

**VOL 28 ISS 1 ART 3 | 0 | INTRODUCTION**

*Suits brought under section 1983 of title 42 of the United States Code have provided additional protection of constitutional rights. Recently, the use of this statute has increased markedly resulting in new areas of controversy. In this Article, Professor Nahmod examines the issue of absolute individual immunity under section 1983. He explores the doctrine's historical background, the distinction between actions for damages and injunctions, and projects the doctrine's effect on certain individuals in the future.*

Section 1983 of Title 42 of the United States Code, a powerful constitutional "sword" for plaintiffs, makes "persons" liable for violations of the Fourteenth Amendment.<sup>1</sup> Its broad facial language admits no exceptions. Yet until recently local governmental entities were considered by the United States Supreme Court not to be "persons" and thus not liable under the statute's provisions.<sup>2</sup> More surprisingly, certain individuals who are clearly "persons" in the common understanding of that term have been given an absolute immunity from liability for damages under 1983.<sup>3</sup> The purpose of this Article is to examine and analyze who is entitled to this immunity.

The difference between absolute and qualified immunity is of immense practical significance for the individual. No inquiry into the absolutely immune defendant's state of mind is permitted, while qualified immunity, an affirmative defense, necessitates such an inquiry after the plaintiff has made out a 1983 cause of action.<sup>4</sup> Typically, an action against an absolutely immune defendant will be dismissed on motion which simply sets out his status and his having acted within his official capacity.

The Supreme Court to date has established three classes of absolutely immune individual defendants: state legislators,<sup>5</sup> judges,<sup>6</sup> and prosecutors.<sup>7</sup> This Article will deal with the Court's reasoning in the leading cases, and consider its implications. It will also explore the scope of absolute immunity, and analyze the use made by the circuits of the Court's decisions. As will be seen, certain line drawing problems emerge which are not alleviated, especially in judicial immunity cases, by the Court's use of jurisdictional terminology.

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### Footnotes

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<sup>1</sup>. The section provides:

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

42 U.S.C. § 1983 (1970). For a discussion of relationship between § 1983 and the Fourteenth Amendment, see generally Nahmod, Section 1983 and the "Background" of Tort Liability, 50 IND. L.J. 1 (1974) and A GUIDE TO SECTION 1983 chapters 2 & 3. Liability under the "laws" is beyond the scope of this Article. See A GUIDE TO SECTION 1983 chapter 2.

<sup>2</sup>. *Monroe v. Pape*, 365 U.S. 167, 191 (1961) (holding that municipalities are not "persons" within section 1983), overruled in *Monell v. Dep't of Soc. Serv.*, 98 S. Ct. 2018, 2041 (1978) (holding that local governments are "persons" for purposes of section 1983). See also *City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

<sup>3</sup>. The emphasis is intentional. As stated in *Rowley v. McMillan*, 502 F.2d 1326, 1331 (4th Cir. 1974): "the doctrine of immunity ... has no application to a suit for declaratory or injunctive relief. ... See the discussion in notes 52-55, 124-133, 178-180 and accompanying text *infra*."

<sup>4</sup>. *Wood v. Strickland*, 420 U.S. 308 (1975). The Court stated that the qualified immunity test contains both objective and subjective elements and held 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.

*Id.* at 322. See generally A GUIDE TO SECTION 1983 chapter 8.

<sup>5</sup>. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

<sup>6</sup>. *Pierson v. Ray*, 386 U.S. 547 (1967).

<sup>7</sup>. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

