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COMMENTS

GAGLIARDI v. FLINT: THE JOINDER OF CONSTITUTIONAL AND PENDENT STATE CLAIMS AGAINST A MUNICIPAL CORPORATION IN A FEDERAL FORUM

Municipal governments' assumption of greater responsibility for societal functions increasingly exposes citizens to the infliction of legal injury by public employees.¹ Relief for such injuries ostensibly is offered by the Civil Rights Act of 1871,² which was enacted to provide redress for actions by state and local officials violating established constitutional and statutory rights.³ The Act's broadest provision, codified as section 1983, awards damages and equitable relief for invasion of such rights by persons acting under color of state law or custom.⁴

A citizen asserting a section 1983 claim may desire to maximize

1. See Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and New York Court of Claims*, 22 *AN. L. REV.* 39, 58 (1969). Municipal involvement ranges from the provision of public services such as education, housing, and fire and police protection to the regulation of business activity through the licensing of such activities as housing construction and the sale of alcoholic beverages.

2. Civil Rights Act, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 28 U.S.C. § 1343 (1970) and 42 U.S.C. § 1983 (1970)).

3. See *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) (citing *CONG. GLOBE*, 42d Cong., 1st Sess. 653 (1871)).

4. 42 U.S.C. § 1983 (1970). Section 1983 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.

The federal district court's original jurisdiction over a § 1983 cause of action is provided by 28 U.S.C. § 1343(3)-(4) (1970), which provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...
...

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens of or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

his opportunity for complete recovery by seeking relief against both the culpable public employee and the municipality.⁵ In *Monroe v. Pape*,⁶ however, the Supreme Court held that municipalities are not "persons" within the ambit of section 1983,⁷ in effect granting municipal corporations immunity from civil liability under the Civil Rights Act. Focusing on the legislative history of the Act, the Court emphasized that the House of Representatives repeatedly had rejected the opportunity to impose such liability on local government units; consequently, the Court reasoned, municipalities could not be sued under section 1983.⁸

Although numerous attempts to circumvent the holding in *Monroe* have proved unsuccessful, the Court of Appeals for the Third Circuit in *Gagliardi v. Flint*⁹ recently upheld an action against a municipal corporation by finding the fourteenth amendment allegations sufficiently substantial to provide a jurisdictional basis for the federal forum to adjudicate pendent state claims. In addition to examining several approaches advanced by plaintiffs in attempts to provide federal courts with jurisdiction over municipalities, this Comment will analyze *Gagliardi* and the procedure approved by the Third Circuit. It concludes that the implementation

5. See notes 62-69 *infra* & accompanying text.

6. 365 U.S. 167 (1961).

7. *Id.* at 191. *Monroe* involved an action for damages against the city of Chicago and thirteen Chicago police officers who allegedly subjected the plaintiff, Monroe, to a brutal search and seizure in his home.

8. *Id.* at 191-92. The interpretation of § 1983 adopted by the Court in *Monroe* has been assailed vigorously by both the judiciary and commentators who have argued, for example, that this construction derives neither from legislative debate over the meaning of the word "person" nor from debate on § 1983 generally, but rather from congressional rejection of the Sherman amendment, which would have made local governments expressly liable for damages caused by their intentional infringement of certain constitutionally protected interests. Moreover, only the House of Representatives rejected the amendment, a repudiation based not on the determination that municipalities should be immune, but on the mistaken notion that the Congress lacked constitutional authority to impose liability on municipal corporations. See generally *Aldinger v. Howard*, 427 U.S. 1, 24-25 (1976) (Brennan, J., dissenting); *Gagliardi v. Flint*, 564 F.2d 112, 122-26 (1977) (Gibbons, J., concurring); *Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 132-36 (1972); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 924-25, 949-51 (1976) [hereinafter cited as *Damage Remedies*]; Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1205-07 (1971). But see Note, *Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine*, 36 MD. L. REV. 123 (1976) [hereinafter cited as *Implying a Damage Remedy*].

9. 564 F.2d 112 (3d Cir. 1977).

by federal courts of this jurisdictional basis will leave undisturbed *Monroe's* interpretation of section 1983 but will permit citizens to seek redress from many municipal corporations for constitutional infringements committed by their employees.

OBSTACLES TO IMPOSING LIABILITY ON A MUNICIPALITY IN FEDERAL COURT

Attempts to sue municipal corporations and thus to bypass the decision in *Monroe* have been based either on theories purporting to sustain independent causes of action in conjunction with federal question jurisdiction¹⁰ or on state claims deemed pendent to section 1983 actions against individuals included within that provision's definition of person. For example, in *Moor v. County of Alameda*,¹¹ decided by the Supreme Court in 1973, the plaintiffs argued that the incorporation into section 1983 of a California statute creating vicarious liability against local governments created an independent federal cause of action.¹² Under a separate federal statutory provision, codified as section 1988,¹³ state law may be incorporated into a

10. Two statutes arguably provide federal question jurisdiction for independent causes of action. 28 U.S.C. § 1331(a) (1970) provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." In addition, 28 U.S.C. § 1343(3) (1970) grants federal question jurisdiction for § 1983 causes of action. For the text of § 1343(3), see note 4 *supra*. In *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), however, the Supreme Court determined that jurisdiction under § 1343 was unavailable in § 1983 suits against municipalities. *Id.* at 513; see notes 16-17 *infra* & accompanying text. The ambiguity in *Bruno's* holding has caused courts and commentators to argue that the case restricts the applicability of § 1343 solely to § 1983 actions. See *Blue v. Craig*, 505 F.2d 830, 837 (4th Cir. 1974) (§ 1343 and § 1983 co-extensive); Comment, *The Civil Rights Acts and Mr. Monroe*, 49 CAL. L. REV. 145, 148 (1961) ("authorized by law" in § 1343 refers to § 1983). *Contra*, *Gonzalez v. Young*, 560 F.2d 160, 166 (3d Cir. 1977); Bodensteiner, *Federal Court Jurisdiction of Suits Against "Nonpersons" for Deprivations of Constitutional Rights*, 8 VAL. U. L. REV. 215, 229-34 (1974); Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U. L. REV. 770, 772 n.13 (1975). Whether § 1343 provides jurisdiction for independent causes of action has not been expressly determined by the Court. See Bodensteiner, *supra*, at 234.

11. 411 U.S. 693 (1973). Plaintiffs sought to recover actual and punitive damages for injuries allegedly suffered when an Alameda County deputy sheriff, who was engaged in quelling a civil disturbance, wrongfully discharged a shotgun. Suit was brought against the individual sheriffs pursuant to 42 U.S.C. §§ 1983, 1985 (1970), and against the county under 42 U.S.C. §§ 1983, 1988 (1970). *Id.* at 695-96.

12. *Id.* at 698. Plaintiffs argued that 42 U.S.C. § 1988 (1970) permitted the incorporation of CAL. GOV'T CODE § 815.2(a) (West 1966) into § 1983 and that, consequently, federal jurisdiction over their action existed under 28 U.S.C. § 1343(4) (1970). 411 U.S. at 700-01. For the pertinent text of § 1343(4), see note 4 *supra*.

13. 42 U.S.C. § 1988 (1970) provides in pertinent part:

federal civil rights act whenever the federal law is "deficient in the provisions necessary to furnish suitable remedies."¹⁴ The Supreme Court, however, rejected the argument that section 1988 authorized the integration of California state law into section 1983, concluding that such an incorporation would be contrary to Congress' intent in enacting the latter section.¹⁵

One month after the decision in *Moor*, the plaintiff in *City of Kenosha v. Bruno*¹⁶ endeavored to restrict *Monroe*'s application to actions against municipalities for the recovery of damages and argued that section 1983 permits suits for equitable relief. Rejecting this argument, the Supreme Court held that municipal corporations are outside the ambit of section 1983, whether relief is sought in law or in equity.¹⁷ Thus, after *Monroe*, *Moor*, and *Bruno*, the Court conclusively had excluded municipalities as potential defendants in section 1983 suits.¹⁸

Plaintiffs' inability to sue municipal corporations under section 1983 encouraged them to resort to direct causes of action implicitly authorized by the Constitution. The basis for these actions was the 1971 decision of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹⁹ in which the Supreme Court permitted a damages suit against federal narcotics agents who allegedly had

[I]n all cases where [federal laws] are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause

14. *Id.*

15. 411 U.S. at 710. The Court evaluated the language and the legislative history of the Civil Rights Act of 1871, concluding both that § 1988 did not create an independent cause of action and that the attempted incorporation of the state statute into § 1983 would contravene the federal law as represented in *Monroe*. *Id.* at 703-09.

16. 412 U.S. 507 (1973). Bruno sought declaratory and injunctive relief against the cities of Kenosha and Racine, which had refused to renew his liquor licenses, allegedly because he permitted nude dancing in his taverns. In each case, the plaintiff named only the municipality as a defendant.

17. *Id.* at 513. As in *Moor*, see note 15 *supra*, the Court in *Bruno* relied on the statutory language as well as the legislative history of the Civil Rights Act of 1871 to support its determination that Congress did not intend to subject municipal corporations to a "bifurcated application" of § 1983 that would vary with the nature of the relief sought. *Id.*

18. For a listing of the governmental entities excluded from § 1983 liability, see Hundt, *supra* note 10, at 772 n.15; 47 Miss. L.J. 799, 802-03 & nn.25-29 (1976).

19. 403 U.S. 388 (1971).

deprived the plaintiff of his fourth amendment rights.²⁰ Although the facts in *Bivens* were limited to claims arising from fourth amendment violations, the case's result suggested that the infringement of any constitutional right could create a claim litigable in a federal court, thus permitting suits against municipalities.²¹

Attempting to extend the holding in *Bivens*, plaintiffs have argued that the fourteenth amendment protects their federal rights from infringement by state and local governments.²² The availability of the remedy recognized in *Bivens*, however, has been uncertain, and the lower courts have reached conflicting conclusions as to the case's applicability in suits against municipal corporations. Although some courts have restricted the scope of *Bivens* to fourth amendment violations,²³ others have extended the case's holding to all federal claims based on alleged constitutional infringements²⁴ and thus have permitted damages suits for alleged violations of the fourteenth amendment.²⁵ In addition to the judiciary's division over

20. *Id.* at 397.

21. See Bodensteiner, *supra* note 10, at 221; Hundt, *supra* note 10, at 772; *Damage Remedies*, *supra* note 8, at 926. Of course, a potential plaintiff must satisfy the jurisdictional requirements of 28 U.S.C. § 1331(a) (1970). For the text of § 1331(a), see note 10 *supra*.

22. For analyses of the use of *Bivens* to support a judicially created cause of action asserting fourteenth amendment rights directly against a municipality, see Bodensteiner, *supra* note 10, at 217-22; Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972); Hundt, *supra* note 10, at 772-75; *Damage Remedies*, *supra* note 8, at 929-59.

23. See, e.g., *Moore v. Schlesinger*, 384 F. Supp. 163, 165 (D. Colo. 1974); *Davidson v. Kane*, 337 F. Supp. 922, 924-25 (E.D. Va. 1972). See also *Cardinale v. Washington Technical Inst.*, 500 F.2d 791, 796 n.5 (D.C. Cir. 1974); *Archuleta v. Callaway*, 385 F. Supp. 384, 388 (D. Colo. 1974); *Smothers v. Columbia Broadcasting Sys., Inc.*, 351 F. Supp. 622, 625-26 n.4 (C.D. Cal. 1972) (*dictum*).

24. *Brault v. Town of Milton*, 527 F.2d 730, 734 (2d Cir.), *vacated on other grounds*, *id.* at 736 (1975) (*en banc*); *accord*, *Gardels v. Murphy*, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974) ("*Bivens* recognizes a cause of action for damages for violation of any constitutionally protected interest."); see *States Marine Lines v. Shultz*, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment); *United States ex rel. Moore v. Koezler*, 457 F.2d 892, 894 (3d Cir. 1972) (fifth amendment); *Bethea v. Reid*, 445 F.2d 1163, 1164-65 (3d Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) (fourth and fifth amendments); *Williams v. Brown*, 398 F. Supp. 155, 156 (N.D. Ill. 1975) (fourteenth amendment); *Revis v. Laird*, 391 F. Supp. 1133, 1138-39 (E.D. Cal. 1975) (first and fifth amendments).

25. Fourteenth amendment claims have been recognized in suits involving, *inter alia*, police misconduct, *Redding v. Medicci*, 402 F. Supp. 1260, 1261 (W.D. Pa. 1975), *vacated on other grounds*, 411 F. Supp. 272 (W.D. Pa. 1976); *Williams v. Brown*, 398 F. Supp. 155, 156 (N.D. Ill. 1975) (illegal arrest and detention); mistreatment in prison, *Wattenberg v. New York City, Dep't of Correction*, 376 F. Supp. 41, 43-44 (S.D.N.Y. 1974) (cruel and unusual punishment); dismissals of public employees, *Hostrop v. Board of Jr. College Dist. No. 515*, 523 F.2d 569, 576-77 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); *Skehan v. Board of*

the ultimate breadth of *Bivens*, several courts either have refused to recognize the existence of a constitutional cause of action against municipalities²⁶ or have been reluctant to adjudicate the issues involved in such suits.²⁷ The disparate holdings by lower courts concerning the applicability of *Bivens* have cast doubt on the viability of direct constitutional attacks against municipal defendants.²⁸

Alternative attempts to sue municipalities have been based on the theory of pendent jurisdiction, which "permits a plaintiff, in appropriate circumstances, to join with his federal claim a state claim over which the court has no independent basis of subject matter jurisdiction."²⁹ In *United Mine Workers v. Gibbs*³⁰ the Supreme Court articulated the two prerequisites for obtaining pendent

Trustees, 501 F.2d 31, 44 (3d Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975); *Barszcz v. Board of Trustees of Community College*, 400 F. Supp. 675, 676 (N.D. Ill. 1975), *cert. dismissed*, 429 U.S. 1080 (1977); *see Singleton v. Vance County Bd. of Educ.*, 501 F.2d 429, 432-33 (4th Cir. 1974) (Winter, J., concurring and dissenting); racial discrimination, *Wright v. Houston Indep. School Dist.*, 393 F. Supp. 1149, 1152 (S.D. Tex. 1975) (backpay and reinstatement); *Robinson v. Conlisk*, 385 F. Supp. 529, 536 (N.D. Ill. 1974), *aff'd in pertinent part, rev'd on other grounds*, 549 F.2d 415 (7th Cir. 1977); deprivation of property without due process of law, *Amen v. City of Dearborn*, 532 F.2d 554 (6th Cir. 1976); *Brault v. Town of Milton*, 527 F.2d 730, 732-35 (2d Cir.), *vacated on other grounds, id.* at 736 (1975) (en banc); *Donohue Constr. Co. v. Maryland Nat'l Capital Park & Planning Comm'n*, 398 F. Supp. 21, 23-24 & n.2 (1975); *Stephens v. City of Plano*, 375 F. Supp. 985, 986 (E.D. Tex. 1974); *Grisson v. County of Roanoke*, 348 F. Supp. 321, 322 (W.D. Va. 1972); *see Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974) (zoning); and other alleged constitutional violations. *See, e.g., Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975) (action for damages for sterilization under allegedly unconstitutional statute).

26. Courts often have dismissed § 1983 suits against municipalities without acknowledging that claims might exist under the fourteenth amendment. *See, e.g., Jones v. Marshall*, 528 F.2d 132 (2d Cir. 1975); *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975); *Howard v. Cataldi*, 464 F.2d 272 (3d Cir. 1972).

27. The Third Circuit avoided reaching a decision on the merits of an action based directly on the fourteenth amendment in *Mahoney v. Waddle*, 564 F.2d 1018 (3d Cir. 1977). The Third Circuit also failed to decide the "difficult and troublesome constitutional questions" of "substantive liability and municipal immunity under the Fourteenth Amendment." *Fine v. City of New York*, 529 F.2d 70, 76 & n.13 (2d Cir. 1975). *See also Brault v. Town of Milton*, 527 F.2d 736, 738 (2d Cir. 1975) (en banc); *Apton v. Wilson*, 506 F.2d 83, 96 (D.C. Cir. 1974).

28. *See Gagliardi v. Flint*, 564 F.2d 112 (3d Cir. 1977), in which the majority and concurring opinions debated at length whether the Third Circuit has recognized such a cause of action. *Id.* at 115 n.3, 117-19. The principal rationale for rejecting the extension of *Bivens* to fourteenth amendment claims against municipalities derives from the concept of federalism and from the Court's interpretation of congressional intent underlying § 1983. *Damage Remedies*, *supra* note 8, at 927-29. *See also Hundt*, *supra* note 10, at 773-75; Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127, 138 n.58 (1977) [hereinafter cited as *Pendent Jurisdiction*]; *Implying a Damage Remedy*, *supra* note 8, at 124-25.

29. *Pendent Jurisdiction*, *supra* note 28, at 128. For a comprehensive history of the doctrine's evolution, *see id.* at 129-35. *See also Aldinger v. Howard*, 427 U.S. 1, 6-16 (1976).

30. 383 U.S. 715 (1966).

jurisdiction: first, the federal claim must be of sufficient substance to confer subject matter jurisdiction on the court;³¹ and second, the state and federal claims must derive from a "common nucleus of operative fact",³² such that they ordinarily would be tried together in one judicial proceeding.³³ If these prerequisites were met, a plaintiff would make a municipality a pendent party by joining his state cause of action against the municipality to a section 1983 claim against the culpable official.³⁴

The Supreme Court's decision in *Aldinger v. Howard*,³⁵ however, limited the availability of this procedure. Distinguishing pendent claims from pendent parties, the Court held that the doctrine of pendent jurisdiction does not authorize the joinder of a state claim against a party over whom no independent federal jurisdiction ex-

31. *Id.* at 725.

32. *Id.* Decisions subsequent to *Gibbs* have held that a loose factual connection between the claims is sufficient to satisfy this "common nucleus" requirement. *See, e.g.,* *Klaus v. Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975); *Hamilton v. Chaffin*, 506 F.2d 904 (5th Cir. 1975); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *Burton v. Waller*, 502 F.2d 1261 (5th Cir.), *cert. denied*, 420 U.S. 964 (1974); *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); *Knuth v. Erie Crawford Daily Coop. Ass'n*, 395 F.2d 420 (3d Cir. 1968); *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972); *Bowman v. Hartig*, 334 F. Supp. 1323 (S.D.N.Y. 1971). If the two claims are totally independent, however, the district court may exercise its jurisdiction only over the federal action. *See, e.g.,* *PAAC v. Rizzo*, 502 F.2d 306 (3d Cir.), *cert. denied*, 419 U.S. 1108 (1974); *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836 (4th Cir. 1974); *Umdenstock v. American Mortgage & Inv. Co.*, 495 F.2d 589 (10th Cir. 1974); *Bowman v. White*, 388 F.2d 756 (4th Cir.), *cert. denied*, 393 U.S. 891 (1968); *Ryan v. New Castle County*, 365 F. Supp. 124 (D. Del. 1973); *Spens v. Citizens Fed. Sav. & Loan Ass'n*, 364 F. Supp. 1161 (N.D. Ill. 1973); *Ely v. Velde*, 356 F. Supp. 726 (E.D. Va. 1973); *Weiss v. Supasco*, 295 F. Supp. 824 (S.D.N.Y. 1969).

33. 383 U.S. at 725. The Court cautioned that the acceptance of pendent jurisdiction is discretionary with the court. In deciding whether to implement the doctrine, a court may consider, *inter alia*, judicial economy, convenience, fairness to the litigants, comity, federalism, the possibility of jury confusion, and the state claim's dominance in the action. *Id.* at 726-27.

34. A pendent party claim requires joinder of a new party "against whom or by whom no claim is asserted which has an independent jurisdictional base." Fortune, *Pendent Jurisdiction—The Problem of "Pendent Parties"*, 34 U. PITT. L. REV. 1, 1 (1972). For additional commentary on pendent party jurisdiction, see 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3567 (1975); Bratton, *Pendent Jurisdiction in Diversity Cases—Some Doubts*, 11 SAN DIEGO L. REV. 296 (1974); Sullivan, *Pendent Jurisdiction: The Impact of Hagans and Moor*, 7 IND. L. REV. 925, 942-59 (1974); Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968); Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs—Federal Question and Diversity Cases*, 62 VA. L. REV. 194 (1976); Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127 (1977); Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A. L. REV. 1263 (1975).

35. 427 U.S. 1 (1976).

ists.³⁶ A section 1983 suit against a municipal officer cannot provide a federal court with independent jurisdiction over a municipal corporation, which is exempt from such actions; consequently, *Aldinger* precludes the joinder of a state claim against a municipality with a federal claim brought under section 1983.³⁷ The decision in *Aldinger* thus further insulates municipalities from liability in federal courts for their constitutional violations.

JOINDER OF CONSTITUTIONAL AND PENDENT STATE CLAIMS

In *Gagliardi v. Flint*³⁸ the Court of Appeals for the Third Circuit sanctioned another procedure through which municipalities could be subjected to liability in federal courts for their infringement of plaintiffs' guaranteed federal rights. After her son had been fatally shot by a Philadelphia police officer, the plaintiff filed suit against the city in federal district court. The district court invoked its jurisdiction over the municipality as to two of the causes of action.³⁹ The plaintiff had based one of these claims directly on the fourteenth amendment, alleging a denial of life, and had asserted the other as a pendent state claim under the Pennsylvania Survival⁴⁰ and Wrongful Death Statutes.⁴¹ The Third Circuit affirmed.⁴²

Substantiality

The Third Circuit approved the use of the fourteenth amendment

36. *Id.* at 10.

37. See, e.g., Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904, 919 n.122 (1976) [hereinafter cited as *Federalism*].

38. 564 F.2d 112 (3d Cir. 1977).

39. *Id.* at 114.

40. The Pennsylvania Survival Statute, 20 PA. CONS. STAT. ANN. § 3371 (Purdon 1975), provides: "All causes of action or proceedings, real or personal, except actions for slander or libel, shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants."

41. The Pennsylvania Wrongful Death Statute, 12 PA. CONS. STAT. ANN. § 1601 (Purdon 1953), provides:

Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned.

42. 564 F.2d at 114. The court based its jurisdiction on 28 U.S.C. §§ 1331, 1343 (1970). Although § 1331 federal question jurisdiction was not pleaded in the original proceedings, the court of appeals invoked 28 U.S.C. § 1653 (1970) to permit the plaintiff to amend the jurisdictional statement. 564 F.2d at 114. For the pertinent text of § 1331, see note 10 *supra*. For the pertinent text of § 1343, see note 4 *supra*.

claim in *Gagliardi*, not to hold the municipality liable, but to establish an independent jurisdictional basis enabling the district court to adjudicate the pendent state cause of action. By finding the constitutional claim sufficiently substantial to vest the district court with federal question jurisdiction,⁴³ the appellate court combined the *Bivens* and pendent jurisdiction doctrines to impose liability on a municipality without resort to section 1983.

Although the substantiality test has been characterized as "more ancient than analytically sound",⁴⁴ its use for determining federal jurisdiction nevertheless has been retained by the Supreme Court.⁴⁵ In *Gagliardi* the Third Circuit's determination that the plaintiff's fourteenth amendment claim was sufficiently substantial derived initially from the court's recognition that in *Mount Healthy School District Board of Education v. Doyle*⁴⁶ the Supreme Court expressly reserved the issue whether, by analogy to its decision in *Bivens*, a plaintiff could imply a cause of action directly from the fourteenth amendment that would not be subject to the limitations of section 1983.⁴⁷ The absence of a Supreme Court holding specifically deciding the question of the substantiality of a direct fourteenth amendment suit based on *Bivens*, combined with the numerous decisions in other courts permitting such causes of action,⁴⁸ indicated to the court that the constitutional claim was not so "devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court."⁴⁹ Having obtained jurisdiction, the district court could adjudicate the pendent state claim, and the Third Circuit thus could avoid resolution of the difficult constitutional question⁵⁰ expressly reserved by the Court in *Mount Healthy*. Such an approach comported with the doctrine of judicial restraint in that constitutional issues unnecessary to the case's disposition were not adjudicated.⁵¹

43. 564 F.2d at 116.

44. *Rosado v. Wyman*, 397 U.S. 397, 404 (1970).

45. See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 538 (1974); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946).

46. 429 U.S. 274 (1977).

47. 464 F.2d at 115 (quoting 429 U.S. at 278).

48. See note 25 *supra*.

49. 564 F.2d at 116 (quoting *Hagans v. Lavine*, 415 U.S. 528, 543 (1974)).

50. See *Hagans v. Lavine*, 415 U.S. 528, 546-47 & n.12 (1974).

51. The Supreme Court repeatedly has indicated that the federal courts should refrain from the adjudication of constitutional issues when alternative grounds, including state claims, for disposing of litigation exist. See, e.g., *Hillsborough v. Cromwell*, 326 U.S. 620, 629

Consistency with Prior Case Law

By combining the fourteenth amendment and the pendent state claim, the Third Circuit did not contravene the prior standard espoused by the Supreme Court.⁵² Because a section 1983 suit was not used to support the pendent state claim, the court in *Gagliardi* was not bound by the Supreme Court's holding in *Monroe* that municipalities were not "persons" within the meaning of section 1983.⁵³ Moreover, the result in *Gagliardi* presents no conflict with the Supreme Court's holding in *Aldinger* that, for purposes of pendent jurisdiction, a federal court may not adjudicate state claims against a party over whom no independent federal jurisdiction exists.⁵⁴ *Aldinger* precluded the joinder of a state claim against a separate pendent party to a section 1983 cause of action under which the court could exercise no jurisdiction over the defendant in the state action. In *Gagliardi*, however, the City of Philadelphia was the defendant in both the federal and the state claims;⁵⁵ the Third Circuit thus permitted the joinder of a pendent state claim with a constitutional claim under which the district court already had attained a jurisdictional basis over the defendant municipality.

On the other hand, the two prerequisites for pendent jurisdiction enunciated in *Gibbs*⁵⁶ were present in *Gagliardi*. As previously noted, the constitutional claim, which alleged that the Philadelphia police officer's actions had deprived the plaintiff's son of his fourteenth amendment right to life, was sufficiently substantial to provide the district court with jurisdiction over the municipality.⁵⁷ In addition, both claims arose from the fatal shooting and clearly stemmed from a common nucleus of operative fact. Consequently, the existing case law did not preclude the district court's decision

(1946); *Cincinnati v. Vester*, 281 U.S. 439, 448-49 (1930); *Siler v. Louisville & N.R.R. Co.*, 213 U.S. 175, 193 (1909); *Seals v. Quarterly County Court*, 526 F.2d 216, 219 (6th Cir. 1975). See also *Hagans v. Lavine*, 415 U.S. 528, 545-49 (1974).

52. See notes 6-8, 11-18, 35-37 *supra* & accompanying text.

53. See notes 7-8 *supra* & accompanying text.

54. See text accompanying notes 35-37 *supra*.

55. For the proposition that the Court should extend the rationale in *Aldinger* from its application to pendent party jurisdiction to ordinary pendent jurisdiction, see *Pendent Jurisdiction*, *supra* note 28, at 148-49.

56. See notes 30-34 *supra* & accompanying text. A letter-brief filed by the City of Philadelphia with the court of appeals in *Gagliardi* protested vigorously the use of the fourteenth amendment cause of action to obtain federal jurisdiction because the plaintiff allegedly never relied on that portion of her complaint in the trial court. Letter-brief for Appellant at 4.

57. See text accompanying notes 46-49 *supra*.

to extend its jurisdiction to the pendent state claim.

Litigants attempting to use the procedure approved in *Gagliardi* must be certain that their claims based directly on the fourteenth amendment are substantial in nature.⁵⁸ This requirement, however, nevertheless permits the assertion of constitutional claims for a wide variety of injuries⁵⁹ because governmental actions have had an increasingly significant impact on individuals. Another potential obstacle to the assertion of the theory advanced in *Gagliardi* is the failure of state law to provide for a waiver of sovereign immunity. Absent such a waiver, a pendent state claim cannot be maintained, and the plaintiff could recover in federal court only if he litigated successfully a direct cause of action against the municipality under the fourteenth amendment.⁶⁰ This restriction presents little threat to suits against many municipalities, given the present trend to dispense entirely with municipal immunity.⁶¹

Policy Perspective

An injured plaintiff seeking relief for the deprivation of his federal rights by a municipal employee ideally would attempt to sue both the municipality and the individual committing the violation, to litigate the action in a federal rather than in a state tribunal, and to consolidate his federal and state claims through the use of pendent jurisdiction. Under the Third Circuit's approach in *Gagliardi*, each of these goals may be achieved.

58. See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946).

59. For example, in *Bell v. Hood*, 327 U.S. 678 (1946), plaintiff's allegation that the Federal Bureau of Investigation imprisoned him and subjected his home to a search was found to be a substantial claim. *Id.* at 683. In *Hagans v. Lavine*, 415 U.S. 528 (1974), the plaintiff's allegation that the operation of a welfare regulation designed to recoup certain payments from the plaintiff constituted a substantial deprivation was held to be sufficient to confer jurisdiction on the federal court. *Id.* at 538. But see *Paul v. Davis*, 424 U.S. 693 (1976), in which the Court cautioned that not every injury caused by a state official acting under color of state law could be deemed a substantial violation of the fourteenth amendment. *Id.* at 699. In *Davis* the Court concluded that the fourteenth amendment's guarantees of liberty and property rights do not protect individuals' reputations from defamation. *Id.* at 709.

60. For a discussion of the viability of a direct constitutional cause of action against a municipal defendant, see notes 22-28 *supra* & accompanying text.

61. For a compilation of cases in which states have abolished governmental immunity, see *Long v. Weirton*, ___ W. Va. ___, 214 S.E.2d 832, 854 (1975). The court in *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, ___, 305 A.2d 877, 889 (1973), listed the position of the various states regarding the decline of governmental immunity under both statutory and common law. See also Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1216 n.75 (1971).

From a practical standpoint, allowing an injured citizen to sue both the municipal corporation and its culpable employee is preferable to restricting the imposition of liability to the individual perpetrator.⁶² Frequently, the commission of violations by groups of governmental employees hinders subsequent identification of the potential individual defendants. In such instances the victim may be denied adequate relief.⁶³

The partial immunity of public servants from legal liability further demonstrates the practical necessity of permitting plaintiffs to sue municipal corporations. The rationale for defenses such as good faith and scope of duty⁶⁴ is that the public's interest in the administration of laws requires the alleviation of a public servant's fear of personal liability for injuries resulting from the performance of his duties.⁶⁵ Public officials should not be so fearful of potential personal liability that they hesitate to perform their responsibilities; the victims of these officials' constitutional transgressions, however, should not be denied an adequate remedy. By providing compensation for these injured citizens, a municipality would not discourage individual officers from enforcing the law.⁶⁶

Even if public servants are not immune, juries often are sympathetic toward an officer who simply has attempted to perform his

62. The Court in *Monroe* acknowledged that it failed to weigh certain policy considerations in its decision to exempt municipalities from § 1983 liability. Specifically, the Court stated that it had not examined whether municipal corporations should be subject to liability because "private remedies against officers for illegal searches and seizures [were] conspicuously ineffective, and that municipal liability [would] not only afford plaintiffs responsible defendants but would cause those defendants to eradicate abuses that exist at the police level." 365 U.S. at 191.

After considering many of the policy implications of municipal immunity, the United States Commission on Civil Rights recommended that § 1983 be amended to reverse *Monroe* legislatively. Kates & Kouba, *supra* note 8, at 143 n.67 (citing U.S. COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 179 (1965)).

63. See, e.g., *Burton v. Waller*, 502 F.2d 1265, 1271, 1281-82, 1284, 1286 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975) (court upheld acquittal of all 69 defendant police officers partially because plaintiffs failed to prove which particular policemen fired shots); *Howell v. Cataldi*, 464 F.2d 272, 279-84 (3d Cir. 1972) (affirmed directed verdict for two police officers alleged to have brutally beaten plaintiff: plaintiff failed to prove whether defendants were the policemen who administered beating).

64. Other such defenses include the absolute or qualified privileges held by some government officers. See, e.g., *Barr v. Matteo*, 360 U.S. 564, 569 (1959).

65. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.17 (1970 Supp.).

66. The establishment of a system rendering municipalities liable for their employees' actions arguably could encourage governmental employees to violate the Constitution or, at least, could remove an important deterrent to such actions. *But see* text accompanying notes 70-71 *infra*.

duty.⁶⁷ Moreover, a plaintiff who successfully litigates his claim may be unable to collect from an officer who has limited funds.⁶⁸ By permitting an injured party to sue the municipality, however, both of these problems may be eliminated; juries would be less subjective in their evaluation of the merits of the plaintiff's action, and a successful litigant would be assured of receiving his entire damages award.⁶⁹

The imposition of municipal liability also would provide a more effective deterrent to future constitutional violations by public employees than does the unsatisfactory exclusionary rule or the sporadic imposition of individual tort liability.⁷⁰ The economic pressure of potential damages awards could provide municipal supervisors with a greater incentive to control their subordinates' conduct. Because supervisors would be required to enforce more strictly suspension or dismissal penalties against culpable employees, they consequently would encourage those employees to act only within the scope of their authority.⁷¹

Federal courts provide a forum preferable to state tribunals for adjudicating the type of state claims involved in *Gagliardi*. Initially, the federal district court's invocation of the pendent jurisdiction doctrine to join a federal and state claim not only provides a convenience for the litigants but also promotes judicial economy.⁷² With the consolidation of two potential proceedings into one, the parties incur lower court costs and avoid the problems raised by inconsistent adjudications or by the municipality's subsequent assertion of collateral estoppel as a defense.⁷³ In addition, adjudication by a federal district court judge, whose life tenure helps to insulate him from political pressure, may enable an injured plaintiff to avoid the potential for bias in a state judge's review of other state officials'

67. See *Damage Remedies*, *supra* note 8, at 926.

68. *Id.* Many municipalities, however, provide tort liability insurance for their employees.

69. See *Hundt*, *supra* note 10, at 779.

70. K. DAVIS, *supra* note 65, at § 25.17. See generally *Hundt*, *supra* note 10, at 782-83; *Kates & Kouba*, *supra* note 8, at 140-41; *Damage Remedies*, *supra* note 8, at 927; *Implying a Damage Remedy*, *supra* note 8, at 125-26.

71. K. DAVIS, *supra* note 65, at § 25.17.

72. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

73. *Minahan, Pendent and Ancillary Jurisdiction of United States Federal District Courts*, 10 CREIGHTON L. REV. 279, 321 n.198 (1976). See generally *Comment, Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size*, 15 DUQ. L. REV. 49, 89 (1976).

actions.⁷⁴ Finally, the selection of juries in federal proceedings from broad-based citizen pools helps to ensure their impartiality.⁷⁵

Critics contend that the procedure approved in *Gagliardi* of invoking pendent jurisdiction compromises federalism and forces federal courts to assume jurisdiction over a broad range of traditional state functions.⁷⁶ Under the doctrine established in *Erie Railroad v. Tompkins*,⁷⁷ however, federal courts have obtained vast experience in the adjudication and application of state law.⁷⁸ Should they commit errors of law, appellate review is available. Moreover, because a decision to accept pendent jurisdiction is discretionary with the court, federal judges will abstain from deciding state claims, even those properly joined with valid federal allegations, that require the expert consideration available only in a state court.⁷⁹

Others might argue that the extensive use of the pendent jurisdiction procedure will flood the federal court docket with frivolous claims.⁸⁰ Such actions could be rejected immediately, however, under the substantiality test,⁸¹ which authorizes dismissal of a pendent state claim "if the federal claim to which it is attached is

74. Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1358 (1970). See generally Kates & Kouba, *supra* note 8, at 145-46; 21 WAYNE L. REV. 1103, 1111-12 (1975).

75. See Jury Selection and Service Act of 1968, 28 U.S.C.A. §§ 1861-1871 (1970 & Supp. 1978). The United States Commission on Civil Rights discussed the problem of discrimination in state juries. See 21 WAYNE L. REV. 1103, 1112 & n.54 (1975), (citing [1961] COMM'N ON CIVIL RIGHTS REP. bk. 5, at 92-94 (1961)).

76. See *Federalism*, *supra* note 37, at 916. See generally Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Caseload*, 1973 LAW. & SOC. ORD. 557; Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968).

77. 304 U.S. 64 (1938). The Court in *Erie* held that federal common law is inapplicable in diversity cases and that, in such situations, a federal court must apply the substantive law of the state in which it sits. *Id.* at 78.

78. See *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (Blackmun, J., concurring); *Schneckloth v. Bustamonte*, 412 U.S. 218, 264 (1973) (Powell, J., concurring); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 400 (1970) (Harlan, J., concurring); *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975).

79. See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); note 33 *supra*.

80. Since 1961, the number of suits filed in federal courts under the Civil Rights Act of 1871 has increased more than forty-fold. Note, *Immunity of Teachers, School Administrators, School Board Members, and School Districts from Suit Under Section 1983 of the Civil Rights Act*, 1976 U. ILL. L.F. 1129, 1129 nn.2-3; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 428-29 (1971) (Black, J., dissenting).

81. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 391 n.4 (1971); Chevigny, *supra* note 74, at 1354 & n.14; notes 58-59 *supra* & accompanying text. This shifting process can be facilitated by requiring plaintiffs to plead facts with specificity, a procedure employed in the Third Circuit. See *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976).

so insubstantial that it cannot serve as the basis for federal question jurisdiction under the general federal question statute."⁸² Inasmuch as plaintiffs will continue to bring section 1983 suits against municipal officers in federal courts, they simultaneously could assert their claims against the pertinent municipalities, and the two defendants could be tried concurrently. Ultimately, then, the approach approved in *Gagliardi* could reduce the total number of suits brought, in that all the federal and state claims deriving from a common nucleus of operative fact could be adjudicated in one proceeding.

CONCLUSION

In *Gagliardi v. Flint*, the Court of Appeals for the Third Circuit held that a claim against a municipality based on a fourteenth amendment violation by a government employee was sufficiently substantial to vest jurisdiction in the federal district court. Having jurisdiction, the district court adjudicated the pendent state claim and thus rendered unnecessary a decision on the constitutional question. This procedure provides an interim solution to a problem created by the Supreme Court's decision in *Monroe v. Pape*, which held that municipal corporations could not be sued under section 1983. It likewise is consistent with the Court's holding in *Aldinger v. Howard*, which precludes the joinder of a pendent claim against a separate party, because the municipal corporation would be the defendant in both the federal and state claims. In providing a federal forum in which victims of constitutional infringements by municipal employees can sue the municipalities directly, this approach permits complete economic remuneration for those plaintiffs who, for a variety of reasons, otherwise might be unable to recover from the particular wrongdoer.

82. *Hagans v. Lavine*, 415 U.S. 528, 542-43 (1974) (citing *Bell v. Hood*, 327 U.S. 678 (1946)).