rule of law contains a mixture of both fact and law, and subsequent federal court decisions have had difficulties in grappling with such issues as (1) what constitutes a disruption; (2) when is a forecast of disruption reasonable; (3) what weight should be assigned to the testimony of interested school administrators and instructors; and (4) what significance should be attached to the availability of alternative means for preventing disruption.\textsuperscript{76} Thus, a school official cannot simply find out that armbands, petitions, gatherings, speeches, or underground newspapers are or are not protected; rather, he must interpret the "substantial disruption" test in the light of his particular circumstances. In effect, each case presents a novel situation, which usually must be resolved immediately. Thus, where the facts are disputed in such cases, federal courts (or juries) may be inclined to treat the law in the area as unsettled, or the jury may conclude that no constitutional violation has taken place. Alternatively, liability might attach for guessing wrongly because the constitutional rule in the abstract was known or should have been known to the school official. A more likely resolution is that only unconstitutional conduct, which could not be justified under any reasonable construction of the facts, would give rise to damage recoveries in \textit{Tinker}-like litigations. This, in effect, puts a greater onus on plaintiffs to prove that the forecast of disruption was unreasonable. Presumably, this burden will be carried in very few cases.

If there is any "settled, indisputable law" in the context of public schools which is amenable to treatment by the \textit{Wood} formulation, it is in the area of the right to procedural due process. Since the Fifth Circuit's

\textsuperscript{74} 393 U.S. 503, 509 (1969).


landmark decision in Dixon v. Alabama State Board of Education, the courts of appeal have unanimously held that a student may not be subjected to expulsion or long-term suspension without a hearing at which he is permitted to challenge the basis of the action taken against him. These due process rights are embodied in perhaps the most highly developed body of case law in the context of student rights. Courts of appeal have been called upon to define the situations in which due process attaches—for example, what constitutes a long-term suspension—and to identify the elements of an appropriate hearing. This is not to say that federal courts have always agreed on these matters: they differ on such issues as the right to counsel, what constitutes an impartial tribunal, the time at which a hearing must occur, and the need for a stenographic record of the proceedings. But, relatively speaking, school officials within their respective jurisdictions should have a clear idea of what is required of them.

The trend in the circuit courts toward procedural due process for student discipline was recently confirmed by the Supreme Court's decision in Goss v. Lopez, the first case in which the Court considered the procedural rights of public school students. The Court had certainly bided its time, waiting 14 years to put its stamp of approval on the Dixon decision. The issue in Lopez was whether public school officials had violated the due process clause by suspending students "for up to 10

77. 294 F.2d 150 (5th Cir. 1961).
80. See sources cited in note 79 supra. See also Kirp & Yudof, supra note 55, at 194-97.
days without a hearing." The suspensions had occurred during a period of student unrest, and the students were charged with various forms of disruptive and disobedient conduct, none of which (if true) would have received substantive constitutional protection. Justice White, writing for five Justices, held that the students had an entitlement or property interest in public education under Ohio law, and that "Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct had occurred." Having determined that the due process clause was applicable because a 10-day suspension from school is not a de minimis property deprivation, the Court nonetheless held that "elaborate hearing requirements in every suspension case" would be unworkable, costly, and destroy the effectiveness of short-term suspensions. Instead, rather minimal procedural requirements were imposed: a requirement of written or oral notice of charges; explanation of the evidence on which the charges were based; and an opportunity for the student to present his side of the story. In general the "hearing" must take place prior to removal of the student from the school, but in emergency situations, removal may occur without a prior hearing. In these cases, the "rudimentary hearing" should be held thereafter "as soon as practicable."

At first glance, the majority opinion in Lopez may appear both narrow and insignificant. In recognizing the applicability of the due process clause to student suspensions, the Court did no more than to


84. Id. at 574. The Court also premised its decision on the "liberty" provision of the due process clause. Id. at 574-75.

85. Id. at 580.

86. In connection with a suspension of 10 days or less, ... the student [must] be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The [due process clause] requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

87. Id. at 581-82. See also Sweet v. Childs, 518 F.2d 320 (5th Cir. 1975) (per curiam denial of petition for rehearing).

88. 419 U.S. at 581-83.
affirm what every court of appeals was already doing and what many school systems already required. Given the pressures in modern public schools, these school districts, and certainly urban districts, probably would have continued to provide procedural safeguards even in the face of the Court's insistence that they were not constitutionally required. A return to the unbridled discretion school officials possessed in pre-\textit{Dixon} years was a nearly impossible alternative for the \textit{Lopez} Court: changes in popular and professional attitudes toward student rights since \textit{Dixon} demanded imposition of some due process safeguards. Significantly, the Court carefully limited the holding to suspensions of 10 days or less. In so doing, it avoided confronting controversial questions such as the procedures required in cases of long-term suspension or expulsion. Laconically, the Court only intimated that such severe sanctions "may require more formal procedures." The Court also declined to answer the dissent's charge that the majority's ruling easily could be extended to failing grades, curricular requirements, and placement in ability groups. And finally, the "hearing" itself, if that is an apt description, is so informal that it imposes only the slightest additional burden on school authorities. As the Court itself noted, "we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspension."

This image of moderation is belied by the far-reaching implications of \textit{Lopez}. Why would the Court select such an "insignificant" factual setting to approve the work of the lower federal courts? Certainly, the variations between circuits were not of such moment as to require Supreme Court resolution. And, even if they were, the Court left most of these inter-circuit disputes untouched in the \textit{Lopez} opinion. In my view, the Court deliberately selected a case involving relatively inconsequential penalties for students in order to demonstrate that the due process clause applied to all manner of sanctions and deprivations visited upon students in the public schools. If the due process clause were applicable to 1-day suspensions, then it is difficult to imagine any other interference with liberty and property in the school context, other than de minimis sanctions, (1-hour, after-school detentions, oral reprimands, etc.) to which due process guarantees would not

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 584.
\item 419 U.S. 565, 583 (1975).
\item This line of reasoning was first suggested to me by Professor Frank Michelman.
\end{enumerate}
\end{footnotesize}
also attach. The Court, in its last major school-law decision in which the Warren Court Justices still constituted a majority, wished to define the scope of procedural entitlements of students in the broadest possible fashion. This may explain the uncharacteristically harsh tone of Justice Powell's dissent on behalf of the four Nixon Court appointees.

If this reading of Lopez is correct, the due process regime in the public schools is here to stay, and the scope of application of that clause is the broadest realistically possible. If there is any "settled, indisputable law" in the American public education world, this is it. To be sure, the Court did not specify the procedures to be followed in every case. But this was not its purpose. Having disposed of the core issue, the majority was willing to allow the lower federal courts to work out the specific details of the enlarged due process regime. By analogy to Lopez, these courts would be able to delineate reasonably precise procedures for the guidance of school officials. Disagreements between the circuits could await later resolution, and in any event, the law within each circuit would be relatively clear.

The result of reading Lopez and Wood together is that immunity from damages will rarely be tolerated where school board members or administrators have denied students their procedural rights. While the reach of Wood is bound to be less certain in other first, fourth, and fourteenth amendment contexts, it does put real teeth into the due process revolution in the schools. The vagaries of the "settled, indisputable law" approach, leaving district courts and possibly juries with great discretion in many cases, are clarified significantly by the ready application the doctrine finds in the procedural domain.

II. SUITS AGAINST SCHOOL DISTRICTS

In damage actions against school officials under section 1983 such as in Wood, it may be possible for the plaintiffs to satisfy their judgment against the individual defendants. If there are only individual plaintiffs and not a class action of any size, and if the amount of the judgment is not large, the personal wealth of a school official may be sufficient. So too, the state may choose, as have Illinois and other states, to satisfy any judgment against individual officeholders under section 1983 from state funds. Alternatively, insurance may be avail-


95. See notes 225-71 and accompanying text infra.
able to public school officials. If adequate financial resources are available, a school official, for reasons we shall examine in a moment, makes the best defendant.

The problem occurs when there is a large money judgment, and execution on the judgment would bankrupt or financially embarrass defendant school officials.\(^9\) Assume for the moment that for some reason they do not have effective insurance coverage, and that the state does not provide for reimbursement of school officials who are held liable under section 1983. Does it nonetheless make sense to seek a large money judgment, knowing full well that the defendant will not be able to satisfy that judgment? For the tactically oriented practitioner, the rationale for pursuing an officer with inadequate resources might well be the expectancy that the legislature, city, or school district will not permit an individual official to suffer bankruptcy. Perhaps this is one reason, among many, why many states willingly bear the costs of defending individual officials even against damage claims.\(^9\) Threatening individual defendants with execution of the judgment would be a way of coercing these entities into satisfying the judgment from public funds, if they were so disposed.

This course of action may prove to be quite risky to the plaintiff. First, the jury might react, particularly in close cases, by refusing to find that there has been a constitutional violation. Second, a jury would probably be quite hesitant to award substantial damages in the vain hope that the state would come to the rescue. Indeed, as in most states, it seems unlikely that the jury would be apprised of insurance coverage\(^9\) and possibly could not even be told of the existence or likelihood of state reimbursal. Third, a legislative body might react to a large judgment against an officeholder by simply allocating enough funds to cover the judgment to the extent that personal assets have been levied upon, and simultaneously enact a statute protecting the officeholder’s assets from further execution.

\(^{96}\) See Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966).
\(^{97}\) See text accompanying notes 225-71 infra.

Prosser notes, however, that “plaintiff's attorneys have ... become very adroit in managing to convey the information.”

The most common device is to ask the jurymen, upon voir dire, about their possible interest in or employment by a liability insurance company. . . . Even where no such information can be conveyed, jurymen are quite likely to assume that any defendant who owns an automobile and is worth suing is probably insured, and treat him accordingly. . . .

\textit{Id.}
The impact of *Wood*, therefore, will depend in part on whether school districts themselves are available as defendants. If they are, plaintiffs will be more likely to pursue those entities due to their greater ability to pay large judgments and to the prospect they will be held to a strict liability standard. Much of the "mickey mouse" of section 1983 suits involves the question whether persons asserting the denial of a constitutional right may sue the governmental entity itself or whether they are required to sue individual officers of state and local governments acting under color of state law.

The problem begins with the eleventh amendment,99 which has been interpreted by the Supreme Court as constitutionalizing traditional notions of sovereign immunity, and thus, as preventing suits by citizens against a state without its consent.100 In order to limit the calamitous effect this would have on the adjudication of constitutional rights, the Court adopted the famous fiction of *Ex parte Young*,101 reasoning that the states lacked the power to enforce unconstitutional laws and that therefore state officials who acted to enforce such laws were not acting in their sovereign capacities. Thus, if a federal court issues an injunction against such unconstitutional activities, the injunction runs against the official as an individual and not against the state itself. The fiction of *Ex parte Young* is not hard to fault conceptually: the individual defendant would not have been sued but for his official status; the fourteenth amendment is applicable only to state action; section 1983 requires actions under color of state law which deny constitutional rights; and effective relief would depend upon the willingness of the

99. U.S. CONST. amend. XI:
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

100. See, e.g., Parden v. Terminal Ry., 377 U.S. 184, 192 (1964); Hans v. Louisiana, 134 U.S. 1 (1890); In re Ayers, 123 U.S. 443 (1887). See generally Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); Comment, *Suits Against State Officials; Attorney's Fees and the Eleventh Amendment*, 53 TEXAS L. REV. 85, 86-91 (1974). A state, of course, may waive its sovereign immunity and, on occasion, the Court has found a "constructive waiver." See, e.g., Parden v. Terminal Ry., *supra*. Professor Tribe argues that these "constructive waiver" cases are better understood as confirming the principle that Congress has the power to compel the "states to submit to adjudication in federal courts and/or ... to entertain designated federal claims in their own courts." Tribe, *supra*, at 694. See Fitzpatrick v. Bitzek, 96 S. Ct. 2666 (1976).

101. 209 U.S. 123 (1908). See also Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).
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public official to act in his official capacity (including the ability to draw on the state treasury to carry out the order). But the illogic of Ex parte Young was a necessary expedient. As Professor Wright has stated, "in perspective the doctrine of Ex parte Young seems indispensable to the establishment of constitutional government and the rule of law."

The fiction that a suit against a governmental entity is in reality a suit against public officials acting as individuals has brought great complexity to the law. In many cases, where only prospective injunctive relief is sought, the fiction has not produced great problems. The Supreme Court has overlooked the impact of such orders on governmental budgets. But at other times the difficulties mount. The officials of the entity which is sued may have no control over revenues, and to the extent that the judgment requires additional funds, an order must be fashioned which seeks to coerce the legislature or other state entity, not includable as defendants, into appropriating additional funds. As Edelman v. Jordan demonstrates, relief may be sought in the form of a retroactive injunction against an official which has the effect of compelling the entity to pay over funds directly from its treasury. While the perceptive observer may fail to discern a major distinction between prospective and retroactive injunctions which place demands on state funds, the Court recently held that such retroactive relief would violate the eleventh amendment. Moreover, there is a mystique surrounding

102. See generally Davis, Suing the Government by Falsely Pretending to Sue an Officer, 29 U. Chi. L. Rev. 435 (1962).


105. Id. As an interesting example of the development of federal courts issues in the Supreme Court, consider the following quotation from the majority opinion in which Justice Rehnquist admits that there are four Supreme Court precedents contrary to the Edelman result:

Three fairly recent District Court judgments requiring state directors of public aid to make the type of retroactive payment involved here have been summarily affirmed by this Court notwithstanding Eleventh Amendment contentions made by state officers who were appealing from the District Court judgment. [Citing State Dep't of Health and Rehabilitative Services v. Zarate, 407 U.S. 918, aff'd 347 F. Supp. 1004 (S.D. Fla. 1971); Sterrett v. Mothers' and Children's Rights Organization, 409 U.S. 809, aff'd unreported order and judgment of District Court (N.D. Ind. 1972) on remand from Carpenter v. Sterrett, 405 U.S. 971 (1972); Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969), aff'd per curiam sub nom. Wyman v. Bowens, 397 U.S. 49 (1970).] Shapiro v. Thompson, 394 U.S. 618 (1970), is the only instance in which the Eleventh Amendment objection to such retroactive relief was actually presented to this Court in a case which was orally argued. . . . This Court, while affirming the judgment, did not in its opinion refer to or substantively treat the Eleventh Amendment argument. Nor, of course, did the summary dispositions of the three District Court cases contain any substantive discussion of this or any other issues raised by the parties.
damage recoveries running directly against the state (as opposed to injunctive relief), and a successful suit for damages against officials acting in their individual capacities means just that: the judgment is executed against the personal assets of the officeholder and not against governmental funds or assets.106

If we assume that large money judgments will be appropriate in a given class of section 1983 actions against school officials, and if our senses of propriety and equity tell us that it is unfair to stretch the Ex parte Young fiction this far, is there any way to sue the school district as an entity for damages? If school districts are creatures of the state (as they are), then logically the eleventh amendment would apply and such actions would be constitutionally impermissible. Logic, however, has little place in the decisional law surrounding the eleventh amendment.

The Supreme Court has held that counties and cities do not have immunity from suit under the eleventh amendment,107 and if counties and cities are not arms or "alter-egos" of the state for purposes of the eleventh amendment, it seems unlikely that school districts would occupy such a position. In contrast to cities, counties are generally charged with the administrative functions of the state at the local level, often lack home-rule or ordinance-making authority, and their officers are often compensated in whole or in part by the state.108 In many ways, the county is the most obvious extension of the state at the local level. Conversely, most school districts are independent and possess authority to levy taxes, formulate budgets, hire and fire personnel, and

This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion. Shapiro v. Thompson and these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the relief awarded by the District Court in this case. Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law. Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today.

106. Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) (en banc); Burt v. Board of Trustees of Edgefield County School Dist., 521 F.2d 1201, 1204 (4th Cir. 1975) (opinion of Craven, J.).


establish the overall curriculum.\textsuperscript{109} While I do not wish to belabor the differences—they are differences in degree which will vary from state to state—the illogic of excluding counties from the coverage of the eleventh amendment would appear to take in school districts as well.\textsuperscript{110}

Having cleared the eleventh amendment hurdle to naming the school district as a defendant in a section 1983 action for damages, there is yet another hurdle to be overcome. In \textit{Monroe v. Pape},\textsuperscript{111} a section 1983 suit for damages against Chicago police officers and the city of Chicago, the Supreme Court held that a municipality is not a "person" within the meaning of the statute.\textsuperscript{112} This decision was extended in \textit{City of Kenosha v. Bruno}\textsuperscript{113} to injunctive actions against municipalities, and to counties in \textit{Moor v. County of Alameda}\textsuperscript{114} even if they may be sued under state law. The logic of the \textit{Monroe}, \textit{Bruno}, and \textit{Moor} cases would appear to extend to school districts since they too are political subdivisions of the state. What the Court hath given under the eleventh amendment, it hath taken away under section 1983.

But the matter is not this simple. Since \textit{Bruno}, it has been clear that the same definition of "person" under section 1983 applies for both equitable relief and damages. How then does one explain the myriad of desegregation cases in which the school district was named as a defendant? What of \textit{Brown v. Board of Education}?\textsuperscript{115} \textit{Shuttlesworth v. Birmingham Board of Education}?\textsuperscript{116} \textit{Green v. County School Board}?\textsuperscript{117} \textit{Swann v. Charlotte-Mecklenburg Board of Education}?\textsuperscript{118} The Court did not address itself to the question of the meaning of the word "person" under section 1983 in any of these litigations, but simply moved past the technical problems to the merits and allowed the school

\begin{itemize}
\item \textsuperscript{110} See Burt v. Board of Trustees of Edgefield County School Dist., 521 F.2d 1201, 1205 (4th Cir. 1975). In Bradley v. School Bd. of the City of Richmond, 416 U.S. 696 (1974), the Court permitted the recovery of attorney's fees against a school district pursuant to § 718 of Title VII of the Emergency School Aid Act, 20 U.S.C. § 1617 (Supp. II 1970), applicable to desegregation cases. The Court did not note or address the eleventh amendment problem in allowing such recoveries.
\item \textsuperscript{111} 365 U.S. 167 (1961).
\item \textsuperscript{112} Id. at 191. See also Broadway v. City of Montgomery, 530 F.2d 657 (5th Cir. 1976); City of Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976).
\item \textsuperscript{113} 412 U.S. 507 (1973).
\item \textsuperscript{114} 411 U.S. 693 (1973).
\item \textsuperscript{115} 347 U.S. 483 (1954). Apparently § 1983 was not invoked at any stage in the \textit{Brown} litigation. \textit{Damage Remedies Against Municipalities}, supra note 2, at 950 n.6.
\item \textsuperscript{116} 358 U.S. 101 (1958).
\item \textsuperscript{117} 391 U.S. 430 (1968).
\item \textsuperscript{118} 402 U.S. 1 (1971).
\end{itemize}
district to be sued as an entity. The reason for this is that the question is largely without relevance where the damages are not sought, affecting little more than the style of the case. When, and if, the Court reaches the issue of whether a school district is a "person" under section 1983, it probably will admit its earlier inconsequential oversights, emphasize its failure to discuss the issue, limit the precedential value of these cases, and draw the obvious parallel to counties and municipalities.\textsuperscript{119} The vast majority of lower federal courts, in the wake of \textit{Bruno}, have held that a school district is not a "person" within the meaning of section 1983.\textsuperscript{120} Individual school board members, however, clearly are "persons" within the meaning of the statute.\textsuperscript{121}

\textsuperscript{119} The only place where this reasoning will pose severe difficulties is with respect to the awarding of backpay. Traditionally, federal courts have awarded dismissed public employees backpay against the governmental entity itself where the dismissal violated constitutional standards. \textit{See}, \textit{e.g.}, \textit{Roane v. Callisburg Independent School Dist.}, 511 F.2d 633 (5th Cir. 1975). The somewhat tenuous rationale is that backpay is a form of "equitable restitution" and not damages. That is, it is incidental to the primary injunctive relief, reinstatement. Thus, if school districts may no longer be sued under § 1983, perhaps individual board members or administrators will be liable for the backpay. A more reasonable alternative—albeit one which stretches the "equitable restitution" doctrine even further—is to order the individual defendants to draw on public funds to satisfy the judgment for backpay. Recently, circuit courts have come perilously close to holding that backpay may not be recovered from public monies whether individuals or the entity has been sued. \textit{Muzquiz v. City of San Antonio}, 528 F.2d 499 (5th Cir. 1976) (en banc); \textit{Monell v. Dep't of Social Services}, 532 F.2d 259 (2nd Cir. 1976). \textit{Compare} \textit{Campbell v. Gadsden County Dist. School Bd.}, 534 F.2d 650 (5th Cir. 1976). The Supreme Court has agreed to review a case raising these issues next term. \textit{Mt. Healthy City School Dist. Bd. of Educ. v. Doyle}, 529 F.2d 524 (6th Cir. 1975), \textit{cert. granted}, 96 S. Ct. 1662 (1976).


\textsuperscript{121} \textit{Burt v. Board of Trustees of Edgefield County School Dist.}, 521 F.2d 1201, 1205 (4th Cir. 1975) (opinion of Craven, J.).
If at this point the reader feels that he or she has been dragged through the deepest subterranean passages of federal courts jurisdiction doctrine, rest assured that there are more darkened explorations to come. Section 1983 creates a cause of action for injunctive and other relief against state officers acting under color of state law who deny a "person" their federal statutory or constitutional rights. Subject matter jurisdiction over this cause of action is bestowed upon the federal courts by section 1343(3) of Title 28 of the United States Code. This jurisdictional section encompasses all actions to redress denials of constitutional rights or rights protected by federal "equal rights" statutes. There are two major advantages to this approach. First, given the expansive interpretation of the fourteenth amendment by modern courts, section 1983 statutorily authorizes suits to vindicate the constitutional rights of students and others and to award damages and other forms of relief. Second, the plaintiff need not assert or prove any particular dollar amount is in controversy, for section 1343 is an exception to the general federal question jurisdiction statute, which requires that the amount "in controversy" must exceed $10,000 to establish federal subject matter jurisdiction. On the other hand, as noted above, section 1983 probably does not authorize suits against school districts as entities for either damages or injunctive relief.

There are, however, other strategies by which plaintiffs may seek to sue school districts, as governmental entities, for damages and injunctive relief.


124. 28 U.S.C. § 1331(a) (1970): 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. See generally Friedenthal, New Limits on Federal Jurisdiction, 11 Stan. L. Rev. 213 (1959).

125. Friedenthal, New Limits on Federal Jurisdiction, 11 Stan. L. Rev. 213 (1959). See 13 Wright, Miller & Cooper, supra note 122, § 3573 at 500. There is an identical jurisdictional amount requirement for diversity suits. 28 U.S.C. § 1332 (1970). For purposes of both sections, interest and costs are not taken into account, while punitive damages are includable. 14 Wright, Miller & Cooper, supra, § 3702, at 389.

126. See text accompanying notes 111-21 supra.
relief. These strategies involve the circumvention of section 1983 by basing the cause of action directly on the Constitution and then invoking the jurisdiction of the federal court through section 1343(3) or section 1331. Neither of these jurisdictional sections has an explicit "person" requirement, and both appear to contain broad enough language to encompass the likely claims. Whether a cause of action can be inferred from the Constitution, without any explicit statutory authorization, is a complex question and one which is mired in the dark ages of constitutional law. It is clear that federal courts have vindicated federal constitutional rights, even in modern times, without reference to any congressional act authorizing a cause of action for the redress of constitutional rights against federal or state officials. Furthermore, although section 1983 was enacted more than 100 years ago, it was rarely used as a basis of a cause of action against state officials prior to Monroe v. Pape. In Ex parte Young itself, no mention is made of section 1983. In the first 65 years after its enactment, there were only 19 court decisions under this statute. The plain fact is that until quite recently federal courts regularly decided constitutional questions


without making explicit references to the source of the cause of action or the statute conferring jurisdiction.

These pre-
Monroe (and some post-
Monroe) cases are premised on the assumption that the Constitution, or at least specific portions of it, creates enforceable rights. This is largely a matter of historical interpretation, but at least insofar as injunctive relief is sought, these cases suggest that the premise has been largely accepted. As three distinguished commentators indicate in a discussion of federal question jurisdiction,

Cases relying on the Constitution pose little difficulty. The Supreme Court has repeatedly held that cases depending directly on the construction of the Constitution are within the grant of federal question jurisdiction. It may be that the Constitution does not give the plaintiff the remedy he is seeking, but so long as his claim that it does is substantial, jurisdiction exists and a dismissal must be for a failure to state a claim on which relief can be granted rather than for want of jurisdiction.\textsuperscript{132}

While the matter is too complex for resolution in this Article, if the Constitution creates causes of action, the real issue is the power of federal courts to fashion noninjunctive remedies. If this premise with respect to the source of the cause of action is wrong, then the discussion of avoiding reliance on section 1983, with its "person" requirement, is at an end. Otherwise, the issue is the impact of the existence of section 1983, insofar as it expressly creates or authorizes causes of action, on the power of federal courts to grant damage recoveries against government entities, where such relief is not barred by the eleventh amendment.\textsuperscript{133}

Perhaps it is best to begin analysis of the sovereign immunity problem with the Supreme Court's recent decision, Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation,\textsuperscript{134} in which the Court held that plaintiffs may recover damages against federal officers who had deprived them of their fourth amendment rights. The Court was compelled to consider the question in constitutional terms since there was no provision in the federal code applicable to federal

\textsuperscript{132} 13 \textbf{WRIGHT, MILLER \& COOPER, supra} note 122, § 3563, at 415 (citations omitted).


\textsuperscript{134} 403 U.S. 388 (1971).
officers which parallels section 1983. The Court adopted the following rationale:

Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." [citation omitted] . . . The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts [citations omitted]. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch 137, 163 (1803).185

Section 1331 was relied upon for jurisdiction.

There are numerous difficulties in extending the Bivens rationale to suits for damages against state and local governmental entities, even where the eleventh amendment does not pose problems. Arguably, the decision is limited only to causes of action under the fourth amendment.186 So too, the Court approved a remedy which would have been available against state officers under section 1983, because it only allowed the recovery of damages against individual federal officers. There was no question of piercing the federal government's sovereign immunity and securing damages from the Federal Bureau of Narcotics itself. But the most significant difficulty is the absence of a statute creating a cause of action against federal officers. It is one thing for the Court to authorize damages where Congress has not spoken to the question, but it is quite another for it to do so where Congress has. Under the Court's construction, damage recoveries against governmental entities are impermissible—at least under section 1983. This embodi-

135. Id. at 396-97.

136. There would appear to be no logical reason for allowing a plaintiff to proceed directly under the fourth amendment, while not affording a similar opportunity under other constitutional provisions. Moreover, since the guarantees of the Bill of Rights, with some exceptions, apply to the states by reason of their incorporation in the fourteenth amendment, such a distinction would not be tenable in actions brought to redress unconstitutional conduct of state entities and officers. Lower courts have had little difficulty in extending Bivens beyond the confines of the fourth amendment. For a long list of cases supporting this proposition, see Panzarella v. Boyle, 406 F. Supp. 787, 792 n.7 (D.R.I. 1975).
ment of congressional judgment is entitled to great weight and is argu-
ably preemptive with respect to the power of the federal courts to fashion
remedies for the violation of constitutional rights under color of state
law. This may be true regardless of the fact that a cause of action may
be authorized by the Constitution itself.

Needless to say, the legislative history of section 1983 yields no
ready answer to the preemption argument, and scholars have paid scant
attention to it. If Congress intended that section 1983 be preemptive
with respect to actions for damages against state and local governments,
we must ask further if the statute is to be preemptive in both state and
federal courts. If so, it raises serious constitutional difficulties, pitting
the power of Congress to specify remedies for the violation of constitu-
tional rights against the power of the judiciary to vindicate constitutional
rights. This would be particularly important where injunctive relief was
not adequate and where individual state and local officers were judg-
ment-proof for all practical purposes. If by preemption it is meant
that federal courts have no authority to award damages against govern-
mental entities, while state courts are free to do so when vindicating
claims directly arising under the Constitution, then the constitutional
problem takes on a different complexion. If the state court remedies
were in fact available and not simply figments of imagination, perhaps
no serious constitutional issues would be raised. The effect of section
1983 would, in a sense, be jurisdictional, taking some cases away from
the federal courts and giving them to state courts. It might be consid-
ered well within the power of Congress to define the jurisdiction of the
federal courts. To the extent that sovereign immunity is alive and well
in state courts, so as to bar actions against all governmental units, the
constitutional ramifications would be identical to those arising in the
context of the exclusivity of section 1983 in state and federal courts.

Given the absence of a clear legislative history or pronouncement, I
am reluctant to attribute to Congress an intention to make section 1983
the exclusive source of judicial power to fashion remedies for the
violation of constitutional rights by state and local governments and,
officials. Ambiguity with regard to fundamental allocations of power
counsels restraint. But this still leaves the problem of the weight to be
given to the remedial limitations contained in section 1983 when a
federal court relies on the Constitution itself for the cause of action.
Perhaps state and local government entities were omitted from section

137. See, e.g., Brault v. Town of Milton, 527 F.2d 730 (2d Cir.), vacated on other
grounds, id. at 736 (1975) (en banc).
1983 because in 1871 Congress did not think that it had the power to include them because of the eleventh amendment.\textsuperscript{138} Given the recent constructions of that amendment which deny its application to counties and other sub-units of the state, perhaps we should be wary of extending the logic of section 1983 to constitutional causes of action. On the other hand, if Congress simply intended to insulate state and local governments from damages under section 1983, perhaps federal courts should not be exercising remedial power contrary to that intention; arguably, that would render section 1983 gratuitous.\textsuperscript{139} This argument is strengthened if \textit{Monroe} is viewed as resting on a combination of statutory interpretation and judicial self-restraint rooted in concepts of federalism.\textsuperscript{140} If the Court construed section 1983 in the light of its concern for the need to protect local and state governments from potentially "devastating" money judgments,\textsuperscript{141} then presumably the Court will apply similar notions of federalism to causes of action resting directly on the Constitution and in the construction of section 1331. It is even more likely that the Court would so construe section 1343(3) since it was originally, prior to codification, combined with section 1983 in a single statutory provision.\textsuperscript{142} Thus, there would be no conflict between the Court's view of the appropriate exercise of remedial discretion in constitutional litigation and the view enacted into law by the

\textsuperscript{138} See \textit{Moor v. County of Alameda}, 411 U.S. 693, 709 (1973); \textit{Damage Remedies Against Municipalities}, supra note 2, at 947.  

\textsuperscript{139} As Judge Timbers has urged,  

The Supreme Court has held that Congress, in implementing the Fourteenth Amendment through enactment of 42 U.S.C. § 1983 (1970) and its predecessors, specifically intended to exempt municipalities from liability in damages for violations of the Fourteenth Amendment. The majority's holding today that creates such liability stemming directly from the Fourteenth Amendment strikes me as wholly ignoring this Congressional intent.  

\textsuperscript{140} I am grateful to Professor Paul Mishkin for first suggesting this analysis to me.  

\textsuperscript{141} See note 130 supra.
Congress in section 1983 (and sections 1331 and 1343(3)).

Given its recent penchant for finding federalism or comity issues in every corner of the constitutional realm, the Court will probably adopt the more restrictive view. However, I believe that it would be wiser for the Court to read sections 1331 and 1983 together to yield an interpretation more sympathetic to the vindication of constitutional rights. Section 1343(3) poses greater difficulty since, despite its unqualified language, historically it has been treated as the jurisdictional counterpart of section 1983 and not as a general jurisdiction statute.

Similar arguments may be made in behalf of extending the Wood immunity, developed in the context of § 1983, to suits against governmental entities arising directly under the Constitution, where jurisdiction rests on § 1331. In developing the federal common law in this area, conceivably the Court could conclude that governmental entities should be held strictly liable for their constitutional torts, while individual defendants should be able to find refuge in a good faith defense. Such a dichotomy would allow for the compensation of those injured by the commission of the constitutional torts and for further deterrence of such wrongs, while providing for some measure of safety for the personal assets of government employees and officers. State courts entertaining § 1983 or constitutionally implied causes of action would also be bound by the federal common law of Wood. If, however, state causes of action for federal and state constitutional denials were created by state legislatures or judges, then state courts might well apply an immunity rule different from that applied in Wood.

One major exception to the Wood immunity rule consists of cases in which dismissed teachers seek backpay and reinstatement as a remedy for the alleged infringement of constitutional or statutory rights. Under such circumstances, the relief is generally characterized as "equitable" in nature, while the Wood immunity only applies to damage actions. The former admits of no good faith defense, at least if the action is brought against the entity or officers acting in their official capacities. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975); Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329, 1334 (6th Cir. 1975); cf. Burt v. Board of Trustees of Edgefield County School Dist., 521 F.2d 1201, 1204 (4th Cir. 1975) (opinion of Craven, J.). Presumably, if the cause of action is created by the Constitution and jurisdiction based on § 1331, the result would be the same.

The principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments. . . .


I have been unable to locate a single case in which a federal court has relied on the Constitution for the cause of action and based jurisdiction on § 1343(3).
This treatment of section 1343(3) is not inevitable (it could be read as encompassing causes of action based on the Constitution itself), but, in the light of the unlikelihood of that result, I limit my analysis to section 1331.

Section 1331 was enacted 4 years after the predecessor of sections 1983 and 1343(3); its legislative history is virtually nonexistent. Nonetheless, most courts and commentators today agree that general federal question jurisdiction was designed to expand national authority over matters which, before the Civil War, had been left to the states. Arguably, in 1875, Congress had no intention of restricting the enforcement of those rights by limiting the scope of section 1331—i.e., by disallowing damage recoveries against state and local entities. The broad language of the statute itself indicates no such limitation; therefore, in the absence of explicit legislative history or statutory language to the contrary, the later statute should control the earlier one. But since section 1331 is only a jurisdictional statute, one would have to take the further step of arguing that that statute has substantive implications. That is, Congress intended to recognize or sanction the power of federal courts to award damages as they saw fit in the vindication of constitutional rights. This interpretation would be derived from the language of section 1331, which gives original jurisdiction to federal courts where the civil action “arises under the Constitution, laws, or treaties of the United States.” These words parallel, if somewhat inexact, the language found in Article III, section 2 of the Constitution, which empowers the judiciary to hear “all cases, in law and equity, arising under this

courts assume that if the cause of action is created by the Constitution itself, then § 1331 is the appropriate jurisdictional statute. See, e.g., Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975); Brault v. City of Milton, 527 F.2d 730 (2d Cir.), vacated on other grounds, id. at 736 (1975) (en banc); Calvin v. Conlisk, 520 F.2d 1 (7th Cir. 1975). Compare Campbell v. Gadsden County Dist. School Bd., 534 F.2d 650 (5th Cir. 1976). Sections 1983 and 1343(3) are, in effect, treated as one statute establishing both a cause of action and jurisdiction. See, e.g., Hagans v. Lavine, 415 U.S. 528 (1974); Steffel v. Thompson, 415 U.S. 452 (1974); Lynch v. Household Fin. Corp., 405 U.S. 538, 543 n.7 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144, 162-63 (1970); Panzarella v. Boyle, 406 F. Supp. 787, 796 (D.R.I. 1975). Presumably, this conjunction reflects the history of these two provisions in that they were originally parts of the same statute. See note 130 supra. I am reluctant to conclude that cases in which the Court failed to discuss the source of jurisdiction or the cause of action stand for the proposition that § 1343(3) is a general jurisdictional statute. See Hagans v. Lavine, 415 U.S. 528 (1974).

146. Act of March 3, 1875, § 1, 18 Stat. 470.
147. See Lynch v. Household Fin. Corp., 405 U.S. 538, 548 n.14 (1972) (“There was very little discussion of the measure before its enactment, in contrast to the extensive congressional debate of the Act of 1871.”)
148. See, e.g., id. at 548.
149. Cf. id.
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constitution, the laws of the United States and Treaties, made, or which shall be made, under their authority . . . .” That is, the federal courts were given the broadest possible power to vindicate constitutional rights, and, in the absence of specific constitutional limitations (for example, the eleventh amendment), they may fashion whatever remedies in law or equity they deem necessary to that purpose.

This construction of section 1331, permitting the recovery of damages against governmental entities, including school boards, is supported by a small but growing number of lower federal court decisions. In addition, the Supreme Court, in City of Kenosha v. Bruno, remanded for consideration of section 1331 jurisdiction after holding that the city was not a “person” within the meaning of section 1983. While no claim for damages was before the Court in Bruno, the language of the opinion gives some support to the conclusion that governmental entities may be sued for damages under section 1331. If the Court’s sense of symmetry and policy led it to define the “person” requirement of section 1983 identically in actions for injunctive relief and damages, possibly these same factors will suffice in construing section 1331. That is, if a governmental body is a proper defendant when an injunction is sought, perhaps this is also the case when damages are sought.

Such a construction of section 1331 does not render section 1983 meaningless. Section 1983 may be looked upon as an effort by the Congress to clarify the meaning of the Civil War constitutional amendments and to signal to the courts that they should adjudicate constitutional claims. Given the continuing debate over judicial review, perhaps Congress felt that an explicit statute was necessary. Perhaps Congress feared, and justifiably so, that the courts would be timid in applying the new amendments—thus further encouragement from the legislative branch was thought necessary. Moreover, section 1983 countenanced damage recoveries, whereas traditionally the Constitution was invoked defensively and only injunctive relief granted. In other words, section 1983 was designed not so much to limit remedies in constitutional litigation as it was to overcome doubts and ambiguities.


152. See Civil Rights Cases, 109 U.S. 3 (1883).
concerning the power of the judiciary to adjudicate and grant redress in such cases. From this perspective, section 1983 should not be considered a bar to proceeding directly under the Constitution itself and section 1331.

So too, the reenactment of the predecessor of section 1983 after the conferring of general federal question jurisdiction in 1875 may indicate that the Congress, if it thought about the question, was drawing a distinction between claims for damage recoveries exceeding $10,000 and those involving claims for a lesser sum. That is, governmental entities may be sued for damages where the amount in controversy exceeds $10,000, while plaintiffs are limited to suing individual defendants under section 1983 where the amount is less than that. To be sure, if the underlying policy is to protect governmental entities from large damage recoveries, this line of reasoning makes no sense. If the policy, however, is one of protecting governmental entities from "nickel and dime" claims, then the line is defensible. Furthermore, more harm may be done to state and local governments through the exclusive liability of individual officers than by shifting the burden of large recoveries to the entities themselves; as Justice Powell reminded us in Wood, such a rule might severely hinder the ability of government to attract and retain talented officers and employees.

Therefore, Bivens should be extended to actions against school districts and other subdivisions of the state. As Professor Dellinger has argued,

The Bivens decision leads to the rather striking conclusion that section 1983 may simply be unnecessary: money damages, as well as equitable relief, may be obtained in suits directly founded upon the Constitution.154

To be sure, there are distinctions between Bivens and situations in which actions are brought against school districts. And the heightened sense of federalism displayed in recent Supreme Court opinions—the notion that the activities of state and local entities should not further be encumbered by the federal constitution and laws—may bode a contrary result. But, on the whole, my cautious judgment is that school districts, in the absence of an eleventh amendment bar, are appropriate defendants in section 1331 actions seeking to recover damages for the


154. Dellinger, supra note 2, at 1559 (citation omitted).
alleged infringement of constitutional rights of students.\textsuperscript{155}

But there remains another major hurdle. Under section 1331, plaintiffs still must meet the $10,000 jurisdictional amount in a context where the constitutional rights asserted, by their very nature, are likely to be difficult to value. In many instances, the injury done by the denial of a right—for example, the right to a hearing before suspension or to engage in first amendment activities—will not result in any easily measurable pecuniary loss. It may consist of a loss of dignity or reputation, of insult, or of emotional distress. Further, as will be developed below, recoveries in such constitutional tort cases may be more reflective of the jury's judgment that future constitutional violations need to be deterred, rather than a recognition of the gravity of plaintiff's injury. But, in any event, the judge must determine at the outset of the litigation whether the jurisdictional amount has been met.\textsuperscript{156} The general rule, favorable to the party invoking the federal court's jurisdiction, is this:

\textit{[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.}\textsuperscript{157}

With regard to actions brought to vindicate substantial constitutional rights, federal courts have had great difficulty in grappling with the valuation problem.\textsuperscript{158} The traditional rule, as three distinguished commentators have formulated it, is that

\textit{when a person seeks to protect a civil or constitutional right from infringement, a claim based solely on the inherent value of that right, as opposed to any damage that is measurable in monetary...}

\textsuperscript{156} 14 Wright, Miller & Cooper, supra note 122, § 3702, at 379. See Zunamon v. Brown, 418 F.2d 883 (8th Cir. 1969). Subsequent events, including a recovery of $10,000 or less, do not destroy subject matter jurisdiction once it has been established. 14 Wright, Miller & Cooper, supra, § 3702, at 379. See Rosado v. Wyman, 397 U.S. 397, 405 n.6 (1970). Often, there is no great difficulty in meeting the jurisdictional amount requirement where teachers seek backpay and other damages incident to an unconstitutional decision to dismiss them. Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803, 805 (9th Cir. 1975).
\textsuperscript{158} See generally 14 Wright, Miller & Cooper, supra note 122, § 3709, at 484-93; Comment, The Jurisdictional Amount in Controversy in Suits To Enforce Federal Rights, 54 Texas L. Rev. 545 (1976).
Today, however, it is fair to say that this tradition has been sharply undercut by a series of lower federal court decisions which creatively apply the rules for determining the jurisdictional amount in order to give federal courts subject matter jurisdiction. In effect, they repudiate the general rule by holding that civil and constitutional rights are inherently worth more than $10,000. The reason for this change in judicial attitudes is clear: with the recent sensitivity to the denial of constitutional rights, federal judges fear that parties will be deprived of their ability to secure a federal forum to pass on the merits of the case by virtue of a preliminary jurisdictional determination. There is a tension between the desire to open the federal courts to cases raising federal issues and the policy of section 1331 to weed out insubstantial claims. A dollar test for measuring the depths of the interests at stake turns out, particularly in constitutional and civil rights cases, to be a crude and highly inaccurate device, and indeed, many commentators have advocated the abolition of the jurisdictional amount requirement with respect to federal question jurisdiction.

In terms of whether federal courts will find the jurisdictional amount lacking in section 1331 actions against school districts, it is very difficult to predict the course of the law. Cases can be found to support virtually any view of the jurisdictional amount question. But it should be noted that the leniency displayed in many modern decisions is a function of the unwillingness of courts to deny the parties a federal forum, particularly where equitable relief is sought. These factors are not present in the case of constitutional tort actions for damages brought by students against school boards and districts. If the jurisdictional amount is found lacking in such cases, plaintiffs still may pursue indi-

161. 14 WRIGHT, MILLER & COOPER, supra note 122, § 3709, at 492.
162. See id. § 3702, at 369.
vidual board members and administrators in federal court pursuant to sections 1983 and 1343.\textsuperscript{164} Obviously, there will be different defendants, and possibly some different issues,\textsuperscript{165} and there may be greater difficulty in collecting on judgments against individuals. But certainly there is no denial of a federal forum. Thus, where students sue school districts for the deprivation of constitutional rights, the closer analogy may be to modern diversity cases where no great importance is attached to dismissing the action and compelling the parties to resort to the state courts.\textsuperscript{166}

In terms of policy, I would suggest that federal courts be reasonably strict in the application of the $10,000 jurisdictional amount. Plaintiffs will probably sue school boards, individual board members, and individual administrators in every case in order to maximize the probability of securing and enforcing a money judgment. If the school board is dismissed from the case, the functional result is that individual defendants probably will be liable only for an amount up to $10,000. I say "probably" because a judge may decide that the jurisdictional amount has not been met at the outset of the litigation, while the jury may ultimately assess damages in excess of $10,000. On the other hand, the governmental entity would be held to be jointly and severally liable in cases involving more than $10,000, if damages were awarded.\textsuperscript{167} Particularly if the courts were willing to adopt a rule to the effect

\textsuperscript{164} See text accompanying notes 96-98 supra.

\textsuperscript{165} Specifically, I have in mind the question whether higher administrative entities may be found to be vicariously liable for the constitutional torts of subordinates. In general, notions of respondeat superior have not received a sympathetic response from federal courts in the constitutional tort context. The simple fact that an official is superior in the administrative hierarchy probably is not sufficient to create liability. Plaintiffs will normally have to demonstrate that the official participated in the unconstitutional deprivation and has done so with the appropriate degree of bad faith. See Rizzo v. Goode, 96 S. Ct. 598 (1976); Milton v. Nelson, 527 F.2d 1158, 1159 (9th Cir. 1976); Palmer v. Hall, 517 F.2d 705 (5th Cir. 1975); Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). But see Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971); Hill v. Toll, 320 F. Supp. 185 (E.D. Pa. 1970). See generally Bristow, § 1983: An Analysis and Suggested Approach, 29 Ark. L. Rev. 255, 283-88 (1975).

\textsuperscript{166} See generally 14 Wright, Miller & Cooper, supra note 122, § 3707, at 464-73.

\textsuperscript{167} Again, the judge may find that the jurisdictional amount has been met at the outset of the litigation, while the jury may ultimately award a sum of money less than $10,000. Furthermore, since individual school board members effectively constitute the governmental entity, it is reasonable to assume that the board will adopt rules providing for governmental liability in the event that the board and individual board members are held to be jointly and severally liable. Administrative officers and teachers may be in a more vulnerable position since the self-interest of school board members may not inevitably lead them to adopt a similar rule for subordinates.
that the jurisdictional amount has not been met only where the judge would set aside a verdict in excess of $10,000,168 there would be a salutary result. Individual defendants would have an incentive to adhere to constitutional standards, but at the same time their liability would be limited to $10,000. On the other hand, school districts would be responsible for large money judgments, and, presumably, this would encourage them to protect the rights of their students. They would not be called upon to defend damage suits involving small sums of money. Moreover, plaintiffs with a significant injury would usually be compensated, and yet the prospect of bankrupting individual officers would be reduced. Also, the magnitude of the risk to individuals could be more easily calculated for purposes of indemnification and insurance.

Despite my view of actions brought under a *Bivens* theory, risk-averse school board members and administrators can gain little comfort from this analysis of the prospect of successful suits against school districts. The law is in a state of flux, and predictions are tentative and, to a large extent, speculative. And there is no reason to assume in advance that federal district and appellate courts in different parts of the country will reach consistent results. Until there is a definitive Supreme Court ruling,169 a school official who relies on the liability of the institution for which he or she works as a whole or partial substitute for his or her own risk planning is playing a deadly financial game. Prudence demands that such officials adjust their conduct to fit the new constitutional facts of life, and prepare for the worst by securing adequate indemnification or insurance.

**IV. THE BACKGROUND TORT LAW AND THE MEASURE OF DAMAGES**

The appropriate standard of damages in section 1983 suits brought by students is a perplexing question. If *Wood* is read broadly, school officials may be held liable in a variety of factual contexts, most of which would not be actionable under the common law of torts. Consider these six hypothetical section 1983 cases in which monetary damages might be sought:


169. Perhaps these questions will be answered when the Court disposes of Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 529 F.2d 524 (6th Cir. 1975), cert. granted, 96 S. Ct. 1662 (1976).
(1) A student is permanently expelled or suspended temporarily from a high school for engaging in protected first amendment conduct.\footnote{170}

(2) A student is assigned to a special education class without any procedural safeguards, and it turns out that the assignment was inappropriate.\footnote{171}

(3) A female student alleges that she has been unconstitutionally discriminated against on the basis of sex because school authorities refuse to admit her to a woodshop class. She files suit after half of the semester has elapsed.\footnote{172}

(4) A group of students publish an underground newspaper and intend to distribute it on school grounds, before and after school. The students are forbidden by the principal from distributing the newspaper on school grounds. They acquiesce in that decision, thereby avoiding suspension, but bring suit in federal court, alleging the denial of a constitutional right under the first and fourteenth amendments.\footnote{173}

(5) A black student in a school district under a desegregation order brings suit alleging that the failure of the school district to comply with the court's order has denied him his constitutional rights under the fourteenth amendment.

(6) A student is suspended on grounds that are constitutionally permissible, but his initial hearing before the school board is procedurally defective. Two weeks later another hearing is held, which meets applicable due process standards, and the suspension is upheld.\footnote{174}

These hypotheticals raise fascinating questions as to how a jury should go about the task of measuring damages. In a few cases, it may be possible to isolate a pecuniary injury arising from the unconstitutional conduct of school officials. For example, the value of the time spent


\footnote{172. See generally Kirp & Yudof, supra note 55; Note, Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles, 24 HASTINGS L.J. 1191 (1973).}


\footnote{174. Cf. Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975).}
out of school by the student in the first hypothetical may be determined with reference to the cost of securing a private education for that period of time. More broadly, an expelled student might contend that the denial of a high school education has a monetary value—the average differences in income production between high school graduates and those who do not graduate. While such statistics are crude and differences in earnings potential may vary from individual to individual, they might provide an approximate measure of the damages necessary to compensate a student for an unconstitutional expulsion.

With respect to the other hypothetical cases, proof and measurement of any pecuniary loss present much more difficult problems. What is the economic impact of the misclassification of a student and her assignment to a special education class? Did the failure to hold an appropriate hearing result in the misclassification? Might the student have been misclassified anyway? To what extent has a female student been injured financially by the denial of admission to a woodshop course? Is it the cost of taking a private woodshop course? Can we calculate the financial effect of the denial on her ultimate earnings as an adult? With regard to the denial of constitutional rights such as required due process hearings, desegregated schools, and freedom of speech, what is the economic loss which is suffered? Obviously, we may feel that in many of these cases some economic losses are likely to follow from the constitutional deprivation, but it is most difficult to prove this, and virtually impossible to establish the magnitude of the loss. Moreover, there is a sense in which we view the constitutional deprivations as an affront to the dignity of those who suffer the treatment, and this in turn generates the feeling that damages should lie even in the absence of solid proof of pecuniary injury. Under these circumstances, how should juries be charged with respect to such damage actions under section 1983?

A. *Monroe v. Pape* and the Tort Background

Analysis of the proper level of damages for section 1983 recovery begins with the Supreme Court's opinion in *Monroe v. Pape*, a landmark case which identified the purposes of section 1983. In *Monroe* the Court held that the abuse of the plaintiff's fourth amendment protections against unreasonable searches by Chicago policemen could support a section 1983 action despite the absence of specific intent to deprive the

plaintiffs of their constitutional rights, and despite the fact that the police action was unauthorized under state law. The Court drew support for this holding primarily from the legislative history of section 1983, part of the Ku Klux Klan Act of 1871. This law was intended by its framers to be a federal guarantee of fourteenth amendment rights to victims of oppressive and unfairly enforced state law in the Reconstruction-era South. Justice Douglas, writing the majority opinion in Monroe, analyzed the original purpose of section 1983 as containing three components of contemporary relevance: first, it is designed to override state laws which deny citizens constitutional rights; second, it provides a remedy where state law is inadequate; and third, it provides a remedy where state law, while adequate in theory, actually fails to protect constitutional rights in practice. At the outset, these three statutory purposes present the obvious interpretive standard for section 1983. Questions of interpretation about section 1983, including the proper standard of damages, should be answered so as to effectuate these purposes. In general terms, this means that section 1983 will be interpreted aggressively to deter future violations of constitutional rights. Damages, it may be assumed, would also be awarded with the deterrence purposes of section 1983 in mind. Using this logical interpretive standard explicitly set forth in Monroe, the damage problem seems relatively straightforward.

The situation, however, clouds considerably because of a major complication introduced in the Monroe opinion itself. In addition to these three statutory purposes, Justice Douglas said that section 1983 was to be interpreted with reference to ordinary tort standards. This idea was introduced in an unelaborated, but potent, single sentence: “Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” This comment introduced a major tension into the problem of interpreting section 1983. Is the section limited only by the far-reaching goals contained in its legislative history, or is the section limited also by the presumably more conservative boundaries of tort laws? Many commentators have asserted an underlying inconsistency between traditional notions of tort liability and effective implementation of the constitutional and statutory purposes of section 1983. In establishing a dual standard, the Court apparently wished to stop short of a strict liability standard which would allow recovery for damages

178. 365 U.S. at 187.
under section 1983 in all cases where nonfederal governmental officers deprived citizens of their constitutional rights. *Wood*, by allowing school officials a “good faith” standard, supports this interpretation. *Monroe*, however, did make it clear that it was not necessary for officials to be acting under authority of an unconstitutional state law for a section 1983 cause of action to arise; indeed, they might be liable even though they were acting in clear violation of state laws.

The intertwining of tort law and federal constitutional and statutory provisions has drawn fire from two directions. Some commentators and courts argue that the uncertainty created through this dual standard so expands the scope of section 1983 that many trivial cases will arise, calling for federal intrusion in local matters, and dramatically increasing the workload of the federal courts, without measurably furthering the basic principles underlying that statute. Courts have been sensitive to this problem. Some courts, prior to *Wood*, attempted to limit section 1983 recoveries by defining the good faith immunity of government officials in such a fashion that reckless, wanton, or purposeful behavior is required—not just simple negligence. And Professor Shapo, drawing on the facts of *Monroe*, has urged that “garden variety” torts should not be actionable under section 1983, while “outrageous” torts, particularly when accompanied by physical force, should be.

Others argue that traditional tort concepts are too limiting, and prevent damage recoveries under section 1983 where they are appropriate in terms of advancing constitutional interests. They emphasize the fact that damage recoveries play a deterrence role, and that the application of tort notions of compensation for pecuniary injury do not satisfactorily take account of the need to deter constitutional violations where there is no such injury. Of course, punitive damages might deter


180. See Nahmod, supra note 2, at 19-21.


182. Professor Nahmod has made this point with great persuasiveness: While the scope of section 1983 should be broad, there are certain limitations inherent in its use. First, a constitutional duty and standard of conduct must
unconstitutional behavior where compensatory damages are insubstantial, but punitive damages are generally available only where deliberate, malicious, or wanton misconduct has occurred. 183

While, as a general matter, I agree that tort law concepts should be modified as necessary in section 1983 cases to better serve the interests protected by that statute, I believe that some courts and commentators have been much too taken with the factual setting of Monroe. Monroe involved the sort of physical abuse and interference with property that falls easily within the scope of traditional tort law. Damages in such cases, while never simple to quantify, may be calculated using well-developed principles of tort law. However, where the constitutional deprivation is not of the sort that gives rise to a discrete physical or property injury, there is a tendency to assert the inappropriateness of those same tort principles. 184 Simple compensation, it is argued, is not sufficient to deter constitutional violations where there is no pecuniary loss. Punitive damages will rarely be available, and in any event, they reach only purposeful or malicious conduct. Hence these commentators conclude that tort principles should be abandoned in section 1983 cases in which no substantial pecuniary loss can be proved.

B. SECTION 1983 AND DIGNITARY TORTS: THE ANALOGY

If the tort principles are to be applied to section 1983 actions, the most appropriate source of law in many instances will be that of the dignitary tort. Dignitary torts include such causes of action as assault, false imprisonment, malicious prosecution, intentional infliction of mental

be identified; this is not always a simple matter. Second, liability under section 1983 should be consistent with that section's purposes which, while including compensation, seem in larger part designed to provide for private enforcement of fourteenth amendment rights and hence to help deter their violation. It is in this connection that the background of tort liability is relevant. To the extent that tort concepts of duty, proximate cause, and cause in fact, as well as various defenses such as consent may assist a court by analogy in deciding 1983 cases, well and good. But courts in 1983 cases must be careful not to let tort law alone determine 1983 liability; for not only possibly different purposes, but different interests as well are usually at stake.

A federal common law for 1983 liability should modify tort law wherever appropriate. Modifications of tort law in order to serve federal policy have occurred elsewhere where constitutional interests have not been involved. It is time for federal courts dealing with the constitutional interests implicated by section 1983 to do the same.

Nahmod, supra note 2, at 32-33 (emphasis in original). See also Basista v. Weir, 340 F.2d 74 (3d Cir. 1965); Civil Actions, supra note 2, at 1033-34.


184. Nahmod, supra note 2, at 9-13; Civil Actions, supra note 2, at 1026.
anguish, libel and slander, and invasion of privacy. While dignitary
torts may involve some economic injury, they all share a common
characteristic: the primary harm "is the affront to the plaintiff's digni-
ty, the damage to his self-interest, and the resulting mental distress." They are not usually premised on physical injury to the person or harm
to property. It has been noted that the recoveries in such cases often exceed any reasonable estimate of the worth or value of the interest compromised. Rather, such recoveries are defended on policy grounds.

Perhaps the real explanation [of large recoveries of general dam-
ages in cases of dignitary injuries] is that some of these suits serve
public law purposes, since they often operate to enforce limits upon
the official or unofficial power of persons in authority and to pre-
serve rights of the public generally to be free from oppressive con-
duct. It may well be that substantial damages are permitted in
these cases partly in recognition that such public purposes are being
served rather than in any belief that a person falsely arrested has
suffered humiliation worth $100,000. Nonetheless, these damages are subsumed under the category of com-
penasatory damages, although the elements of intentional harm or malici-
cious wrongdoing are relevant to the awarding of these damages, despite
the absence of the "punitive" label.

Once it is recognized that tort law does protect interests in human
dignity and not just entitlements to bodily integrity or property, many of
the difficulties with the Monroe formulation disappear. If intentional
dignitary tort recoveries are themselves defensible, a matter discussed
below, their logic can easily be extended to the class of intentional
constitutional torts which many find so bothersome. When a person
is denied the right to vote in a state election on the basis of race, when
free speech is abridged, when procedural fairness is disregarded, the
injury is essentially to the dignity of the person, his associational interest,
and his reputation. We may also fear that the election results will not reflect the majority will, that public policy will suffer from the absence of discourse, or that the failure to abide by fair procedures will lead to erroneous decisions by public bodies. But by their nature such injuries are difficult to prove and impossible to measure. And, indeed, the injury may be greater to the group than to the individual who is the focus of the unconstitutional conduct.

Many statements in the judicial and scholarly literature focus on the concern for dignity underlying many constitutional rights. For example, Professor Emerson perceives that this interest is one of the underpinnings of the first amendment:

[F]reedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature.

Perhaps Professor Michelman, in the context of discussing the right to protect one's rights through litigation, has most ably stated the different types of values underlying constitutional entitlements:

I have been able to identify four discrete, though interrelated, types of . . . values, which may be called dignity values, participation values, deterrence values, and (to choose a clumsily neutral term) effectuation values. Dignity values reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. Participation values reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills "counted," in societal decisions they care about. Deterrence values recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. Effectuation values see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.

Effectuation values most closely resemble the remedies of injunction and compensation for actual harm suffered, while deterrence finds its most

obvious remedial counterpart in punitive damages, fines, and criminal sanctions. The relationship between dignity and participation values and specific remedies is less clear, and the next section, in the tort context, will consider the remedial structure necessary to preserve these values.

C. A Digression into Tort Theory

Many modern commentators have approached the law of torts from the perspective of economic efficiency. In the most general terms, this approach seeks to maximize society's net wealth; it is only collaterally concerned with compensating the victim or punishing the defendant. Maximization of society's net wealth occurs when potential defendants will take preventive measures which cost up to but no more than the costs prevented thereby. The theory tolerates some accident-causing conduct, but only that which costs more to prevent than the damages it causes. Once the accident has taken place, the payment of damages to the plaintiff as compensation is irrelevant from an efficiency perspective except insofar as prompt compensation prevents other losses, such as that caused by inadequate hospitalization. The damage award simply constitutes an after-the-fact wealth transfer. The importance of liability lies in the impact it will have on future transactions. As Professor Posner notes,

The association of negligence with purely compensatory damages has promoted the erroneous impression that liability for negligence is intended solely as a device for compensation. Its economic function is different: it is to deter uneconomical accidents. As it happens, the right amount of deterrence is produced by compelling negligent injurers to make good the victim's losses. Were they forced to pay more (punitive damages), some economical accidents would also be deterred; were they permitted to pay less than compensation, some uneconomical accidents would not be deterred. It is thus essential that the defendant be made to pay damages and that they be equal to the plaintiff's loss. But that the damages are


paid to the plaintiff is, from an economic standpoint, a detail. It is payment by the defendant that creates incentives for more efficient resource use. The transfer of the money to the plaintiff affects his wealth but does not affect efficiency or value.\textsuperscript{195} Perhaps Posner and other advocates of this theory underestimate the primacy of compensation for injury in tort cases, and the difficulty of disentangling the elements of compensation, retribution, and deterrence. Certainly the notion that compensation for actual losses produces “the right amount of deterrence” is simplistic. Given the uncertainties of the jury system, the difficulty in predicting the amount of injury in advance, the costs of suing, ignorance of legal principles, the availability of insurance and the like, the magnitude of damage recovery necessary to deter “uneconomical accidents” appears far more speculative. But even accepting the deterrence formulation at face value, does it apply to the situation where there are no provable pecuniary losses? Posner indicates that damages (be they labelled as compensatory or punitive, special or general) may be appropriate in such cases where there is a strong suspicion of pecuniary harm but where the nature of the tort makes proof of pecuniary injury difficult. He cites defamation as an example.\textsuperscript{196} Recovery is allowed in recognition of the facts that generally a person would not relinquish his good name, privacy, or other dignity interests without compensation, and that the failure to award damages would increase the incidence of such dignitary torts. But there are other tort cases where there is a slight or nonexistent pecuniary injury and yet substantial compensatory damages are awarded—usually on the basis of some fictional injury. How are these cases to be explained? Or are they indefensible deviations from the basic objectives of tort law?

Perhaps at this point it would be beneficial to examine the approach of Professors Calabresi and Melamed to torts, property, and contract law.\textsuperscript{197} When confronted with a conflict between two or more persons or groups, the state must decide which side to favor.\textsuperscript{198} Favoring one side produces an entitlement for that person or group; a primary function of the legal system is the protection and allocation of entitlements. These entitlements are protected by property, liability, or inalienability.
lienability rules, or, more likely, a combination of such rules. A property rule simply means that an entitlement is protected in the sense "that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller." In such cases the state need not place a value on the entitlement, but leaves it to the owner to decide what it is worth and whether to transfer it (by contract, barter, gift, etc.). An entitlement is protected by a liability rule "[w]henever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it." Contract law and tort law largely rest on this theory of liability. In contract law, the expectancy interest in the performance of a contract (at least in traditional theory) provides a basis for recovery when the opposing party fails to live up to the contractual agreement. The expectancy is based on the mutual exchange of obligations, which, in a sense, creates a private law of entitlements. In tort law, the general notion is that there is a publicly-created expectancy in the integrity of person and property. Where such expectancies or entitlements are destroyed or injured, the value of the entitlements is fixed by an organ of the state and the injured party made whole accordingly. Moreover, the state may be selective in allowing liability to attach, enforcing only some promises (for example, when there is a substantial reliance interest) and permitting only some types of tort recoveries (for example, when it furthers economic efficiency).

The third set of rules that Calabresi and Melamed identify for protecting entitlements are those relating to inalienability:

An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller. The state intervenes not only to determine who is initially entitled and to determine the compensation that must be paid if the entitlement is taken or destroyed, but also to forbid its sale under some or all circumstances. Inalienability rules are thus quite different from property and liability rules. Unlike those rules, rules of inalienability not only "protect" the entitlement; they may also be viewed as limiting or regulating the grant of the entitlement itself.

199. Id. at 1092-93.
200. Id. at 1092.
201. Id. Where bargaining is feasible, punitive damages may be awarded to discourage conversion of a property entitlement into a liability entitlement. The policy against involuntary conversion is probably based on distrust of the ability of the state to determine the value of an entitlement in the absence of a voluntary transfer.
202. Id. at 1092-93.
Thus, if a particular entitlement is protected by a rule of inalienability, the state attempts, in "some or all circumstances," to forbid its transfer, in addition to protecting it from destruction under rules of liability. The normal remedy would be the nullification of the purported transfer.

Inalienability rules are most often applied to "merit goods," which are entitlements deemed so fundamental and essential that society wishes to maximize the opportunity of each individual, regardless of wealth or personal desires, to obtain at least a minimum endowment of that good. There are additional reasons why society might decide to treat a particular good as inalienable. First, it may be feared that the decisions of individuals may create significant externalities or costs to third persons. For example, the decision of a child to drop out of school may appear perfectly sensible from his perspective, as he weighs the costs and benefits of continuing his education. But it may impose costs, which he does not consider, on his parents and the other members of the community in which he lives. Thus society may not allow a child to remove himself from the schools until he has received a defined minimum of schooling and has matured to the point that he is more sensitive to the costs imposed on others. Paternalism is another reason for inalienability rules. Simply put, the state believes that it knows what will make individuals better off, or that the individual, upon calmer and more extended reflection, would choose differently.

203. Id. at 1100.
204. Id. at 1111.
205. An example of external costs is what Calabresi terms "moralisms." Another instance in which external costs may justify inalienability occurs when external costs do not lend themselves to collective measurement which is acceptably objective and nonarbitrary. This nonmonetizability is characteristic of . . . [s]uch external costs . . . [as] moralisms.

If Taney is allowed to sell himself into slavery, or to take undue risks of becoming penniless, or to sell a kidney, Marshall may be harmed, simply because Marshall is a sensitive man who is made unhappy by seeing slaves, paupers, or persons who die because they have sold a kidney. Again Marshall could pay Taney not to sell his freedom to Chase the slaveowner; but again, because Marshall is not one but many individuals, freeloader and information costs make such transactions practically impossible. Again, it might seem that the state could intervene by objectively valuing the external cost to Marshall and requiring Chase to pay that cost. But since the external cost to Marshall does not lend itself to an acceptable objective measurement, such liability rules are not appropriate.

Id. at 1111-12.

The Calabresian categories are most helpful in the analysis of dignitary tort law, for they give us some insights into the different ways in which the legal system protects a myriad of entitlements. But it would be mistaken to view these categories in a rigid fashion—perhaps it is better to view them as points along a continuum. In some sense, every legal entitlement is a "merit good" such that the legal system attaches sufficient importance to it to make available various types of rules for protecting it. Conversely, even so-called "inalienable rights" such as freedom of speech and the right to a jury trial may be waived under appropriate circumstances. It is difficult to conjure up interests which are absolutely inalienable; slavery and bodily integrity (or at least some forms of it) probably come closest. In addition, as Calabresi and Melamed clearly assert, entitlements may be protected by a combination of property, liability, and inalienability rules, not to mention the possibility of criminal sanctions in some circumstances.

Within this framework, where should one place dignitary injuries where there is no proof of pecuniary loss? Our choice of the rule to protect a section 1983 entitlement will determine the damages which should be awarded to a citizen who has been deprived of that entitlement. One simple way to explain recoveries in such cases is to argue that dignitary entitlements are protected by liability rules. When an individual fails to purchase a dignitary entitlement where he might have done so, the state places a value on the loss and compensates the victim accordingly. The fact that the precise degree of injury may be difficult to calculate should not lead a court to award no damages; rather it should estimate damages, however crudely. Otherwise, the whole notion of an entitlement to dignity becomes a farce. This achieves the same result as Professor Posner's approach, and presumably would lead, in his view, to the appropriate amount of deterrence. Note also that this analysis assumes that in some or all circumstances, dignitary entitlements are alienable. A person may sell his good name and forego his privacy by permitting a cereal manufacturer to put his picture on the front of a box of shredded wheat or by publishing his private letters or diaries for an appropriate sum of money.

Suppose, however, that recoveries exceed any reasonable estimate of the injury. Under the liability rule approach, such recoveries could not be justified. This result can be explained by the theory that there is a need to deter infringements on dignitary interests even in the absence of a pecuniary loss. A deterrence approach assumes that the infringed dignitary interests, while alienable, are nonetheless a form of merit good. Except in a situation where it is clear that an individual intended to
transfer his entitlement, we will not treat such infringements lightly. There may be a presumption against waiver or consent to transfer.\textsuperscript{208} Furthermore, the denial of privacy or reputational entitlements cannot be remedied by an after-the-fact nullification of the transfer.

To enlarge upon what is implicit in the Calabresi-Melamed analysis, one way to deter destruction of alienable merit goods is to create superliability rules. Normal liability rules would not yield a sufficient degree of deterrence.\textsuperscript{209} These superliability rules would essentially allow for the recovery of "punitive" damages, however they are officially labeled. They would encourage persons suffering dignitary injuries to bring suit, and they would defray the costs of litigation. In contrast to the normal fashion in which punitive damages are justified, the critical element justifying recovery under a superliability rule is the significance of the interest which has been compromised, human dignity, rather than simply the willfulness or wantonness of the asserted misconduct. This may explain, in part, the tradition of labelling excessive recoveries in dignitary tort cases as compensatory damages, thereby avoiding a confrontation with traditional notions of punitive damages which often fail to take account of the merit-good concept.\textsuperscript{210}

D. Economic Principles and Monroe

The point of this extended detour is this: it seems likely that the awarding of substantial damages in cases of dignitary torts reflects the merit-good qualities of the entitlement to human dignity, as reflected in what may be called superliability recoveries. In making these awards, juries and judges are saying that society's interest in human dignity is so great that the recovery may exceed any plausible estimate of economic


\textsuperscript{209} See generally Comment, Punitive Damages Under Federal Statutes: A Functional Analysis, 60 CALIF. L. REV. 191, 213-18 (1972). Large recoveries in dignitary tort actions are also justified by the fact that not all poachers on human rights are taken to court and made accountable for their misconduct. The penalty for those brought to court must be increased to counterbalance the decreased risk of being held legally accountable. The courts must seize the few opportunities that arise on their dockets to alter general patterns of misbehavior.

\textsuperscript{210} While most constitutional torts are intentional (it is difficult to find examples of negligent constitutional violations), the intention to achieve the result is not sufficient to establish a case for punitive damages. That is, for example, a principal may forbid a student to distribute an allegedly obscene underground newspaper without intending to deny him his constitutional rights. The principal in fact may believe that he has a privilege to act as he does.
injury. People can sell many of their dignitary entitlements, and thus it is impossible to argue that all dignitary entitlements are inalienable. But there is an undercurrent of moralism (external costs) at work here, and a desire to distribute wealth equally in terms of dignitary entitlements, and, in some sense, to protect the individual against both invasion and improvident lapses. In short, the interests at stake in dignitary tort cases bear a substantial resemblance to merit goods. It is only in this way that one can explain the long list of dignitary injuries for which substantial damages are often awarded in the absence of significant pecuniary harm.

Once it is recognized that tort law does protect interests in human dignity, and not just to the extent of pecuniary injury, the analogy to constitutional deprivations actionable under section 1983 is apparent. We often speak of inalienable constitutional rights which may not be taken away by government or foregone except in the clearest cases of a knowing and intelligent waiver. To a much greater degree than dignitary torts, constitutional rights are merit goods as they are defined by Calabresi and Melamed. 211

Monroe v. Pape, then, is correct on its facts, but the physical injury background law applicable to that case should not be extended to other constitutional deprivations where pecuniary harm is virtually absent. Rather, reference should be made to the way in which courts treat dignitary harms under state law, for established tort law readily lends itself to both the compensatory and deterrence purposes of section 1983. Tort law, then, produces a coherent, if imprecise, framework for calculating damages where students successfully sue school officials for depriving them of their constitutional rights. Consider what is at stake in the six hypothetical cases which opened this section. The exclusion

211. Although American courts have rarely made express distinctions among varieties of rights when considering punitive damages, they have done so in other contexts. The Supreme Court, for example, has often stressed that certain rights, such as the right to vote and the guarantee of free speech, are of prime importance. . . . Some punitive damages decisions reflect a similar concern for the value of the rights involved. . . .

Federal courts might wish to offer exemplary recoveries to punish violators of important rights because such awards would stress the importance of the violated right. Courts awarding punitive damages under the Civil Rights Acts seemingly have had such considerations in mind.

Comment, Punitive Damages Under Federal Statutes: A Functional Analysis, 60 Calif. L. Rev. 191, 210-11 (1972), citing, inter alia, Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). While this quotation is consistent with the position taken in the text, the writer places too much stress on the compensatory-punitive dichotomy, failing to realize that many so-called compensatory awards in constitutional tort cases are, in fact, punitive in nature.
from a woodshop class on the basis of sex, the failure to desegregate the
schools, the denial of first amendment speech rights, the failure, later
corrected, to abide by due process standards—these constitute more of
an affront to the individual so treated than pecuniary loss measurable in
terms of traditional compensatory damages.

The application of the law of dignitary injuries to section 1983
actions leaves us with a great sense of ambiguity, although uncertainty is
something we have learned to tolerate in tort law. The rule, if one can
call it that, is that there are no fixed standards for the measurement
of liability, and that "the award is peculiarly in the province of the jury,
subject to review for excessiveness."212 The jury must determine
whether the plaintiff has been seriously distressed.213 It must look to
the degree of public humiliation involved.214 It will examine the de-
fendant's motives and behavior, such as it would if punitive damages
were sought.215 The jury's sense of outrage, its willingness to set an
example to deter future misconduct of this type, its recognition of the
need to encourage plaintiffs and their lawyers to bring such suits: all
of these factors will combine in an ill-defined manner to determine the
extent of liability. Perhaps even the wealth of the defendant will be
taken into account, as it is in traditional actions for punitive damages.

Two additional points with respect to the measure of damages in
section 1983 actions brought by students against school officials are in
order. First, the dignitary tort background suggests that the debate in
Wood over appropriate standards of immunity may not be as conse-
quential as it first appears. On the surface, the Court—and particularly
the majority—hold forth the prospect of damages being awarded for
the negligent denial of constitutional rights, including the failure to
familiarize oneself with the settled law relating to students. Neither the
majority nor the dissent in Wood believe that a showing of malice or
deliberateness is necessary to pierce the immunity of school officials
under section 1983. Yet, it is precisely these matters of motivation and
blatantness, in addition to the magnitude of the interest affected, that
are likely to be considered by juries—and indeed judges where they are
trying the case without a jury—in determining the amount of damages.
The fact that the damages are labelled as compensatory rather than
punitive serves to obfuscate this deliberation process. When the school
officials have acted with some sense of fair play, juries may create de

213. Id.
214. Id. at 530.
215. Id. at 531.
facto immunity from damages where, as a matter of law, no such immunity exists. Perhaps then damage recoveries may not be as large or as frequent as one would predict on the basis of the Wood opinion.

Second, despite a substantial number of successful damage actions under section 1983, there are few cases in which damages have been awarded for essentially dignitary harms. Most commonly, damages are awarded for police misconduct (often involving physical harm) and for the unconstitutional dismissal or demotion of teachers and school administrators. The normal remedies in the latter cases are backpay and reinstatement. In one case, the cost of sending a child to another school was recovered when a transfer was necessitated by an employment dispute between the father (coach and teacher) and the school system. Occasionally, recoveries for pain and suffering and humiliation and embarrassment have been allowed.

The federal voting rights cases most closely resemble actions that students are likely to bring against school officials. In Nixon v. Hertford, the Supreme Court permitted the recovery of $5000 in damages against an election official who, pursuant to state statute, had excluded blacks from the polls. Justice Holmes was undaunted by the award: "That private damage may be caused by such political action and may be recovered for in a suit at law has hardly been doubted for over two hundred years..." The Court never required proof of pecuniary harm. The loss of the right to participate in the election was enough to sustain a recovery which did not appear outlandish or excessive. So too, in Lane v. Wilson, a damage recovery was sustained against a government official for denying the right to vote to blacks.

221. 273 U.S. 536 (1927).
222. Id. at 540.
In these voting rights cases, the purpose of the award was obviously more punitive than compensatory:

Although the plaintiff has lost something that can never be returned—the right to vote in one election—any pecuniary recovery given him will be nothing more than a windfall. In addition, the jury can look only to the degree of defendant's culpability in arriving at the amount of their award: the extent of plaintiff's loss cannot be a factor since there has been none.\(^2\)

The injury was largely dignitary in nature, and the amount of the award served the purpose of deterrence. Precise guidelines for measuring damages were not articulated, but juries were given broad discretion to set damages. I believe that the experience with student rights litigation under section 1983 will be similar. For better or worse, juries will have great leeway in determining the extent of liability, in the absence of any precise standard for the measurement of damages.

V. INSURANCE, INDEMNIFICATION, AND DEFENSE STATUTES

For risk-averse school officials, the most promising avenue of escape from section 1983 liability lies in shifting the costs of litigation and money judgments to private insurance companies, the state, or the local school district.\(^2\) From a behavioral standpoint, school officials arguably would prefer this to more fundamental changes in their activities which would be required if they were held personally liable. Perhaps such risk-shifting devices increase the probability of being sued, but the alternative of personal liability poses even greater risks. The current state of the law, however, does not breed much confidence. The states vary tremendously in terms of the types and scope of assistance made available to school officials who are sued for damages. Some states offer no assistance. Of the others, most fail to deal squarely with the question of whether section 1983 damage actions are within the ambit

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\(^2\) Civil Actions, supra note 2, at 1027. See also McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, 60 Va. L. Rev. 1, 60 (1974).

\(^2\) See generally Baylor, Liabilities Under Civil Rights Statutes and Insurance Coverages Thereof, in AMERICAN BAR ASS'N SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION, 1968-69 PROCEEDINGS 152 (1969) [hereinafter cited as Baylor]; Note, DAMAGES UNDER § 1983: The School Context, 46 IND. L.J. 521, 535 (1971) [hereinafter cited as DAMAGES UNDER § 1983]. To describe the scholarship and case law on this subject as sparse is an understatement. I have been aided in my efforts by the original research performed by Charles Brophy and Cathy Leary, students at the University of Texas, School of Law.
of their statutory scheme. Only the Iowa, Connecticut, and Illinois statutes specifically refer to section 1983 or civil rights actions. Minnesota's broad statute has been construed by its attorney general to achieve the same results, and perhaps about another dozen states have laws which could be similarly interpreted. If Wood results in a large number of section 1983 damage actions against school officials, presumably legislatures and courts, at the behest of school board members, administrators, and teachers, will move to clarify the law and to ensure greater protection. At the moment, however, clarity is lacking, and quite probably, there will be many casualties before appropriate planning for the risk takes place.

There appears to be a trend among state legislatures in the direction of affording greater protection to state officers and employees who are sued individually for damages for acts or omissions arising within the scope of their public employment. This may be a reaction, in part, to the increased incidence of section 1983 litigation since Monroe v. Pape, decided in 1961. But different legislatures have seen the problem from very different perspectives, and no uniform approach appears to have taken hold. Perhaps it is best to begin with three broad categories of protective devices, ignoring, for the moment, the myriad of significant deviations from state to state. Legal defense statutes are quite common, and these generally provide that the state, school district, or other governmental entity must or may furnish defendant state officials with attorneys or compensate or reimburse them for their legal


228. CONN. GEN. STAT. ANN. § 10-235(a) (Supp. 1976).


expenses. Often court costs will be covered as well. There are also insurance statutes, and, less commonly, provisions for indemnification. The latter usually permit or require local school districts to pay money judgments entered against governmental employees and officers under defined circumstances. The former usually oblige or authorize school districts to carry insurance for specified officers and employees against particular classes of liability. Such authorization is generally needed if local and state authorities are to make such expenditures from public funds. And finally, state or local protective measures may supplement, supplant, or be available only in the absence of private liability insurance purchased by state officials at their own expense.

Such policies may be issued individually or as part of a group policy obtained through a professional organization.

The adequacy of protection will vary from state to state and depend upon a number of factors. The statutes may be mandatory or optional, allowing state or local officials to make individual or group determinations. In Massachusetts, indemnification is mandatory for actions "arising out of . . . negligence or other act . . . resulting in accidental bodily injury to or the death of any person or in accidental damage to or destruction of property." It is optional in all other cases. A law may cover only a few classes of state and local employees.

234. See, e.g., ARIZ. REV. STAT. ANN. § 11-532(c) (Supp. Pamphlet 1975) (county attorney "may represent" a school board member); CAL. GOV'T CODE § 825 (West Supp. 1976); Mich. COMP. LAWS. ANN. § 691.1408 (1970); Miss. CODE ANN. § 25-1-47(1) (1972) ("Any municipality . . . is . . . authorized . . . to investigate and provide legal counsel"); N.J. STAT. ANN. § 18A:16-6 (1968) ("the board shall defray all costs of defending such action"). Cf. WIS. STAT. ANN. § 895.35 (Supp. 1975-76).


240. MASS. GEN. LAWS ANN. ch. 41, § 100C (Supp. 1975).
or it may cover all. For example, Arizona has specific insurance and legal defense statutes covering school board members, while the California indemnity law embraces any "employee or former employee of a public entity." Wisconsin's defense provision includes "any officer," but a teacher is not an officer for this purpose. Indeed, there may be separate laws for different classes of defendants, and the treatment of such classes need not be identical.

Often, legislatures are concerned with the nature of the wrongdoing, and draw lines accordingly. Some states, for example, will not provide a state-financed legal defense in criminal cases. In Nebraska, however, school districts have the option to provide such a defense if the defendant "had no reasonable cause to believe that his conduct was unlawful." New Jersey pays defense costs only if the defendant prevails. On the civil side, often indemnification or legal defense is not permitted where there was an absence of "good faith" or the officer’s actions were willful or "wanton, reckless, or malicious." South Dakota limits reimbursement for judgments and costs to $3000, without specific legislative approval. Closely related to these categories, only compensatory damages for personal injury or damage to property may be reimbursable. Presumably, in such states, dignitary injuries are excluded.

When the various pieces of the legal defense, indemnification, and governmentally purchased insurance puzzle are put together, the picture  

that emerges for school officials is grim. At best, it is fair to say that three state statutes are specifically addressed to liability for constitutional torts, and a few others may be so construed. At worst, many state statutes appear to exclude the very recoveries that are most likely under section 1983, for example, liability for actions taken in "bad faith." The statutory schemes are, however, immensely complex and varied, and often dispositive judicial interpretation is lacking. Phrases such as "good faith" may have one meaning under state law and quite another under federal law. These risk-shifting statutes constitute a body of law which is markedly undefined and unsettled. Statutory reform and recodification are absolutely essential—if not inevitable—and professional organizations of board members, administrators, and teachers must push for these changes if they are to protect themselves. But in the short run, individual school officials in most states can take little comfort from the existing laws.

To add to the chaos, it is far from clear that standard comprehensive general liability insurance policies purchased by individuals or school districts cover damage recoveries for constitutional torts. While some form of such insurance is sold in all 50 states, the focus is generally on physical injury and associated harms and property damage. Dignitary harms, as such, are not included. Moreover, general liability insurance "is designed to indemnify the insured for damage which he causes inadvertently, negligently, even recklessly." Liability for intentional torts is excluded. There is, however, a standard endorsement which may be added to the policy to cover so-called intentional torts: the endorsement usually covers false arrest, false imprisonment, libel, slander, privacy torts, malicious prosecution, and the like. In some states, the approved form of this standard endorsement specifi-

251. See generally Baylor, supra note 225, at 160-65; Damages Under § 1983, supra note 225.
255. Id.
256. Id. at 1238. See also Damages Under § 1983, supra note 225, at 535. Apparently, this standard endorsement was introduced in 1966 as part of new general liability insurance policy forms for the insurance industry and has been carried forth in the 1973 revisions. See generally The Defense Research Institute, Inc., General Liability Insurance 1973 Revisions (1974).
ally excludes constitutional torts, although this exclusion may be limited by a further endorsement covering liability for racial discrimination. 287

The interpretation of the standard endorsement for intentional torts poses tremendous difficulties. Apparently, this endorsement is made available on a quite selective basis, and is a part of what the industry describes as a "non-admitted market." 258 But even when the special endorsement is available, it is not clear that the courts will enforce this provision. The major problem is that courts traditionally have been averse to allowing defendants to shift their liability to insurance companies where they have engaged in intentional wrongdoing. 259 The argument is that insurance undermines the deterrent effect of any judgment. 260 Similar considerations apply to punitive damages. As two commentators have noted,

That rule [against the enforcement of insurance provisions covering intentional torts] is now confronted by an insurance market in which forms of the supposedly prohibited coverage are available to some buyers, bringing up the question whether its purchasers have acquired insurance, or merely participated in an illegal bargain. 261

The difficulty with the traditional argument for not enforcing insurance policies covering intentional wrongs is that it largely ignores the interest of the plaintiff in being compensated for his injuries; often the defendant will be unable to satisfy a judgment from his personal assets. And it must be noted that similar considerations apply to garden-variety negligence, where insurance is permitted. Arguably, the shifting of the loss to the insurance company in any tort action may make the insured less careful in his conduct. Perhaps for these reasons there has been increasing recognition by the courts that what is intentional as against public policy for insurance purposes need not be coincident with what is intentional within the meaning of tort law, 262 and recoveries for injuries have been permitted in cases involving intentional torts.

The problem is more complex with respect to dignitary torts and most constitutional torts. In these cases, pecuniary injury may be slight

257. Baylor, supra note 230, at 163.
259. See id. at 1241.
260. Id. at 1245-46.
261. Id. at 1246.
or nonexistent; thus, the interest in compensating the plaintiff for his injury is not as significant. The primary purpose of the recovery is to foster desirable social policies. Under such circumstances, the tension between deterrence and compensation is largely absent, and thus, perhaps, the insured should not be able to shift liability to the insurer. Maximum deterrence is achieved by compelling defendants to pay judgments from their own assets, whatever their personal wealth. Thus, even assuming that insurance companies are willing (and able under state law) to write general liability insurance policies which cover constitutional torts, something that they generally are not doing at the moment, the enforceability of such coverage in the courts is questionable.

For a variety of reasons, I believe that federal courts generally should enforce liability insurance policies which encompass the constitutional torts of public school officials. The strongest reason is that the unavailability of insurance coverage would have a devastating effect on the recruitment of officers and employees for public school districts, and might well lead to the exodus of many already in the school systems. If the question of enforceability of insurance policies for constitutional torts is to turn on public policy concerns, as it should, then the need to deter unconstitutional behavior must be balanced against the public's interest in encouraging able employees and officers to serve in the public sector. This is particularly true for school board members, who often serve without compensation, and for the vast bulk of education administrators and teachers, whose salaries are notoriously low. Even small judgments might bring financial despair, or even bankruptcy, to many members of the latter class.

This argument is buttressed by other considerations. Students who have been denied their constitutional rights may not be able to afford to hire attorneys and pay the cost of litigation if the only available defendants are virtually judgment-proof. In other words, students may play a private-attorney-general function in vindicating constitutional rights which have been denied them, and the unavailability of insurance might well deter them from playing this role. The converse of this, of course, is that school officials may be sued more often once it becomes known that they have obtained adequate insurance coverage.

That a public school official does not personally pay the judgment does not remove entirely the incentive to maintain constitutional stan-

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Disciplinary action may be taken by higher school authorities (or, in some cases, the voters) where a particular official or employee makes a practice of denying the constitutional rights of his charges. This is most likely where the school district itself pays the premiums on the insurance policies, and the rates are raised or the policy cancelled as a result of the misconduct. So too, higher premiums or cancellation might well influence public school officials who maintain their own insurance. In addition, there is the public embarrassment of the litigation, the possible loss of reputation, and the sheer trauma of being a part of a lawsuit. In combination, these factors would appear to largely accomplish the objective of deterrence, while avoiding the adverse consequences of uninsurability. Moreover, policies could be written with a deductible amount which the insured would have to pay.

While I have been unable to find any cases involving the insurability of school officials against constitutional torts,264 general liability policies purchased by municipalities to protect police officers have been construed in some cases to cover damages arising out of section 1983 actions. In *Peoria v. Underwriter's at Lloyd's London, Unincorp.*265 the policy insured individual members of the Peoria Police Department "against loss by reason of any liability imposed by law . . . committed or alleged to have been committed" by the insured.266 The plaintiff alleged that he had been held incommunicado for 11 days by the Peoria police before being taken before a magistrate, that he was denied the right to consult with an attorney, and that he was repeatedly questioned during this period until he signed a confession. On the basis of these facts, he asserted in his complaint that he had been deprived of due process and equal protection of the laws and the right to counsel in violation of the United States Constitution and section 1983.267

The central issue in *Peoria* was whether the general liability insurance policy covered these civil rights act damages. The court held that such recoveries were within the scope of the policy. It reasoned that whether the basis of the action was common law or statutory, the complaint asserted a cause of action arising "by reason of" a "false imprisonment" within the provisions of the Lloyd's policy.268 Of partic-
ular interest is the court's observation that the insurer had written the policy and might have limited it to common law actions or excluded civil rights actions. This interpretation still seems to be the law in Illinois.

The implications of Peoria for school officials are unclear. Narrowly construed, there may only be protection under general liability policies against civil rights actions which might have been brought as common law actions for which their policies provide coverage. Thus, only some dignitary harms would be covered, and many others (for example, infringement of first amendment rights or denial of due process), which often might be the basis of section 1983 actions, would not be. Furthermore, Judge Morgan, writing in Peoria, did not explicitly discuss whether, as a matter of public policy, police officers should be permitted to shift the risk of damages to insurance companies where they have engaged in unconstitutional behavior. This reflects a common difficulty in interpreting insurance cases. It is not clear whether the decision rests on an interpretation of vague insurance provisions or on a broader public policy basis. In practice, one suspects interpretation and public policy are so intertwined that they cannot be disentangled.

This discussion leads us, with some discomfiture, back to the division between the majority and the dissent in the Wood case. In his dissent, Justice Powell accused the majority of "explicitly" equating "ignorance of the law" with "'actual malice.'" If this were the case, the results would be bizarre. A school board member or other educational official would be deemed to have acted maliciously and intentionally whenever he failed to educate himself as to the state of the "settled, indisputable law." Justice Powell might well have feared that the majority decision would subject educators to punitive damages, and possibly this is a major reason for the vehemence of the dissent on this point. Also, the effect of the shift from negligence to malice might mean that insurance or indemnification would be unobtainable.

With all due respect to Justice Powell, this reading of the majority opinion cannot be sustained. The majority equates ignorance of the law with malice in only a very limited sense. The Court was simply making the point that denying a person his constitutional rights through ignorance of the law is no more justified than is doing so with malicious

269. Id.
271. 420 U.S. 308, 328 (Powell, J., concurring and dissenting).
intent. That the Court was equating ignorance of the law with malice for the limited purpose of designing rules of immunity does not mean that it was equating them for the purpose of computing damages or applying indemnity statutes or insurance policies. Moreover, while there is some confusion in the majority opinion, the negligent/deliberate ignorance-of-the-law distinction appears to track the objective/subjective view of good faith. Either would result in piercing the school board member's immunity. But mere negligent failure to inform oneself of settled constitutional principles does not equate with "actual malice" in the broader sense. Even a purposeful ignorance of the law is not the functional equivalent of a purposeful denial of constitutional rights. The "see no evil, hear no evil, speak no evil" routine, if believable, should insulate a school official from punitive, but not compensatory, damages. It certainly should not obviate insurance or indemnification coverage. Where a school official knows the law and then purposefully acts contrary to its dictates, then, and only then, do the arguments against insurance or indemnification for constitutional torts gain weight.

VI. WOOD AND THE FUTURE OF PUBLIC SCHOOLING

Despite the difficulties in the measurement of damages, in the standard of governmental immunity, in the hazards of determining what is settled constitutional law, and in the dictates of the eleventh amendment, it seems likely that student plaintiffs will be able to reach the jury in many section 1983 actions against school authorities. In turn, juries in some instances may award substantial damages. The size of the award will largely depend on the jury's sense of outrage at the constitutional deprivation and its perception of the need to deter such deprivations in the future. These judgments, at least in the short run, will probably be paid by individual defendants, given the inadequacy of existing indemnification and insurance schemes. If this is the case, it appears that damage recoveries may serve the function of compelling school officials to refrain from the blatant forms of unconstitutional conduct in the treatment of their students.272 In less outrageous cases, and notwithstanding the definition of good faith propounded by the federal courts as a matter of law, student plaintiffs will be left with only injunctive remedies. Thus, the "peril" of Wood, in terms of actual recoveries against school officials, is by no means as great as Justice Powell would have it. But conversely, its "promise" may be much less than the majority anticipated.

The real significance of Wood, however, lies in the effect that it may have on the operation of public schools, in terms of both pedagogy and governance. This is a function not only of the actual probability of successful damage suits' being brought but also, and equally as important, of perceptions of the risk of liability held by teachers, administrators, and board members. They will respond to Wood in ways likely to reduce that risk as they perceive it, while seeking to conform to organizational, group, and professional norms. It is by no means clear, however, that the prospect of damages will inevitably lead to a significant enlargement of protection for substantive constitutional rights. Where there is a basic conflict between the established pattern of institutional behavior (regularities) and legal rules and decisions, reduction of the risk of damage action may be accomplished by other means more consistent with the group and institutional norms. Despite their reputation to the contrary, public schools have a vast capacity to adapt to new conditions and restraints while preserving the basic authority structure.

Any attempt to formulate the likely consequences of Wood is bound to be speculative. Too little time has elapsed since the decision. Too little is known about the processes of change in public schools. Perhaps the beginning of wisdom is the recognition that Wood is yet another manifestation of the tendency in modern America to legalize methods of dispute resolution in institutions formerly insulated from judicial oversight. By legalization, I primarily have in mind the use of rules and defined procedures for limiting discretion. Philip Selznick has offered the following definition of legality:

The essential element in the rule of law is the restraint of official power by rational principles of civic order. Legality imposes an environment of constraint, of tests to be met, standards to be observed, ideals to be fulfilled. Legality has to do mainly with how policies and rules are made and applied rather than with their content.

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276. Id. at 20.
This is not to suggest that the notion of "arbitrary" is completely clear, or that it has a simple meaning. All of this is a matter of degree. Few decisions are completely arbitrary, yet we may compare the more and the less. 278

In these terms, legalization has made school officials—and juvenile courts, police officers, prison wardens, military officers, and the like—less free to exercise their discretion than they have been in the past. Increasingly, they must adhere to certain procedures, and in so doing, traditional patterns of institutional governance are affected. This is not to say that the "elaboration of formal rules and procedures" can necessarily be equated with the "reduction of arbitrariness." 279 Legalization may result in formally correct decisions which nonetheless ignore the real interests at stake. It may impose an inflexibility which makes adjustment to changing conditions more difficult. It certainly may impose substantial transaction costs. But the significant fact is that the model of democratic rule which permeates the world outside of schools is now increasingly breaking down the schoolhouse doors. 280 Fundamental democratic beliefs, such as the need to protect individuals and minorities, the need for reasoned official decisions, and the opportunity to present grievances before an impartial tribunal, have taken hold in the school environment. Most important, legalization requires that children be treated as "legal" beings with bundles of rights and duties and the power and competence to assert their rights in appropriate forums.

The "ideal of legality," as Professor Selznick describes it, is closely related in America to due process of law: "The rules of due process may be thought of . . . as the positive law of legality. . . ." 281 In a sense, due process is the doctrinal framework for constraining official conduct without imposing any particular set of substantive rules. Its concern is primarily in the domain of the formulation and application of rules. This, of course, fits in well with the Wood test for immunity from damages. Liability under Wood generally will attach only where school officials have violated settled constitutional principles, and as argued earlier, 282 the law tends to be more settled and identifiable with

282. See text accompanying notes 77-94 supra.
respect to procedure than substance in the public school context. Thus, the primary impact of *Wood*, particularly in the light of the *Goss* decision, may be to speed up the process of legalization within the public schools. More and more decisions will be made within a legal framework. While due process is not necessarily equatable with adversary hearings designed along judicial lines (witness the *Goss* decision), it seems likely that this is the direction in which public schools will be headed in the future.

Apart from its direct impact on school procedures, how are risk-averse school officials likely to respond to the threat posed by the *Wood* decision? In other words, what form is "defensive education" likely to take? Some analogy to the plight of medical doctors may be in order, for they too face accountability suits in the form of damages for malpractice. A Medical Malpractice Commission appointed by the Secretary of Health, Education, and Welfare has described defensive medicine as

the alteration of modes of medical practice, induced by the threat of liability, for the principal purposes of forestalling the possibility of lawsuits by patients as well as providing a good legal defense in the event such lawsuits are instituted.

In terms of the practice of medicine, many physicians take care to treat the chart as well as the patient by ordering extra tests and procedures in

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285. See generally Symposium on Medical Malpractice, 1975 Duke L.J. 1177; Brooke, Medical Malpractice: A Socio-Economic Problem From A Doctor's View, 6 Willamette L.J. 225 (1970); Hershey, The Defensive Practice of Medicine: Myth or Reality, 50 Milbank Memorial Fund Q. 69 (1972).

286. U.S. Dept. of Health, Education, and Welfare, Report of the Secretary's Comm'n on Medical Malpractice 14 (1973). In terms of the magnitude of the threat of malpractice suits, clearly the risk of litigation has risen dramatically over the last decade. In 1969, 4% of physicians had malpractice suits pending against them, whereas in 1974, 10% had pending suits. In addition, the size of the average claim had roughly doubled over the same period. Evans, The Malpractice Mess, Private Practice, April 1975, at 59. In terms of claims filed with insurers, 6.5 medical malpractice claims files were opened for every 100 active practitioners in 1970. Medical Malpractice, supra, at 12. There was some payment in approximately 45% of all claims—although most were for less than $10,000. Id. at 10-11. Between 1960 and 1970, premiums for physicians rose 540.8% and those for surgeons, an extraordinary 949.2%. Id. at 13.
order to document the appropriateness of their treatment. In some
cases, physicians may be unwilling to take risks on new cures where
there is no certainty of their effectiveness. There also appears to be
some reluctance to publish in medical journals the details of diagnostic
and therapeutic techniques which have not proved efficacious. The fear
is that patients or lawyers will see the published material and use them
as the basis of law suits. In addition, medical malpractice suits may
encourage some doctors to retire early or to locate in states where
malpractice laws are less favorable to plaintiffs. With regard to all of
these reactions to the threat of liability, it has proved difficult to deter-
mine precisely how many doctors have altered their behavior, to gauge
the impact on patients, or to measure the increased costs of medical care
attributable to this cause. Also, the fact that liability may encourage
doctors to exercise greater care in the performance of their duties
is rarely mentioned. The literature tends to be anecdotal, unsce-
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nonal, and "pro-physician." Nonetheless, it seems reasonably clear that
many more physicians today see the patient as a potential enemy, and
exhibit hostility toward the legal profession for their part in the mal-
practice conspiracy. Perhaps the latter feeling is best exemplified by
a recent bumper sticker: "Support Your American Trial Lawyers'
Association—Send Your Son to Medical School."

The parallels between physicians and educators are far from per-
fect. Their status and organizational roles, and certainly their economic
situations, are far different. The reach of malpractice suits under tort
law is far greater than the reach of section 1983, limited, as it is, to
federal, constitutional and statutory deprivations under color of state
law.287 But in some respects educators seem likely to follow the lead of
doctors in reacting to the threat of litigation. Apart from the directly
imposed requirements of due process, educators, like physicians, will
probably resort to complex procedures and recordkeeping in order to
protect themselves against substantive constitutional claims.288 Meticu-

287. Ironically, at least one medical commentator has reacted to Wood with
enthusiasm, regarding it as a step forward in protecting physicians in state hospitals from
liability:

This opinion [Wood] appears to offer substantial protection for state-hospital
psychiatrists (and other public officials) who, in good faith, do the best
they can with limited resources.
McGarry, The Holy Legal War Against State-Hospital Psychiatry, 294 NEW ENGLAND J.
MED. 318, 319 (1976). This is another example of the perception of liability's being
more important than its reality.

288. See Trienzenberg, How to Live With Due Process, 55 BULL. OF THE NAT'L
ASS'N OF SECONDARY SCHOOL PRINCIPALS 61 (Feb. 1971).
lous documentation of the facts may reinforce the school official's version and may be important, particularly where liability hinges on the reasonableness of a forecast of disruption, where, for example, students insist on the right to distribute leaflets or wear political buttons. The appearance or reality of deliberation and consultation with teachers, parents, lawyers, and others may also convince a court that the actions were taken in good faith. This is also a way of spreading the responsibility for decisions. Further, more expansive procedures, including full adversary hearings, while time-consuming and expensive, may leave parents and students with the feeling that they have had an adequate opportunity to challenge the actions taken against them. Even if this is not the case, the practical necessity of working one's way through the various levels of school district review—even if exhaustion of remedies is not legally required—may blunt the willingness of would-be plaintiffs to bring their cases to court. As the matter drags on, as expenses mount, and as the injury becomes more remote, parents and students may begin to think that the price of vindication is too high. Thus, the collateral consequences of the prospect of section 1983 liability may reinforce the trend toward legalization of dispute resolution in schools already inherent in the *Goss v. Lopez* decision.

There are other ways in which educators may attempt to cope with the *Wood* decision. They may be less likely to make controversial decisions, such as suspending rowdy students or affording special treatment to children with unusual talents or disabilities. With the current distaste for any form of differentiation, equality of treatment may appear to be the safest, if not necessarily the soundest, course. Alternatively, school people may delegate to parents and students decisions which they previously took upon themselves. If a parent authorizes action which is ultimately found to violate section 1983, this may be treated as a waiver of any constitutional claim. Even if the waiver is not informed and intelligent, the existence of such a waiver on paper may be probative as to the good faith of school authorities.

Other changes in the behavior of teachers and administrators as a result of *Wood* may be more subtle. As greater care is taken with official records, an oral tradition may develop as a way of communicating information without risking court action. Teachers may label an outspoken student as a "troublemaker" in discussions with other teachers, while declining to specify this in written form for fear of section

289. *Id.*
1983 ramifications.\textsuperscript{290} This oral tradition is related to two other likely responses to \textit{Wood}. First, school people are likely to begin describing their conduct in official records and communications in the language that courts require for a favorable decision.\textsuperscript{291} Whether consciously or otherwise, a principal is not likely to admit suspending a student for passing out literature which is ideologically objectionable. Rather, the principal, and the school records, will speak of actual or likely disruption to the educational process. Prayers will be converted into voluntary periods for "meditation." Not only the decisionmaking processes, but also the language employed in public schools will be legalized. Second, educators may resort to sanctions falling short of suspension and expulsion to insulate themselves from judicial review.\textsuperscript{292} Except for the procedural due process cases, courts are far more likely to intervene in school affairs where exclusion has been employed to thwart the exercise of constitutional rights of students. But teachers and administrators have many other weapons at their command, ranging from oral reprimands and attempts to arouse peer-group pressure to inconvenient course scheduling, low grades, denial of extracurricular activities, and after-school detention. By their very nature these penalties are much more difficult for courts to address, although cumulatively they may push a child out of school. They may also be difficult for a student to prove, particularly where school records are silent.

Finally, the application of constitutional norms to public schools, with the new peril of personal liability for failure to abide by those norms, may have profound consequences for the structure and pedagogy of education. In my view, concepts of legal entitlements for students, of legally imposed limits on administrative discretion, and of procedural fairness in decisionmaking, are far more consistent with progressive, child-centered education, than they are with more traditional, authoritarian models that treat the child as a passive receptacle for learning. These concepts are also inconsistent with a rigid hierarchical structure, with all decisions imposed from above. As equals, at least in some respects, within the democratic order, there may appear to be less justification for circumscribing students' liberties and compelling them


\textsuperscript{291} Kirp & Yudof, \textit{supra} note 55, at 187.

\textsuperscript{292} Id. at 184-85.
to endure discomfort in the name of their own, and the culture's, ultimate good. I do not mean to overstate these implications: children are not today, and are not likely to be in the future, the equals of adults in the legal system. Formal institutions for socialization are an inevitable part of the modern technological state, and such institutions imply constraint and adherence to group norms. But the perception that students are participants in democratic society may, over time, have important consequences for adult perceptions of children and childhood.

Most importantly, despite the noted costs, adherence to the legalization model and the introduction of substantive constitutional guarantees into public school systems may contribute to the socialization of the young to democratic ideals. Ironically, educators have often belied constitutional standards in their own conduct and treatment of students, while paying lip service to those very same values in the classroom. "Do as I say and not as I do" too often has been the rule. John Dewey drew attention to the close connection between the quality of educational experience a society offers and the type of democracy it enjoys.

Since education is a social process, and there are many kinds of societies, a criterion for educational criticism and construction implies a particular social ideal. . . . The . . . measure[s of] the worth of a form of social life are the extent in which the interests of a group are shared by all its members, and the fullness and freedom with which it interacts with other groups. An undesirable society, in other words, is one which internally and externally sets up barriers to free intercourse and communication of experience. A society which makes provision for participation in its good of all its members on equal terms and which secures flexible readjustment of its institutions through interaction of the different forms of associated life is in so far democratic. Such a society must have a type of education which gives individuals a personal interest in social relationships and control, and the habits of mind which secure social changes without introducing disorder.293

Perhaps as the reality of schooling begins to conform to democratic doctrine, those doctrines will take on a new vitality in future generations. Should that happen, *Wood v. Strickland* will have more than fulfilled its promise.

293. J. Dewey, Democracy and Education 115 (1932).