Constitutional Torts: Section 1983 Redress for the Deprived Debtor
NOTES

CONSTITUTIONAL TORTS: SECTION 1983 REDRESS FOR THE DEPRIVED DEBTOR

Section 1983 of the Civil Rights Act may well rival section 10b of the Securities and Exchange Act in the volume of federal litigation it has precipitated. Indeed, newspaper headlines tout with increasing frequency the demise of public officials held personally liable for damages caused by their official conduct. Often, liability is imposed under section 1983 because the plaintiff was deprived of a newly-surfaced constitutional right which previously lurked in obscurity behind broad concepts such as equal protection, privacy, or due process. Among these astounded officials have been prison and correction officers, public employers, school board superintendents, law enforcement officers, and zoning boards.¹

Supreme Court decisions in 1969 and 1972, moreover, portend the addition of the ubiquitous creditor to the growing list of section 1983 defendants. For years, creditors and secured parties have garnished, repleved, repossessed, and attached the property of defaulting debtors without the burden of a judicial hearing, unaware that such seemingly harmless conduct might subject them to personal liability to the debtor. But *Sniadach v. Family Finance Corp.*, ² *Lynch v. Household Finance Corp.*,³ and *Fuentes v. Shevin*,⁴ when read together, suggest that such prejudgment seizures are violative of the due process clause of the fourteenth amendment, and that if those practices are effected, the aggrieved debtor may obtain relief in federal court under section 1983 of the Civil Rights Act.

The thesis question of this Note is whether such a suggestion is indeed tenable. In forming an affirmative answer to this inquiry, the development of section 1983 must be considered, and an analysis of its essential elements must be undertaken.

3. 92 S. Ct. 1113 (1972).
The Evolution of Section 1983

Section 1983—Its Beginning

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.\(^5\)

A creditor's liability, to be sure, is not immediately evident from the face of the statute; the success of any action under section 1983 will be determined by the meaning ascribed to the terms "rights . . . secured by the Constitution" and "color of [law]."\(^6\) Since there are to date unanswered questions concerning the interpretation of these terms, and since the precise intent and consequent use of section 1983 is unsettled, a brief look at its history and judicial development is necessary.

The statute derived from an attempt by the Reconstruction Congress to impress upon the states some of the ideals for which the Civil War had been fought. After prohibiting slavery via the thirteenth amendment, Congress passed the Freedmen's Bureau Bill and a concurrent civil rights act,\(^7\) which together were intended to extend legislative protection to all United States citizens who were victimized because of their status as former slaves or Negro sympathizers. Neither bill was designed exclusively to protect Negroes, although both were meant to prohibit atrocities committed by an individual or the state.\(^8\)


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

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

\(^6\). See note 62-85 infra & accompanying text.

\(^7\). Act of April 9, 1866, 14 Stat. 27 (1866).

The Act of April 9, 1866, did not satisfy its major proponents. They felt that it was susceptible to repeal by a less sympathetic future Congress. Thus, a permanent solution was attained by the passage of the fourteenth amendment, which was intended to include all the provisions and protections that the 1866 Act had extended to its beneficiaries.9

Notwithstanding its lofty purpose, the fourteenth amendment failed to accomplish the desired result. Reconstruction brought bitter political conflict to the legislature, accompanied by rampant lawlessness throughout the South. To combat this disruption, as well as to assure the amendment's enforcement, Congress passed the Act of April 20, 1871. Section 1 of this act was later codified in section 1983.

The purpose of section 1983 was manifest, but its scope and implementation were not clear; although it was enacted to assure federal control in the face of shirked state responsibility, the class of persons sought to be protected was the subject of varied opinions. Some Congressmen voted for its passage in the belief that it was to be applied only in alleviating the plight of Negroes. Both the Congressional floor debates11 and American history lend credence to this view. But more reliable evidence of what Congress intended is to be found in the introductory speech of the bill's floor manager:

The model [for section 1 of the 1871 Act] will be found in the second section of the act of April 9, 1866, known as the "civil rights act." That section provides a criminal proceeding in identically the same case as this one provides a civil remedy for, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery. This section of the bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people, where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.12

9. Id. at 1328-29.
12. Id. at appendix, at 68 (emphasis supplied).
Other than these two views concerning the scope of section 1983, manifestations of legislative intent were scarce. It was thus left to the courts to decide just how the act was to work; in the century following its enactment, section 1983 became one of the most potent weapons available to ensure the protection of fundamental human rights.

Section 1983 in the Supreme Court

The developing judicial interpretation of section 1983 has been anything but predictable. Although the instant provision was not specifically at issue, in United States v. Cruikshank,\textsuperscript{13} the Supreme Court in 1875 undermined the 1866 Civil Rights Act by holding that an action alleging a denial of equal protection could not be maintained under the fourteenth amendment, since the duty insuring equality of treatment “was originally assumed by the States; and it still remains there.”\textsuperscript{14} The same reasoning was advanced in rejecting an alleged violation of the plaintiff's first amendment right of assembly.\textsuperscript{15} Section 1983 also was subjected to this restrictive interpretation. In Holt v. Indiana Manufacturing Co.,\textsuperscript{16} the statute was invoked in 1899 by an Indiana corporation to challenge an allegedly unconstitutional assessment of personal taxes. The Court branded section 1983 in one sentence with an interpretation that was to last for 72 years: “Assuming that [the civil rights acts] are still in force, it is sufficient to say that they refer to civil rights only and are inapplicable here.”\textsuperscript{17} Thus Holt definitively excluded property right infringement from the purview of the statute.

At the beginning of the twentieth century, then, section 1983 was limited to unconstitutional state deprivations of civil rights, and the words “secured by the Constitution” were construed to apply only to a deprivation of newly conferred rights which were granted concurrently with United States citizenship under the fourteenth amendment. Since state infringement of property rights already had been considered a violation before the amendment was adopted, it was not redres-sable in federal court. This interpretation endured, and few plaintiffs

\textsuperscript{13} 92 U.S. 542 (1875).
\textsuperscript{14} Id. at 555.
\textsuperscript{15} Id. at 552.
\textsuperscript{16} 176 U.S. 68 (1900).
\textsuperscript{17} Id. at 72.
DEPRIVED DEBTORS

attempted to invoke section 1983 to protect an economic interest for
many years thereafter.18

In 1939, the Supreme Court ruled on a case which helped to move
property interests a bit closer to section 1983 protection. In Hague v.
CIO,19 the members of a labor union sued several Jersey City officials
alleging a conspiracy to deprive union members of their first amend-
ment rights of assembly and free speech. Unlike Cruikshank, Hague
recognized federal jurisdiction for this cause of action, interpreting
"secured" to mean "protected." It no longer mattered that the rights
deprived were redressable in the state courts prior to the adoption of
the Constitution; if the Constitution provided protection as well, a
federal suit could be maintained to guarantee that protection. The
burden of Cruikshank was gone. Section 1983 could be invoked, as it
was here, to seek a remedy for the deprivation of constitutional rights
by the state. Yet one important limitation remained. Justice Stone
pointed out that the jurisdictional counterpart of the act gave federal
courts authorization to hear section 1983 cases without regard to the
amount in controversy. This was seemingly irreconcilable with the
Judiciary Act of 1875 which gave federal courts jurisdiction only in
cases where the amount in controversy met a specified minimum.20 The
Justice resolved the conflict by interpreting the two provisions to-
gether to mean that Congress intended section 1983 to be applied where
the amount in controversy was not susceptible of monetary valuation.
What resulted was a statement that remained precedent until 1972:

The conclusion seems inescapable that the right conferred by the
Act of 1871 to maintain a suit in equity in the federal courts to
protect the suitor against a deprivation of rights or immunities
secured by the Constitution, has been preserved, and that whenever
the right or immunity is one of personal liberty, not dependent for
its existence upon the infringement of property rights, there is
jurisdiction in the district court ....21

18. Comment, The Civil Rights Act: Emergence of an Adequate Federal Civil
20. Act of March 25, 1875, ch. 137, 18 Stat. 470. The jurisdictional amount then was
$500. It subsequently has been raised several times to the present $10,000. 28 U.S.C.
21. 307 U.S. at 531-32 (Stone, J., separate opinion) (emphasis supplied). Note that
no majority opinion was written in Hague; Justice Stone's opinion carried as much
weight with the lower courts as did Justice Roberts'. But see note 41 infra.
Thus, the property right-personal right distinction was perpetuated, but in a new and less compelling form.

During the next decade, further qualifications were placed upon the statute. *United States v. Classic* and *Screws v. United States* reinforced each other in defining deprivation under "color of state law" as "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law..." Both cases dealt with section 242 of the United States Code, a criminal provision closely approximating the core of section 1983, and they were important insofar as they aided in the construction of the statute when later cases arose. They were especially meaningful in deciding that actions contrary to state law could be just as culpable as actions in pursuance of it. Earlier Supreme Court decisions had held that the former were not actionable under section 1983.

Another significant case was *Snowden v. Hughes*, which was more relevant for what it refused to decide than for what it actually held. The Court found that the denial by the state of the right to run for political office was neither actionable under the fourteenth amendment nor cognizable under section 1983. Of particular importance was the Court's discussion of the relationship between sovereign immunity principles and section 1983. Although the Court found it unnecessary

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22. 313 U.S. 299 (1941).
23. 325 U.S. 91 (1945).
24. 313 U.S. at 326.
25. Section 242 reads:
   Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.
26. *See*, e.g., *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Myers v. Anderson*, 238 U.S. 368 (1915). These were all cases in which a state official was held to be acting "under color of law" when he deprived Negroes of their right to vote. *See also* notes 75-85 infra & accompanying text.
27. 321 U.S. 1 (1944).
28. For a later treatment of this question, see *Tenney v. Brandhove*, 341 U.S. 367 (1951). *See also* notes 104-38 infra & accompanying text.
to decide whether the Snowden facts could be considered state action within the meaning of the statute, it impliedly recognized that state officials and agencies could be held liable in a proper fact situation.

In 1961, another major step was taken toward expanding and clarifying some of the unsettled questions concerning section 1983 actions. In *Monroe v. Pape*, the several Chicago policemen broke into the plaintiff's home in the early hours of the morning without a search warrant and made his family stand naked in the living room while they ransacked their house. Mr. Monroe was then taken into custody and detained for 10 hours while he was questioned about a murder that had taken place two days earlier. He was given no hearing, was allowed to make no telephone calls, and subsequently was released without charges being made against him. The Monroes sued both the City of Chicago and the policemen under the Civil Rights Statute.

Justice Douglas, speaking for the Court, examined in detail the historical development of section 1983. Although the facts seemed ready-made for an application of section 1983, he concluded that the statute was not intended to expose municipalities to liability, and thereby dismissed the complaint against the City of Chicago. But in saying that "19[83] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," the Court proceeded to hold that the plaintiffs had stated a cause of action against the policemen. The defense of immunity seemingly was unavailable to state officials or, at least, law enforcers. The opinion also sounded the final demise of the state versus national rights doctrine, stating that if a valid cause of action is alleged, section 1983 meant to establish an original federal forum for redress regardless of the fact that a state remedy was available: "[T]he latter need not be first sought and refused before the federal one is invoked." The Supreme Court thus further opened the door to plaintiffs who formerly could not have maintained an action under the statute. Some questions remained unanswered, one of which was whether a cause of action could be maintained for the unconstitutional deprivation of a mere property right through state action. An attempt was made to resolve those issues in the following years.

30. Id. at 187.
31. This interpretation was short-lived. See notes 104-09 infra & accompanying text.
32. 365 U.S. at 183.
33. See notes 41, 49-51 infra & accompanying text.
Prior to 1969, it was not apparent that prejudgment seizures were violative of the due process clause of the fourteenth amendment; thus, section 1983 was of little value to aggrieved debtors. In the event of a debtor's default, the creditor usually sought a writ from the nearest court clerk and either garnished the debtor's wages or repossessed the goods as provided for by an appropriate state statute.\textsuperscript{34} If the debtor responded by alleging a denial of due process of law, the courts typically denied relief. Judicial acquiescence normally was explained in language similar to that used by the Wisconsin Supreme Court in \textit{Family Finance Corp. v. Sniadach}, where it was said that "garnishment before judgment proceedings does not involve any final determination of the title to a defendant's property, but merely preserves the status quo thereof pending determination of the principal action. The defendant receives notice and a hearing before being permanently deprived of his or her property."\textsuperscript{35}\textsuperscript{35} Furthermore, it was said that an action alleging a denial of due process could not be brought in a federal court under section 1983 because the personal rights-property rights distinction was still applicable under the \textit{Hague} reasoning.\textsuperscript{36}

A trio of recent Supreme Court decisions have reversed this rationale. The first was \textit{Sniadach v. Family Finance Corp.}\textsuperscript{37} At issue was the Wisconsin wage garnishment statute which permitted the creditor's lawyer, upon request to the court clerk, to serve his debtor's employer with a summons and to compel the debtor's wages to be frozen until the merits of the creditor's claim could be determined in a subsequent suit.\textsuperscript{38} Mrs. Sniadach protested the garnishment order, alleging that the Wisconsin statute which allowed her wages to be withheld was an

\textsuperscript{34} Before it was amended, the New York replevin statute allowed seizure of goods by the sheriff upon delivery to him of an affidavit, requisition, and undertaking by the alleged rightful owner. \textsc{N.Y.R. Civ. Prac. 7102(a)} (McKinney 1963). The statute was changed to comply with the Supreme Court's ruling in \textit{Fuentes v. Shevin}, 92 S. Ct. 1983 (1972). The statute now requires that the sheriff seize goods only in pursuance of a judicial order. \textsc{N.Y.R. Civ. Prac. 7102(a)} (McKinney 1961).

\textsuperscript{35} \textit{37 Wis. 2d} 163, \textit{---}, \textit{154 N.W.2d} 259, 262 (1967), \textit{reversed}, 395 U.S. 337 (1969). There were, of course, other approaches. See Note, \textit{Protecting the Low Income Consumer: Procedural Due Process Revisited}, 14 \textsc{Wm. & Mary L. Rev.} 337, 341 [hereinafter cited as \textit{Due Process Revisited}].

\textsuperscript{36} But see note 41 infra.


unconstitutional violation of due process,\textsuperscript{39} inasmuch as it deprived her of the use and enjoyment of her money until the trial on the merits and forestalled any opportunity for her to forward any defense she might have against the creditor. The Court agreed: "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing, this prejudgment garnishment procedure violates the fundamental principles of due process."\textsuperscript{40}

It should be noted that Mrs. Sniadach did not sue Family Finance in a federal court under section 1983; her claim of a due process violation was made in a show cause order following the institution of the garnishment proceedings. At the time of her contention, she would have had little success under the act—she was alleging infringement of a mere property right,\textsuperscript{41} and her creditor was an individual, not the state. Moreover, the Court's holding that prejudgment garnishment absent prior notice and hearing was a violation of due process did not establish the jurisdictional element necessary for a section 1983 action.

\textsuperscript{39} Mrs. Sniadach also alleged an equal protection violation, which was not considered either by the Wisconsin Court or by the Supreme Court.

\textsuperscript{40} 395 U.S. at 341-42.


Due to the split of authority, for purposes of discussion Hague will be presumed to be a barrier to a section 1983 suit until Lynch definitively eliminates the personal-property distinction.
There was, to be sure, much litigation following Sniadach on behalf of litigants who sought rulings of unconstitutionality for all types of prejudgment seizures, including garnishment, replevin, benefit termination, and liens. Some courts restricted the Sniadach principle to wage garnishments, while others extended it to all types of non-notice, non-hearing seizures. Meanwhile, the lower federal courts began to relax the requirements for section 1983 jurisdiction. The specter of Hague remained, but a trend away from its restrictions was evident. A Connecticut housewife finally won a significant battle for all aggrieved debtors—access to the federal courts.


48. See note 41 supra.
In *Lynch v. Household Finance Corp.*, Mrs. Lynch brought suit in a Connecticut district court under section 1983, charging that the defendant's prejudgment garnishment of her bank account was violative of due process under *Sniadach*. In reversing the district court's conclusion that it had no jurisdiction to entertain the suit, the Supreme Court swept away a 72-year-old barrier by saying: "This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of 1343 (3) jurisdiction." Today we expressly reject that distinction." The specter of *Hague* was gone. Section 1983 had reached its full potential, and its utility for an unconstitutionally-deprived debtor had been maximized.

The decision in *Fuentes v. Shevin* can be viewed as an expansion and clarification of *Sniadach*. *Fuentes* resolved a lingering lower court conflict, holding broadly that the right to notice and a hearing before garnishment was not limited to wages. Since the due process clause forbids the deprivation of any property without the protections of constitutionally-mandated procedure, "it is not the business of a court adjudicating due process rights to make its own critical evaluation... and protect only [that property which], by its own lights, [is] 'necessary'." The Florida and Pennsylvania prejudgment replevin statutes were thus held unconstitutional. Moreover, the conclusion was inescapable that, except in extraordinary situations, *any* prejudgment seizure of a debtor's property would be violative of due process unless he was afforded notice and an opportunity to be heard. It is true that some exceptions to notice and hearing remained, but it was equally true that, in the ordinary situation, "damages may... be awarded... for the wrongful deprivation."

In sum, the Supreme Court has developed the 1871 Civil Rights Act to such an extent that, as far as the debtor is concerned, section 1983 is useful to him today as follows:

1) Except in a limited number of circumstances, prejudgment seizures of property are violative of due process of law.

2) If a debtor is deprived of his property in this manner, he may seek redress in a federal court.

49. 92 S. Ct. 1113 (1972).
50. See note 5 *supra* (footnote supplied).
51. 92 S. Ct. at 1117.
53. *Id.* at 1999.
54. *Id.* at 1995.
3) If the creditor, who is presumed to know the law, wrongfully deprives a debtor of his property pursuant to a state statute, he is acting under "color of state law."

4) The debtor may obtain damages or injunctive relief for the wrongful deprivation.

If there were nothing more to be considered, a debtor's action for a wrongful taking would, indeed, be simple. But despite the broad latitude the Supreme Court has afforded the debtor, there are a number of other obstacles that must be overcome before there can be any assurance that such a suit will be successful. These issues are the subject of the remainder of this Note, and involve: private repossession, creditors' defenses, waiver of due process, injunctive relief, the federal anti-injunction statute, damages which can be recovered, and retroactive application of the Sniadach-Lynch-Fuentes evolvement of section 1983.

STATE ACTION AND DUE PROCESS

The primary element for successful recovery against a wrongdoing creditor is, of course, a statutorily-maintainable cause of action. The Federal Rules of Civil Procedure permit a defendant to move for dismissal on the pleadings if the plaintiff has failed to state a claim upon which relief can be granted. The debtor's complaint, therefore, must comply precisely with the elements of a section 1983 cause of action if he is to do more than visit the courtroom. As has been discussed above, section 1983 requires that the plaintiff be 1) deprived of a constitutional right, 2) under color of state law. A debtor suing for a...

55. See notes 94-103 infra & accompanying text.
56. See notes 104-78 infra & accompanying text.
57. See notes 139-40 infra & accompanying text.
58. See notes 179-98 infra & accompanying text.
59. See notes 182-98 infra & accompanying text.
60. See notes 199-249 infra & accompanying text.
61. See note 240 infra & accompanying text.
63. The Federal Rules of Civil Procedure require that the complaint contain a short statement of jurisdictional grounds, a short and plain statement of the claim, and a demand for judgment. Fed. R. Civ. P. 8(a). A section 1983 claim must set forth the jurisdiction as established by section 1343(3), a prayer for injunctive or monetary relief or both, and, most importantly, a deprivation of a constitutional right under color of state law. The averment of deprivation under color of state law is the subject of this discussion.
wrongful seizure presumably has no problem satisfying the first requirement—Sniadach and Fuentes say that a prejudgment taking of property without notice and without a hearing violates due process of law, and Lynch holds that proprietary due process violations are cognizable under section 1983. The second element of a section 1983 action—that the deprivation be made under color of state law—poses more serious problems.

As will be recalled, the generally accepted definition of "color of state law" was announced by Justice Stone in United States v. Classic.65 "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. ..."66 Justice Douglas in Screws v. United States67 clarified a distinction that previously had been drawn between state law and authority of state law: "[A]cts of officers in the ambit of their personal pursuits are plainly excluded [from the definition]. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."68 Since the common law had established that any agent or officer of the state acts for the state itself, there was "state action" so long as the officer was acting within the scope of his duty. If, while performing the duties of his office, he deprived another of a constitutional right, there was a valid claim against him under the fourteenth amendment and its statutory counterparts.69

Cases subsequent to Classic and Screws further refined this definition of "color of law" until it became indistinguishable from the related concept of "state action."70 United States v. Price,71 for instance, held that one need not be a state official to be acting under color of state

65. 313 U.S. 299 (1941).
66. Id. at 326.
67. 325 U.S. 91 (1945).
68. Id. at 111.
law. A private individual wilfully participating in an activity with the state or its agents could be said to have acted under color of state law. Inasmuch as the classic definition of “color of law” assumed that the defendant would be a state official, cases such as Price all but obliterated the distinction.  

Assuming, then, that only state action serves to validate a section 1983 claim, it is necessary to define that term within the meaning of the Act. All the definitions the courts have proffered have arisen in the context of particular fact situations, and the concept varies with the circumstances in which it is raised.

Clearly, an official performing an authorized act within the scope of his duties is acting under color of state law, and state action is involved. This includes the court clerk issuing a writ, the sheriff repossessing collateral, or the judge entering an order confessing judgment. In the absence of immunity, these individuals could be sued under section 1983 if their actions are unconstitutional vis-à-vis the plaintiff. However, most of the questions arise when the activities are performed by private persons, and when phrased in the context of the thesis of this Note, the crucial inquiry is whether a debtor can sue his creditor, who normally is not a state official. The courts have helped formulate some answers.

The most noted case to deal with the question of state action is Shelley v. Kraemer, where a Negro purchased a house in Kraemer’s neighborhood. Kraemer sued to force the seller to abide by the terms of a re-
strictive covenant prohibiting the sale of homes to Blacks. Since a long line of precedents had established that mere voluntary private discrimination was not a constitutional wrong, the lower court refused to take cognizance of Shelley's equal protection allegation; the necessary state action for a fourteenth amendment violation was absent. Although the Supreme Court reaffirmed the legality of purely private discrimination, it held that Shelley had a valid constitutional claim, since the state court previously had interpreted the covenant to allow discrimination, thereby sanctioning its content. After Shelley, state action logically might be inferred from judicial sanction of any private conduct. But the enduring gloss of Hague has survived Lynch, and the lower courts have not been consistent in applying state action concepts where the conduct involves mere property rights unrelated to racial discrimination.\textsuperscript{78}

In addition to finding state action from judicial decisions, the Supreme Court has drawn a similar inference when a state constitution sanctions or encourages conduct violative of the United States Constitution. In Reitman v. Mulkey,\textsuperscript{77} the state of California amended its constitution to allow private discrimination by property owners. Since a state statute previously had prohibited such discrimination, adoption of the amendment was seen as state encouragement of unconstitutional activity, thus bringing the conduct within the ambit of the fourteenth amendment.

In terms of consistency of application, perhaps the most difficult context in which state action concepts have been examined occurs when the conduct involved has been authorized by common law, custom or usage, or other "generally understood practice of ancient and honorable lineage."\textsuperscript{78} The Supreme Court addressed this situation in Adickes v. S. H. Kress & Co.,\textsuperscript{79} when it held that state action existed where discriminatory customs which had no statutory or constitutional basis were enforced by local police officers. Regrettably, the Court's movement away from insistence on statutory or constitutional involvement as a


\textsuperscript{77} 387 U.S. 369 (1967).


\textsuperscript{79} 398 U.S. 144 (1970).
prerequisite to a finding of state action has been interpreted too re-
strictively by several lower courts. In rejecting state action claims based
on common law or custom, several courts\(^\text{80}\) have found the rationale
of \textit{Adickes} to be inapplicable. It is submitted, however, that these courts
overlook the teachings of \textit{Shelley v. Kraemer}, where the Court stated
clearly that "State action, as that phrase is understood for the purposes
of the Fourteenth Amendment, refers to exertions of state power in all
forms," \(^\text{81}\) and that "action is not immunized from the operation of
the Fourteenth Amendment simply because it is taken pursuant to the
state's common-law policy." \(^\text{82}\) The lower courts attempted to dis-
tinguish \textit{Shelley} and \textit{Adickes} on the ground that these cases involved
racial discrimination. Mere deprivation of property rights, they reason,
is not sufficient to trigger the \textit{Adickes-Shelley} extension of the state
action concept. It is submitted, however, that in view of \textit{Lynch}, this
distinction has become attenuated. Thus, a proper reading of \textit{Shelley},
\textit{Adickes}, and \textit{Lynch} suggests that prejudgment seizure cannot be dis-
missed from state action considerations merely because such seizure is
made pursuant to custom or common law rather than statutory or con-
stitutional provisions.

Still another issue regarding state action is whether conduct on the
part of a person, not a government official, will entail state involvement
sufficient to raise a fourteenth amendment question. In \textit{Hall v. Garson},\(^\text{83}\)
a landlord, in accordance with local statutory lien provisions, entered
a tenant's room and seized the tenant's television set as compensation
for rent due. In deciding for the plaintiff, the Court of Appeals for the
Fifth Circuit held such conduct to be state action. While the landlord
had no connection whatsoever with the state, her entry and seizure were
said to have been acts which had the characteristics of actions typically
performed by state officials.\(^\text{84}\)

\(^{80}\) See cases cited note 76 \textit{supra}.
\(^{81}\) Shelley v. Kraemer, 334 U.S. 1, 20 (1948).
\(^{82}\) Id.
\(^{83}\) 468 F.2d 845 (5th Cir. 1972), reaff'g 430 F.2d 430 (5th Cir. 1970). \textit{See also} Collins
\(^{84}\) This rationale presents what is called the "public function theory." It similarly
was adopted in United States \textit{v. Wiseman}, 445 F.2d 792 (2d Cir.), \textit{cert. denied}, 404
U.S. 967 (1971). In \textit{Wiseman}, the defendants were professional process servers employed
by a private organization. Instead of serving the summonses upon the named parties
at their ghetto residences, the defendants threw them into the sewer and falsely swore
to service. The supposedly-served parties, meanwhile, had default judgments entered
Thus, what once was a rather narrowly construed concept of “color of state law” has been transformed into the multifarious concept of state action. Included is judicial, legislative, or common law sanction; compulsion via custom; and actions which are characterized as functions of the state. These factors converge to provide substantial support for many claims based on section 1983. Thus, when the circumstances of a particular unconstitutional deprivation or seizure of property coexist with one of these categories of state action, a successful complaint should be possible. Even under expanded notions of state action, however, substantial difficulty might continue to be encountered in showing state involvement in the seizure. Discussion of this problem follows.

Seizure Involving State Officials

Satisfying Due Process: No Liability

Before determining which of the creditors’ remedies can be found to encompass unconstitutional state action, an assessment must be made of those which cannot. The guiding principle of Sniadach and Fuentes was that prejudgment garnishment, attachment, or replevin, without notice and a meaningful opportunity to be heard, are violative of due process against them. The court held that since the defendants were performing what is ordinarily a public function, any claim against them was maintainable under the due process clause. Accord, United States v. Barr, 295 F. Supp. 889 (S.D.N.Y. 1969).

85. A recent state action case, Moose Lodge v. Irvis, 92 S. Ct. 1965 (1972), demonstrates how the state can become an unwitting party to private action. The defendant-in-error sued the lodge under the equal protection clause for refusing to serve him because he was black. Irvis’ allegation of state action grew from the fact that the Pennsylvania Liquor Control Board regulated all local licensees, including the Moose Lodge. Such regulation was held insufficient to support a finding of state action. The Court did, however, find state action in the fact that a state statute compelled the board to require its licensees to adhere to their respective constitutions and by-laws. Since Moose Lodge’s charter compelled racial discrimination, it had deprived Irvis of equal protection under color of state law. See also Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

86. Attachment in this sense is used synonymously with garnishment where a distinction is made between the two procedures. Technically, garnishment is a levy upon property belonging to the debtor but in the hands of a third person, or upon a debt owed to the debtor by a third person, the garnishee. Attachment, on the other hand, is a levy upon property which the debtor owns and has in his possession. The latter should be distinguished from foreign attachment, discussed in note 89 infra & accompanying text. Whether it is called garnishment or attachment, the applicable constitutional principles afford a parallel result. See Randone v. Appellate Dept., 5 Cal. 3d 356, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).
The rationale of this premise is that every person is entitled to a hearing before being deprived of his property. The obvious result of this rule is that prejudgment seizures which occur after notice is given and after a hearing is provided, as well as post-judgment seizures, are not violative of the Constitution. The question of state action is, of course, irrelevant if the creditor's claim has been heard and the debtor's defenses have been asserted in a proceeding which has provided a fair hearing of the disputed claims. Due process will have been fulfilled and there is no constitutional violation upon which to base a complaint under section 1983.

A third procedure arguably beyond objection is foreign attachment, where the debtor is a resident of a state other than that in which his creditor lives, and the creditor executes upon in-state property belonging to the debtor and prosecutes his claim only after the property is in the custody of the court. In such situations, the debtor often cannot be notified, and a viable justification for dispensing with procedural due process may be presented. The court's inquiry in such a case should not, however, be limited to whether the debtor is absent from the forum state. Several opinions have indicated that where in personam jurisdic-

87. Some courts have held prejudgment replevin unconstitutional on yet another ground, that of unreasonable search and seizure. Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), held, for example, that California's claim and delivery (replevin) law violated the fourth amendment in that the issuance of the writ to the sheriff was merely ministerial, without prior determination as to the probable cause of the creditor's right to the property. The California court also rejected the argument that the debtor waived his rights by admitting the sheriff into his home, concluding that the debtor was precluded from denying entry to a man who represented the "intimidating presence of the law." Finally, the court said that the public interest in promoting commerce or extending credit was not sufficient to forgo the fourth amendment requirement of a search warrant. Accord, Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970).


88. Although a section 1983 suit would not lie following a postjudgment seizure, the debtor could file suit in a state court alleging unconscionability of the sales contract. Uniform Commercial Code § 2-302. See Kosches v. Nichols, 10 UCC REP. SERV. 147 (1971). Garnishment and replevin are provisional remedies, the benefit of which lies in the avoidance of an expensive and time-consuming adversary adjudication. Since lack of notice and a hearing were the precise elements prejudgment seizures were designed to circumvent, once the creditor is forced to appear in court, there is no need for him to garnish or replevy—he will have his claim validated or invalidated and, in the former case, can merely execute the judgment. It follows that, except where judgment is by default, summary creditor remedies have been all but eliminated.
tion is readily obtainable, special protection of a state or creditor interest does not justify dispensing with the constitutional requirements of notice and hearing, even though the debtor resides in a foreign state.\textsuperscript{89}

The \textit{Fuentes} decision suggests circumstances in addition to foreign attachment where notice and a hearing may be unnecessary:

There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly-drawn statute, that it was necessary and justified in the particular instance.\textsuperscript{90}

It is not entirely clear from this language whether all three requirements must coalesce before the "extraordinary circumstances" exception arises. A review of the cases cited by the court, however, indicates that all three factors were present in each case.\textsuperscript{91} Thus, the possibility that a creditor will succeed in an argument that the circumstances of his case fall within the "extraordinary" category are at best speculative; the specific statute and judicial attitude of the respective jurisdiction should be consulted and, if a debtor's property is seized summarily on a ground which fails to fit the policies elucidated by the courts, a sec-

\textsuperscript{89} An inference can be drawn that the Court in \textit{Sniadach v. Family Fin. Corp.}, 395 U.S. 337 (1969), was making precisely this determination. Justice Douglas stated:

But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts. . . . Petitioner was a resident of this Wisconsin community and \textit{in personam} jurisdiction was readily obtainable.


\textsuperscript{90} 92 S. Ct. at 1999-2000 (footnotes omitted).

\textsuperscript{91} \textit{See} \textit{Due Process Revisited}, supra note 35 at 344.
tion 1983 complaint would not be without merit.\textsuperscript{92} This is especially true in view of the liberal trend being evidenced in the federal courts.\textsuperscript{93}

\textit{Unconstitutional Deprivation: Liability}

Assuming \textit{arguendo} that "extraordinary circumstances" are not pertinent and that due process has been violated, it is necessary to return to the problem originally raised—what actions of the creditor are to be considered state action? Two types of seizures must be considered. The first involves a seizure pursuant to a prejudgment garnishment, attachment, or replevin statute which does not require notice or a hearing and which does not set forth narrowly drawn circumstances in which such a seizure is permitted. In this situation, the state usually is an active party (in garnishment and attachment via a judically-issued writ and in replevin by a sheriff's seizure). Thus, both elements of a section 1983 allegation, state action and unconstitutional infringement, are present. The second type of seizure, private repossession, presents a more perplexing problem.

Section 9-503 of the Uniform Commercial Code provides:

\begin{quote}
Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party \textit{may proceed without judicial process} if this can be done without a breach of the peace or may proceed by action.\textsuperscript{94}
\end{quote}

It is important to note that two requirements are essential to private repossession: The creditor must be a secured party and the debtor must be in default. Since most consumer credit sales are made under installment plans, the creditor normally retains a security interest in the merchandise and will take the steps required to assure his status as a secured party. The second question, whether there actually has been a default,

\textsuperscript{92} In Blair v. Pitchess, 5 Cal. 3d 258, 277, 486 P.2d 1242, 1256, 96 Cal. Rptr. 42, 56 (1971), for example, the Supreme Court of California found that the asserted need for promptness because of the likelihood that the debtor would abscond with the property was not sufficient justification for eliminating due process requirements. \textit{But cf.} Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970). \textit{See generally} Clark, \textit{Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation}, 51 Ore. L. Rev. 302, 340 (1972) [hereinafter cited as Clark]; Smith, \textit{Sniadach and Summary Procedures: The Constitution Comes to the Marketplace}, 5 Ind. L.F. 300 (1972).

\textsuperscript{93} \textit{See} cases cited note 41 \textit{supra}.

\textsuperscript{94} \textit{Uniform Commercial Code} § 9-503 (emphasis supplied).
is at the core of most self-help seizures; in most instances, however, the issue is determined unilaterally by the creditor, and due process requirements are bypassed. The question arises whether Code section 9-503 is unconstitutional state action within the parameters of *Fuentes*, and, if so, whether insertion of similar terms in the installment contract will ameliorate its taint. As discussed above, several lower courts have confronted this important issue.

"Private" Repossession—Is the State a Party?

Two California federal district courts have reached opposite conclusions concerning the effect of a contractual adoption of section 9-503 terms. Both *Adams v. Egley* and *Oller v. Bank of America* dealt with installment sales contracts which contained a provision permitting private repossession upon default. It is submitted at the outset that, based upon the long-standing precedents regarding "color of law" which have proliferated since *Shelley v. Kraemer*, the self-help section of the Code, absent a contractual inclusion, will constitute state action. Indeed, it is a state statute sanctioning the very practices prohibited by *Fuentes*, and if a creditor merely follows the encouragement of section 9-503, a section 1983 suit may succeed under the due process clause. Adams and Oller, however, reach opposite conclusions when the terms of section 9-503 are inserted in an installment sales contract.

In *Adams*, (a pre-*Fuentes* decision which presaged the rationale espoused in *Fuentes*) the court found that section 9-503 was state sanction of an unconstitutional taking and that its insertion into a contract did not change its character. The Code, in essence, inspired Egley to provide for private repossession in the agreement: "[T]he agreements defendant creditors were persuaded or induced to include repossession by the fact that such repossession was permitted by the statute." *Oller*, on the other hand, found neither the Code nor a contractual adoption of it to involve state action. The court reasoned that repossession was a well established common law remedy which had

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95. 338 F. Supp. 614 (S.D. Cal.), appeal docketed, No. 72-1484 (9th Cir. 1972). This case was consolidated with Posadas v. Star & Crescent Fed. Credit Union.
97. 334 U.S. 1 (1948). See note 75 supra & accompanying text.
98. One author has argued that even if private repossession should be found not to be encouraged by the state, there is state action in the issuance of deficiency judgments which follow most repossessions. Clark, supra note 92, at 329. See note 102 infra.
been approved judicially before the enactment of the UCC.\textsuperscript{200} It also distinguished \textit{Adams} by discounting its reliance on \textit{Reitman v. Mulkey}. Concepts of state action as applied in the civil rights context were not felt to be relevant in property rights cases.\textsuperscript{201} The Supreme Court has yet to decide the question, but, as noted above, it would seem that despite the fact that repossession existed before the Commercial Code sanctioned it, it cannot stand in the face of \textit{Fuentes}, \textit{Kraemer}, and \textit{Adickes} the right to due process is no less sacred because the goods are seized by a man without a badge,\textsuperscript{202} and the distinction drawn in \textit{Oiler} between civil rights and property rights may be untenable after \textit{Lynch}.\textsuperscript{203} Indeed, perhaps \textit{Adams'} reliance upon \textit{Reitman v. Mulkey} was misplaced. Instead, \textit{Adams} should have relied on the more compelling logic of \textit{Shelley} and \textit{Adickes}.

\textsuperscript{100} 342 F. Supp. at 23.

\textsuperscript{101} Another question which arises from contractual private repossession is whether the debtor has waived his due process rights simply through the execution of the agreement. Due process rights can be waived by contract, but it is likely that in consumer retail installment agreements the disparity of bargaining power is so great that waiver would be disfavored. \textit{See} notes 139-140 infra & accompanying text.

\textsuperscript{102} A recent case dealing with similar facts is \textit{Messenger v. Sandy Motors, Inc.}, 121 N.J. Super. 1, 295 A.2d 402 (1972). The court followed \textit{Oiler} in upholding the constitutionality of self-help, resting its decision on the prior legal recognition of repossession, the difficulty of altering the nation's credit system to conform to the \textit{Adams} requirements, and the recognition that automobile buyers are "well informed" of the likelihood of repossession if they do not pay. It concluded by taking judicial notice of the studies that have been made of section 9-503 and its consequent lack of change. \textit{Accord}, \textit{Greene v. First Nat'l Bank}, 348 F. Supp. 672 (W.D. Va. 1972). \textit{See also} McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971).

It is submitted that the distinction between prejudgment replevin and self-help will be ephemeral. As noted in the text, \textit{Shelley}, \textit{Fuentes}, and \textit{Adickes} seem to compel a different result. Moreover, the mere fact that the courts had sanctioned private repossession before the adoption of the Code does not make fundamental constitutional safeguards any less necessary. Thus, the conclusion is inescapable that such widespread judicial sanction involves state action and therefore necessitates a holding that self-help \textit{is} unconstitutional. Since the application of notice and hearing requirements to private repossession before the adoption of the Code does not make fundamental constitutional safeguards any less necessary. Thus, the conclusion is inescapable that such widespread judicial sanction involves state action and therefore necessitates a holding that self-help \textit{is} unconstitutional. Since the application of notice and hearing requirements to private repossession will require a major overhaul in credit selling practices, \textit{Messenger}, \textit{Greene}, \textit{Oiler}, and \textit{McCormick} probably presage a Supreme Court determination of the self-help question. However, in light of the fact that self-help reaches beyond car buying, affects the great majority of low-income consumers who buy on credit, and is, after all, a deprivation of property without due process of law, the \textit{Fuentes} rationale presumably would justify a similar result when the Court examines section 9-503.

\textsuperscript{103} \textit{See} text accompanying notes 49-51 \textit{supra}.
DEFENSES

Although the debtor may be able to surpass the state action hurdle and establish a constitutional claim utilizing section 1983, there are numerous defenses, such as the defendant's immunity, waiver by the debtor, the statute of limitations, specific intent, and survival of the action, which must be overcome.

Immunity

Section 1983 provides that every person who deprives a United States citizen of a constitutional right under color of state law shall be liable to the injured party. A literal reading of the statute would suggest that the doctrine of official immunity could not be raised as a defense in a section 1983 claim for damages. The first time the question was raised, the Court of Appeals for the Third Circuit came to precisely that conclusion. In Picking v. Pennsylvania R. R., the court held the doctrine of official immunity inapplicable as a defense to protect the governor of Pennsylvania and a justice of the peace who had extradited the plaintiff without due process of law. However, six years later the Supreme Court in Tenney v. Brandhove held that Congress could not have intended the Civil Rights Act to have such an unqualified interpretation and allowed the California Senate Committee on Un-American Activities to assert immunity as a defense. Although the case dealt only with legislative immunity, the door was opened thereby and the defense was soon extended to other officials. It is now well established that the common law doctrine of official immunity is available as a defense to a section 1983 suit.

Under the common law, the immunity afforded judges, legislators and high ranking executives was absolute, but lower ranking administrative officials were granted immunity only if their acts were discre-
tionary, as opposed to ministerial. In addition, lower ranking officers could not claim immunity unless they were acting in good faith.  \(^{109}\)

An analysis of the immunity doctrine in the context of the debtor-creditor relationship is necessary to clarify the policy considerations underlying the doctrine and its limitations. There are potentially four party-defendants to whom an aggrieved debtor may look for recovery: The sheriff who replevies or levies upon the debtor’s property, the court clerk who issues the writ, the creditor’s lawyer, or the creditor and his collection agents. Due to the fact that immunity would preclude recovery against any of these parties, separate consideration of each relationship is essential.

The Creditor’s Lack of Immunity

The doctrine of immunity traditionally has been employed for the purpose of promoting the “fearless and impartial” execution of duty by officials charged with the responsibility of making judicial, legislative, or executive policy decisions.  \(^{110}\) Since this policy would not be served by invoking immunity on behalf of the creditor, the doctrine clearly is inapplicable to him.

The Sheriff

State law enforcement officers have been frequent targets of section 1983 suits,  \(^{111}\) and there is little doubt that their actions are “under color of” state law. In *Monroe v. Pape*,  \(^{112}\) it will be recalled, the Supreme Court held that certain Chicago policemen were subject to a claim for damages under section 1983. Although the policemen did not rely on immunity, some courts concluded that the Supreme Court had abrogated the defense as it applied to section 1983 actions.  \(^{113}\) The Court laid


\(^{110}\) In *Pierson v. Ray*, 386 U.S. 547, 554 (1967), the Supreme Court stated that it is in the public’s best interest that judges should be allowed the freedom necessary to exercise their functions with independence and without fear of consequences. This was a reaffirmation of *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). For further discussion of the rationale underlying official immunity see W. Prosser, *Law of Torts* § 132 (4th ed. 1971); Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263 (1937); *Federal Comity*, supra note 10, at 751.

\(^{111}\) *Federal Comity*, supra note 10, at 797.

\(^{112}\) 365 U.S. 167 (1960).

\(^{113}\) E.g., *Cohen v. Norris*, 300 F.2d 24, 33 (9th Cir. 1962); *Federal Comity*, supra note 10, at 800 n.266.
to rest all speculation in *Pierson v. Ray*,\(^{114}\) when it held that section 1983 did not deprive policemen of their common law tort immunity.\(^{115}\) The immunity to be enjoyed by police officers is not unqualified, however; it can only be claimed if the officer has acted in good faith and with probable cause.\(^{116}\)

Although this standard is applied to police officers making arrests, it is probable that a sheriff carrying out a seizure writ successfully could claim good faith and probable cause,\(^{117}\) although such a claim normally would be unnecessary. It is more likely that an officer executing an order which is fair on its face, and which was issued from a court of proper jurisdiction, will be able to rely on the propriety of the order; he will not be held liable unless he acts beyond his authority.\(^{118}\) Thus, in the vast majority of section 1983 actions brought by debtors, the sheriff executing a writ should be immune from suit.\(^{119}\) There could be, however, several exceptions to this general rule. In states which have garnishment statutes similar to Connecticut's,\(^{120}\) the sheriff may lose his traditional immunity. In *Lynch v. Household Finance Corp.*, the Supreme Court held that the sheriff who levied a garnishment was not acting as an agent of the court; rather, he was said to have been an agent of the creditor and the creditor's attorney.\(^{121}\) Undoubtedly, this seemingly artificial distinction would make it difficult for the sheriff to claim immunity, but statutes allowing garnishment without the participation of a judge or clerk are relatively uncommon.\(^{122}\)

Another exception to the general rule of immunity may have a more profound effect upon a sheriff's potential liability. Often, state pre-judgment seizure statutes permit the sheriff to enter the debtor's house

114. 386 U.S. 547 (1967).
115. *Id.* at 555.
116. *Id.* at 557. For a discussion of the problems and ambiguities associated with this test see *Federal Comity, supra* note 10, at 804 n.290.
119. In the pre-*Sniadach* case of *Thompson v. Baker*, 133 F. Supp. 247 (W.D. Ark. 1955), a district court held that a constable carrying out a writ of garnishment which allegedly had been issued without evidence of a valid claim and without the required bond was still protected from a section 1983 action provided the writ was valid on its face.
121. 92 S. Ct. 1113, 1123 (1972).
122. *Id.*
and seize the collateral, without first seeking the permission of the
debtor.123 A potential fourth amendment search and seizure violation
lurks in such a procedure. Indeed, pleas for relief based upon fourth
amendment grounds have been successful in lower federal courts,124 and
appear to be logically compelled from the Sniadach-Fuentes due process
rationale. Whether the sheriff's immunity will survive in an action
against him for damages for an unconstitutional seizure in violation of
the fourth amendment is problematic.125

The Clerk of the Court

Judges quite clearly are accorded absolute immunity for their judicial
acts within the jurisdiction of their court.126 This is true even where
the conduct is corrupt or malicious and intended to do injury.127 The
Supreme Court in Pierson v. Ray128 unequivocally held that judicial
immunity is available as a defense in a section 1983 action.129 Judges
generally are not involved in a prejudgment replevin, attachment, or
garnishment proceeding, and as illustrated by Fuentes, the clerk of the
court usually issues the writ.130

Whether the judge's absolute immunity should be extended to include
the clerk's activities, or whether the clerk should be protected only when
acting pursuant to a judicial order, is not clear.131 A lucid analysis of

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123. See, e.g., CAL. CIV. PRO. CODE § 517 (West 1954).
124. See, e.g., Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971),
discussed in note 87 supra.
125. See notes 117-18 supra & accompanying text.
(13 Wall.) 335 (1871); Baurers v. Heisel, 361 F.2d 581 (3d Cir. 1966), cert. denied, 386
U.S. 1021 (1967); Gabbard v. Rose, 359 F.2d 182 (6th Cir. 1966); Haldane v. Chagnon,
345 F.2d 601 (9th Cir. 1965); Arnold v. Bostick, 339 F.2d 879 (9th Cir. 1965), cert.
denied, 382 U.S. 858 (1965); Harman v. Superior Ct., 329 F.2d 154 (9th Cir. 1964);
Sires v. Cole, 320 F.2d 877 (9th Cir. 1963); Gately v. Sutton, 310 F.2d 107 (10th Cir.
1962); Meredith v. Van Oosterhout, 286 F.2d 216 (8th Cir. 1960); Rhodes v. Houston,
202 F. Supp. 624 (D. Neb.), aff'd, 309 F.2d 959 (8th Cir. 1962), cert. denied, 372 U.S.
909 (1963).
Immunity applies only to actions for damages; it does not apply to actions seeking
injunctive relief. See, e.g., Cassidy v. Ceci, 320 F. Supp. 223, 228 (E.D. Wis. 1970); Stamba-
129. Id.
131. Davis v. McAteer, 431 F.2d 81, 82 (8th Cir. 1970); Dieu v. Norton, 411 F.2d
761, 763 (7th Cir. 1969); Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969) (per curiam);
Brown v. Dunne, 409 F.2d 341, 343 (7th Cir. 1969); Steinpreis v. Shook, 377 F.2d 282,
this problem was made in *McCray v. State*. A Maryland prisoner sought section 1983 relief against a court clerk who allegedly had impeded the filing of the prisoner’s petition for post-conviction relief. In answer to the question whether the judge’s absolute immunity should be extended to a court clerk, the Court of Appeals for the Fourth Circuit said:

> [I]n determining whether the protection afforded by the doctrine of absolute immunity is to be expanded to lesser judicial personnel, it is imperative always to bear in mind the reasons underlying the creation of the immunity shield. ‘The proper approach is to consider the precise function at issue, and determine whether the officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct.’ The privilege of absolute judicial immunity should be ‘applied sparingly’ in suits brought under section 1983 since to give too wide a scope of protection to state officials would effect a ‘judicial repeal’ of the congressional purpose . . . .

The court held that although the clerk’s duty is associated with the court system, it is ministerial rather than quasi-judicial or discretionary in nature. Under the common law, a state officer failing to perform a ministerial act was not granted immunity. The court felt that the threat of possible tort liability in these circumstances would not “unduly inhibit” the clerk in the discharge of his duties; thus, there was no compelling reason to invoke the doctrine. It was acknowledged, however, that a clerk acting pursuant to his lawful authority or following an order of the court still would be protected.

The court’s conclusion that a clerk should not be granted absolute immunity, along with its cogent supporting rationale, could have an important impact on the debtor-creditor situation. Certainly the issuance of a writ is no less ministerial than the filing of a petition. It is equally

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There is no doubt that the conduct of a court clerk meets the state action requirement for a section 1983 suit. *Federal Comity, supra* note 10, at 786.

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certain that the issuance of the writ is not, in most cases, directly pursuant to a judicial order. Nor should a clerk be allowed to contend that he was acting pursuant to lawful authority if he issued a writ in compliance with a state statute which was similar to those declared unlawful by the Supreme Court. Although recovery from a court clerk under such circumstances appears possible, it is more probable that courts will be reluctant to subject clerks to liability in view of the numerous decisions granting them immunity.\textsuperscript{136}

\textit{The Creditor's Lawyer}

An attempted suit for damages by the debtor under section 1983 naming the creditor's lawyer as a defendant probably would fail. Although the debtor may have been deprived of a constitutional right, state action generally would not be involved. It has been held that an attorney representing a private party in litigation is not a state functionary within the meaning of the Civil Rights Act.\textsuperscript{137}

However, in states where the creditor's attorney, in lieu of the clerk or judge, is permitted to initiate and process a seizure writ, the reasoning of the "state function" cases may support a finding of state action.\textsuperscript{138}

The troublesome doctrine of immunity will present a potential obstacle for the debtor and an arguable defense for the four possible defendants. It is the creditor, however, who is the most likely party for a successful section 1983 suit. If the property is seized by an official of the state, or privately by the creditor pursuant to statutorily authorized procedure which does not require notice and a hearing, both state action and an unconstitutional deprivation can be asserted. Moreover, the creditor is the one least likely to be successful in raising an immunity defense.

\textit{Waiver}

Of greater utility to the creditor will be a showing that the debtor validly waived his constitutional rights when he accepted the terms of the installment sales contract or other financing arrangement. The utility and validity of purported waivers of constitutional rights has been the

\textsuperscript{136} See note 131 \textit{supra}.


\textsuperscript{138} See notes 79-82 \textit{supra} \& accompanying text.
subject of an extended discussion elsewhere.\textsuperscript{139} Although specific standards for determining the validity of attempted waivers have not been promulgated by the Supreme Court, it is fair to assume that such waivers must be made \textit{knowingly} (thus raising questions of conspicuous type and consumer awareness), \textit{voluntarily} (bringing into question the choices available to the debtor, the relative bargaining positions of the parties, and the general character of the contract), and \textit{intelligently} (did the debtor understand the consequences of his action—was he advised by counsel?).\textsuperscript{140} The current judicial presumption against waivers of constitutional rights augurs well for the aggrieved debtor and suggests that a creditor would encounter substantial difficulty when asserting a purported waiver in defense of a section 1983 claim—especially if the debtor is a low-income consumer entrapped by an unresponsive sellers’ market.

\textbf{Statutes of Limitations and Laches}

Appropriate statutory periods of limitation pose another possible defense to a section 1983 action.\textsuperscript{141} A specific limitation period was not provided in the Civil Rights Act;\textsuperscript{142} consequently, courts have assumed that the statute of limitations of the forum state should be applied.\textsuperscript{143} The Federal Rules of Civil Procedure should govern the tolling of the state statute, however.\textsuperscript{144}

Once it is decided that the state law of limitations is dispositive, the applicable law within the forum state must be determined.\textsuperscript{145} A state may have separate statutes of limitations for liability created by a

\begin{footnotesize}
\begin{enumerate}
\item[139.] See Due Process Revisited, supra note 35, at 365-81.
\item[140.] \textit{Id}.
\item[141.] E.g., O'Sullivan v. Felix, 233 U.S. 318, 324 (1914); Crawford v. Zeider, 326 F.2d 119, 121 (6th Cir. 1964); Swan v. Board of Higher Educ., 319 F.2d 56, 59 (2d Cir. 1963); Horn v. Baille, 309 F.2d 167, 168 (9th Cir. 1962); Conrad v. Stitzel, 225 F. Supp. 244, 246 (E.D. Pa. 1963); Note, \textit{The Civil Rights Act of 1871: Continuing Vitality}, 40 Notre Dame Law. 70, 73 (1964); \textit{Civil Remedy, supra} note 70, at 851.
\item[142.] See Swan v. Board of Higher Educ., 319 F.2d 56, 59 (2d Cir. 1963).
\item[143.] E.g., Holmberg v. Armbrrecht, 327 U.S. 392, 395 (1946); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906); Campbell v. City of Haverhill, 155 U.S. 610, 614 (1894); Swan v. Board of Higher Educ., 319 F.2d 56, 59 (2d Cir. 1963).
\item[145.] See, e.g., Swan v. Board of Higher Educ., 319 F.2d 56, 59 (2d Cir. 1963).
\end{enumerate}
\end{footnotesize}
statute, 146 for tortious conduct, 147 and for a catch-all category of "action not otherwise provided for." 148 Most cases have applied the time period for liability created by statute, 149 but since statutory provisions vary from state to state this result has not been uniform.150

Although the failure of Congress to specify a statute of limitations has led the federal courts to adopt the local law of limitations for actions at law,151 the doctrine of laches is applicable when the federal right created has its sole remedy in equity.152 When a party bringing a section 1983 action seeks only declaratory and injunctive relief, the question arises whether the action should be characterized as merely equitable so as to invoke the more flexible rules of laches. In Swan v. Board of Higher Education, 153 the Court of Appeals for the Second Circuit concluded that since the plaintiff also could have sought damages, he was not asserting a federal right which had its sole remedy in equity.154 Thus, the statute of limitations was used.155 The Court of Appeals for the Sixth Circuit followed this approach in Madison v. Wood, 156 where a policeman brought a section 1983 action for damages caused by his wrongful discharge. After his claim for damages was dismissed because the statutory limitation period had run, he amended his complaint to seek purely equitable relief.157 The court barred his action on the

147. See, e.g., Jackson v. Duke, 259 F.2d 3, 5 (5th Cir. 1958); Conrad v. Stitzel, 225 F.2d 59, 63 (7th Cir. 1958).
148. Wakat v. Harlib, 253 F.2d 59, 63 (7th Cir. 1958). See also Crawford v. Zeitler, 326 F.2d 119, 121 (6th Cir. 1964).
149. Civil Remedy, supra note 70, at 851.
152. Id. There is one equitable doctrine which is applied even though the state statute of limitations is appropriate. When a plaintiff has been injured by fraud, the statute does not begin to run until the fraud either has been discovered or should have been discovered with reasonable diligence. Id. at 397.
153. 319 F.2d 56 (2d Cir. 1963).
156. 410 F.2d 564 (6th Cir. 1969).
157. Id. at 565.
ground that equity will not grant relief when the applicable statute of limitations bars a concurrent legal remedy.\textsuperscript{188} When placed in the context of the consumer transaction, several conclusions regarding limitation of actions can be framed. If the debtor seeks an injunction restraining a creditor from taking action against property not yet detained, of course the problem of limitations will not arise. If seizure has already occurred, however, it is likely that some damages will have been suffered giving rise to an action at law. Thus, the debtor, in most cases, must assert his claim within the time allowed under the applicable statute of limitations. The characterization of the action by the forum jurisdiction as tortious, statutory, or otherwise, of course, will be controlling.

\textit{State of Mind}

Section 1983, unlike comparable provisions in the Criminal Code,\textsuperscript{169} does not restrict recovery to cases of willful deprivation. Prior to the Supreme Court’s decision in \textit{Monroe v. Pape},\textsuperscript{160} lower federal courts were reluctant to accept the idea that a defendant could be held liable without intentionally depriving the plaintiff of a constitutional right.\textsuperscript{161} Then, when the Court held in \textit{Monroe} that section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his action,”\textsuperscript{162} it should have been evident that the Supreme Court merely interpreted the statute not to require specific intent or willfulness.\textsuperscript{163} However, lower federal courts were reluctant to abandon their previous concepts,\textsuperscript{164} primarily because

\begin{footnotesize}
\textsuperscript{158} Id. at 567.

\textsuperscript{159} The applicable provision of the Criminal Code states:

\begin{verbatim}
Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . .
\end{verbatim}


\textsuperscript{160} 365 U.S. 167 (1961).

\textsuperscript{161} See Francis v. Lyman, 216 F.2d 583, 587-88 (1st Cir. 1954); Cobb v. City of Malden, 202 F.2d 701, 706-07 (1st Cir. 1953); Downie v. Powers, 193 F.2d 760, 764 (10th Cir. 1951).


\textsuperscript{163} Id. at 180.

\textsuperscript{164} Note, \textit{The Civil Rights Act of 1871, supra} note 141, at 80.
\end{footnotesize}
of a misunderstanding of the Supreme Court's holding. The Court did not hold that a defendant in a section 1983 action could not assert any defense. Rather, as was emphasized in Pierson v. Ray, Monroe merely held that:

A complaint should not be dismissed for failure to state that the officers had 'a specific intent to deprive a person of a federal right,' but this holding, which related to requirements of pleading, carried no implication as to which defenses would be available to the police officers.

It is logical to assume that a debtor asserting a section 1983 violation need not allege an intentional act—or even a negligent or innocent act—so long as he shows the deprivation of a constitutional right under color of state law. There is no apparent policy consideration which would call for a different rule where property rights, as opposed to personal rights, are involved.

**Survival of the Cause of Action**

Section 1986 of the Civil Rights Act specifically provides that the legal representative of a party who has been killed as the result of a conspiracy to interfere with civil rights may recover up to $5,000 in damages from one who had the power to prevent the conspiracy but failed to do so. Similar language does not appear in section 1983, and under the doctrine of *expressio unius est exclusio alterius*, it would be logical to assume that Congress did not intend for section 1983 claims to survive their victims. Moreover, section 1983 provides only for recovery by the "party injured." In Brazier v. Cherry, however, the Court of Appeals for the Fifth Circuit rejected these arguments and concluded that the congressional purpose for enacting section 1983 would be frustrated if a victim who died from a police beating was

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165. *Id.* at 80-81.
166. 386 U.S. 547 (1967).
167. *Id.* at 556.
168. See notes 49-51 supra & accompanying text.
170. However, in a wrongful death action brought under section 1983, the Federal District Court for the Northern District of Illinois construed "party injured" to include the administrator of the deceased's estate. Davis v. Johnson, 138 F. Supp. 572, 575 (N.D. Ill. 1955).
171. 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961).
denied recovery. 172 The court relied upon section 1988,173 which allows state law to be used when federal law does not furnish a suitable remedy. 174 Under the authority of section 1988, the court invoked two Georgia statutes which allowed the decedent's claim to survive175 and provided a new cause of action on behalf of the widow for wrongful death. 176

In a case more analogous to the debtor-creditor problem, Nelson v. Knox, 177 the Court of Appeals for the Sixth Circuit found that the executrix of the deceased plaintiff could pursue the plaintiff's section 1983 claim for damages to his business. Interestingly, the court intimated that there would have been no survival had the plaintiff alleged deprivation of a personal right rather than a property right. 178 Although this distinction is questionable, it would not be important in the debtor-creditor context where property rights are usually involved. It can, therefore, he concluded that the death of the debtor will not bar a section 1983 action.

Injunctive Relief Under Section 1983

Although this Note is concerned primarily with the debtor's right to damages, there are several instances in which injunctive relief will be more appropriate. For example, in a suit against a public official, the immunity doctrine may bar the recovery of damages, but if injunctive relief is sought instead, immunity would be inapplicable. 179 Also, it

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174. 293 F.2d at 405. Accord, Pritchard v. Smith, 298 F.2d 153 (8th Cir. 1961).


177. 230 F.2d 483 (6th Cir. 1965). It is also clear that a section 1983 action will survive the death of the defendant. See, e.g., Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961).

178. The rationale is that a personal wrong ceases to exist when the person injured can no longer be benefited by a recovery, or when the person inflicting the injury can no longer be punished. On the other hand, where an injury to property can be recovered by the decedent's estate there is seemingly justification for allowing that recovery. 230 F.2d at 484. Apparently this was the approach of the federal common law. Survival of Actions, supra note 173, at 294.

may be the best approach in a class action brought on behalf of a large group of debtors.\textsuperscript{180}

There are, however, several barriers to federal injunctive relief.\textsuperscript{181} One barrier may be raised by the federal anti-injunction statute,\textsuperscript{182} which applies only to suits which already have been instituted in a state court:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.\textsuperscript{183}

Federal courts, moreover, frequently refuse to grant injunctive relief under principles of comity,\textsuperscript{184} equity,\textsuperscript{185} and federalism.\textsuperscript{186} These restrictions are applicable to contemplated federal interference with threatened as well as pending state procedures.\textsuperscript{187} In \textit{Younger v. Harris},\textsuperscript{188}

\begin{itemize}
  \item \textsuperscript{180} E.g., Lynch v. Household Fin. Corp., 92 S. Ct. 1113 (1972).
  \item \textsuperscript{181} For a thorough discussion of federal injunctions being applied to state prosecutions, see Note, \textit{The Civil Rights Act of 1871 Versus the Anti-Injunction Statute: The Need for A Federal Forum}, 1971 WASH. U.L.Q. 625 [hereinafter cited as \textit{Anti-Injunction Statute}].
  \item \textsuperscript{182} 28 U.S.C. § 2283 (1970).
  \item \textsuperscript{183} \textit{Id.} The exceptions concerned with jurisdiction and judgments usually will not affect a section 1983 action and will not be discussed further. \textit{Anti-Injunction Statute}, \textit{supra} note 181, at 630 n.27.
  \item \textsuperscript{184} The doctrine of comity between courts teaches that one court should defer action on causes properly within its jurisdiction until courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. Darr v. Burford, 339 U.S. 200, 204 (1949).
  \item \textsuperscript{185} It is a "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Younger v. Harris, 401 U.S. 37, 43-44 (1971).
  \item \textsuperscript{186} The requirements of federalism usually are expressed in terms of exhaustion or abstention. The inapplicability of exhaustion to section 1983 actions was established in McNeese v. Board of Educ., 373 U.S. 668, 672 (1963), where the Supreme Court held that the purpose of section 1983 would be defeated if the assertion of a federal claim in a federal court had to await an attempt to vindicate the same claim in a state court. Under the abstention doctrine, a federal court will not decide the constitutionality of a state statute when an interpretation of the statute by a state court may render the federal court interpretation unnecessary. C. Wright, \textit{The Law of Federal Courts} § 52 (2d ed. 1970). The abstention doctrine has been held appropriate in section 1983 actions. Harrison v. NAACP, 360 U.S. 167, 176 (1959). But it has been held inappropriate in other cases where first amendment rights are the basis of the action. Dombrowski v. Pfister, 380 U.S. 479 (1965).
  \item \textsuperscript{187} \textit{Anti-Injunction Statute}, \textit{supra} note 181, at 630.
  \item \textsuperscript{188} 401 U.S. 37, 54 (1971).
\end{itemize}
the Supreme Court held that unconstitutionality of a statute on its face does not alone justify an injunction against good faith attempts to enforce it. Before federal injunctive intervention in a pending state court prosecution is proper, there must be extraordinary circumstances where irreparable injury is both great and immediate, or there must be a showing of bad faith harassment.\textsuperscript{189} Whether the same principles should be applied to state civil proceedings has not yet been determined. In \textit{Mitchum v. Foster},\textsuperscript{190} this question was noted but left for a determination by the district court on remand. Justice White, however, has stated that the considerations which restrict interference in criminal cases are equally applicable to state civil litigation.\textsuperscript{191} Indeed, Justice Stewart believes that courts of equity traditionally have been more reluctant to intervene in criminal prosecutions than in civil cases.\textsuperscript{192} Therefore, it probably is safe to conclude that debtors seeking to enjoin a potential property deprivation will, at the very most, have to satisfy the \textit{Younger} standard.

Assuming that the debtor seeking injunctive relief under section 1983 for a pending deprivation has satisfied the federalism requirements, the next inquiry is whether his efforts will be thwarted by the federal anti-injunction statute. In other words, the question is whether section 1983 is "expressly authorized by Act of Congress" as an exception to the anti-injunction statute. In \textit{Mitchum v. Foster},\textsuperscript{193} the Supreme Court unequivocally held section 1983 to be such.\textsuperscript{194} This decision was justified by the legislative history of section 1983, which demonstrated an intent of Congress to alter the relationship between the states and the nation with respect to the protection of federally-created rights.\textsuperscript{195}

In light of the Court's earlier decision in \textit{Lynch}, that the anti-injunction statute was inapplicable to the Connecticut garnishment statute, the \textit{Mitchum} decision had a particularly important impact in the debtor-creditor area. The plaintiff in \textit{Lynch} sought section 1983 injunctive relief against all Connecticut sheriffs who levied on bank accounts, as well as against creditors who invoked the garnishment statute.\textsuperscript{196} The

\begin{itemize}
  \item \textsuperscript{189} \textit{Id.} at 53.
  \item \textsuperscript{190} 92 S. Ct. 2151, 2163 (1972) (concurring opinion).
  \item \textsuperscript{191} \textit{Lynch v. Household Fin. Corp.}, 92 S. Ct. 1113, 1126 (1972) (dissenting opinion).
  \item \textsuperscript{192} \textit{Younger v. Harris}, 401 U.S. 37, 55 n.2 (1971) (concurring opinion).
  \item \textsuperscript{193} 92 S. Ct. 2151 (1972).
  \item \textsuperscript{194} \textit{Id.} at 2162.
  \item \textsuperscript{195} \textit{Id.}
  \item \textsuperscript{196} 92 S. Ct. 1113, 1115 (1972).
\end{itemize}
Court held that the anti-injunction act was inapplicable because the Connecticut garnishment procedure was not a "proceeding" in the state court.\textsuperscript{197} This result obtained only because Connecticut was one of the few states which authorized garnishment without court participation, and the garnishment occurred before the debtor had been served with process.\textsuperscript{198} Had it not been for the \textit{Mitchum} decision holding section 1983 to be an express exception to the anti-injunction statute, debtors would have been forced to make tedious distinctions among the hundreds of state attachment, garnishment, and replevin statutes to determine whether, indeed, they involved a "proceeding." After \textit{Mitchum}, the debtor seeking section 1983 injunctive relief need not concern himself with the federal anti-injunction statute; it is important to note, however, that requirements of federalism, comity, and equity still must be overcome.

\section*{Damages}

\subsection*{Recoverability}

Having established that section 1983 provides a remedy against a creditor or state official acting under color of state law when the debtor has suffered an unconstitutional deprivation of property, the question arises whether damages can be recovered. The discussion of this issue will assume that the initial question of liability has been determined in favor of the debtor.

The language of section 1983, "shall be liable to the party injured in an action at law . . . .", clearly implies that damages are awardable to the plaintiff. The legislative history indicates nothing to the contrary.\textsuperscript{199} The cases awarding damages under section 1983 have been legion,\textsuperscript{200} and although there are only a few cases to date which have awarded damages to a debtor who has sued under the Act,\textsuperscript{201} the Su-

\textsuperscript{197} \textit{Id.} at 1122.

\textsuperscript{198} \textit{Id.} at 1123.

\textsuperscript{199} \textit{See} Monroe v. Pape, 365 U.S. 167 (1961); \textit{cf.} Shapo, \textit{supra} note 1.

\textsuperscript{200} \textit{See}, e.g., Haines v. Kernan, 92 S. Ct. 594 (1972); Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); Cole v. Smith, 344 F.2d 721 (8th Cir. 1965); Maryland v. Heyse, 315 F.2d 312 (10th Cir. 1963); Hurlburt v. Graham, 323 F.2d 723 (6th Cir. 1963); Rhoads v. Horvat, 270 F. Supp. 307 (D. Colo. 1967); Brooks v. Moss, 242 F. Supp. 531 (W.D.S.C. 1965).

preme Court cases which established liability are quite recent and it is probable that their numbers will increase.\textsuperscript{202}

\textit{Applicable Law}

Assuming a debtor can recover damages of some kind for the violation of his constitutional rights, it is appropriate to consider whether state or federal rules control. Although section 1983 is silent on this point, section 1988 provides:

\begin{quote}
The jurisdiction in civil \dots matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they 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 \dots.\textsuperscript{203}
\end{quote}

The court in \textit{Basista} v. \textit{Weir}\textsuperscript{204} interpreted this section to imply that a federal law of damages should be applied because of the need for uniformity in the protection afforded by the Civil Rights Act. It stated further that the effect of applying different standards to different types of damages (for example, applying federal law to compensatory and nominal damages, and state law to punitive damages) "would be to create a legal hybrid of an incredible and unworkable kind."\textsuperscript{205}

One criticism of the \textit{Basista} rationale is that the federal forum might allow damages that would not be recoverable in state courts or might circumvent state statutory limits on liability.\textsuperscript{206} Proponents of this criti-

\textsuperscript{202} "Damages may even be awarded to him for the wrongful deprivation." \textit{Fuentes} v. \textit{Shevin}, 92 S. Ct. 1983, 1995 (1972).
\textsuperscript{204} 340 F.2d 74 (3rd Cir. 1965).
\textsuperscript{205} Id. at 87.
\textsuperscript{206} See \textit{Page}, \textit{State Law and the Damages Remedy Under the Civil Rights Act: Some Problems in Federalism}, 43 \textit{Denver L.J.} 480, 488 (1966), \textit{color} \textit{COLORADO TRIAL LAWYER'S ASS'N, 13 TRAIL TALK No. 5, p. 2 (1966); Niles, Civil Actions for Damages under the
cism argue that state law always should be applied unless the state provisions would frustrate the purposes of the Civil Rights Act;207 furthermore, they claim that a review of civil rights cases reveals that a consistent federal law of damages simply does not exist.208

The Supreme Court apparently settled this federalism controversy by its interpretation of section 1988 in Sullivan v. Little Hunting Park:209 "[A]s we read section 1988 . . . both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired."210 Although the action in Sullivan was brought under section 1982, there are no apparent policy reasons which would preclude a similar construction in an action brought under a companion section such as section 1983.

Theory of Liability

Once a state statute is found to be an unconstitutional violation of due process, the form of the statute (attachment, garnishment, Uniform Commercial Code) should not affect the kind or measure of damages recoverable by the debtor. Rather, recoverability should be determined by the underlying theory upon which the court holds the defendant liable.211

The federal courts frequently have stated that an action under the Civil Rights Act lies in tort and, with little discussion of the subject, have applied traditional tort rules in the determination of liability and the measurement of damages.212 The commonly cited source of this theory of liability is Justice Douglas' now familiar statement in Monroe v. Pape: "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."213

207. Niles, supra note 206, at 1025.
208. Id.
210. Id. at 240. See also Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961).
211. Niles, supra note 206, at 1025.
212. Id.
213. 365 U.S. at 187.
Use of the tort theory, however, has led to considerable confusion in awarding damages for civil rights violations;\textsuperscript{214} the law of torts is concerned primarily with compensating an individual for harm done to his person or property by the conduct of another;\textsuperscript{215} whereas the original policy of the civil rights statute was punitive in nature and was intended to be a deterrent to the violation of constitutional rights.\textsuperscript{216} An award of damages under the Civil Rights Act should not depend solely on the common law test of whether the plaintiff has suffered a measurable physical or economic injury, but also upon whether defendant's conduct comes within the scope of actions that the statutes were intended to penalize.\textsuperscript{217}

As a result of the failure of courts to perceive or acknowledge the difference in policies, damages which are actually punitive in nature are awarded and deceptively labeled "compensatory." The confusion of terms also extends to "consequential" and "special" damages.

The majority of suits under section 1983 in which damages have been awarded have involved common law torts, such as assault and battery,\textsuperscript{218} false imprisonment,\textsuperscript{219} and negligence.\textsuperscript{220} Indeed, the violation of the constitutional right alone has been termed to be a "constitutional tort."\textsuperscript{221} However, courts also have recognized a right to recover at least nominal damages for deprivation of constitutional rights where no measurable physical or economic injury has been sustained.\textsuperscript{222}

In view of the reliance on the tort theory and the existing confusion in the application of terms with regard to damages, a major task incumbent upon a plaintiff debtor is to identify and delineate the injured interests for which he seeks recovery. This is also important for the purpose of providing proper instructions to the jury for avoiding challenges of double or excessive compensation.\textsuperscript{223}

\textsuperscript{214} See Niles, supra note 206, at 1026.
\textsuperscript{215} W. Prosser, LAW OF TORTS § 1 (4th ed. 1971).
\textsuperscript{216} See generally Monroe v. Pape, 365 U.S. 167 (1961); Shapo, supra note 1.
\textsuperscript{217} Niles, supra note 206, at 1026.
\textsuperscript{218} Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).
\textsuperscript{219} Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), cert. denied, 375 U.S. 975 (1964).
\textsuperscript{220} See Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957).
\textsuperscript{221} See Shapo, supra note 1, at 329.
\textsuperscript{223} See Niles, supra note 206, at 1026-30.
In order to facilitate discussion of this difficult task, it is desirable to
divide the possible fact situations into two categories: (1) where the
conduct of the defendant includes a common law tort; and (2) where
the defendant's conduct results in injury, but where no common law
tort is involved.

**Conduct Including Common-Law Tort**

One significant effect of an intentional common law tort is that it
could strip a minor public official of his qualified immunity.\(^{224}\) A state
official thereby could become liable for damages resulting from a wrong-
ful appropriation or conversion. A creditor, however, has no immunity
and could be liable at common law for wrongful appropriation, con-
version, or misrepresentation of a claim against the debtor.

The plaintiff debtor should be aware that although his loss or injury
results from only one act by the defendant, such action may give rise
to two distinct torts—a common-law tort and a constitutional tort. The
courts frequently fail to make this distinction, and as a result the plain-
tiff may be deprived of the broader scope of recovery arising out of the
constitutional tort.\(^{225}\) For example, one of the advantages of suing
under section 1983 is that punitive damages can be awarded even in the
absence of out-of-pocket loss.\(^{226}\) In other words, a creditor who for
malicious purposes misrepresents a claim against the debtor and de-
prives him of his property by acting in accordance with a statute that
does not provide notice and hearing could be liable for punitive dam-
ages even if he later returned the property and the debtor suffered no
actual economic loss. Under the general rule of tort law, however, an
award of punitive damages may not be made without a showing of
actual damage.\(^{227}\) A second advantage offered by section 1983 is that
the plaintiff may recover, in addition to the compensation for the
common law tort, an amount based solely upon the constitutional tort.
For instance, damages for mental suffering caused by a deprivation of
valuable property might be claimed.\(^{228}\)

\(^{224}\) See note 109 supra & accompanying text.
\(^{225}\) See Niles, supra note 206.
\(^{226}\) Cases cited note 222 supra; Chubbs v. City of New York, 324 F. Supp. 1183
(E.D.N.Y. 1971).
\(^{227}\) Basista v. Weir, 340 F.2d 74, 86 (3rd Cir. 1965) (citing Pennsylvania law); Holl-
diday v. Great Atl. & Pac. Tea Co., 256 F.2d 297 (8th Cir. 1958) (citing Missouri law);
(1951).
\(^{228}\) Cf. Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) (mental suffering from
Another problem which may arise in the absence of diversity jurisdiction is the possibility that the federal court may adjudicate the common law tort claim only if the doctrine of pendent jurisdiction is applicable; in other words, there must be a substantial federal claim before both claims can be heard in a federal forum. This could mean that unless the damages resulting from the violation of the constitutional right alone are substantial, the court will not entertain the claim arising out of the common law tort.

In order to avoid this problem, the plaintiff should proceed upon the theory that the common law tort is a “lesser included offense” within the scope of the constitutional tort. Taking this view, the court in Rue v. Snyder found it unnecessary to rule on the issue of pendent jurisdiction because it considered that the damages recoverable under the common-law tort were included in the damages awardable for the claim arising under section 1983.

**Conduct Not Including Common-Law Tort**

In a situation where the creditor has acted in good faith in following the provisions of an existing state statute to gain possession of the debtor’s property, it is doubtful whether a common law tort has been suffered. When injury is incurred by the debtor as a consequence of the unconstitutional taking of his property, the absence of a common-law tort makes it more difficult to frame an appropriate theory of liability. The injury involved could take the form of a financial loss if the property taken was being used in the production of income or as a means of transportation to the place of employment, or if the seizure, usually in the form of garnishment, caused the debtor to lose his job. Furthermore, if the property taken is a necessity or a means of procuring necessities (such as wages needed to buy food or medicines), physical injury could result; such injury presumably would be compensated.

In jurisdictions where the constitutionality of the particular statute has not been adjudicated, it is likely that the constitutional violation was not foreseeable to the creditor.

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231. Id. at 743. See also Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962).
On what basis, then, is the creditor to be held liable for these damages? In construing section 1983, the court in *Cobb v. City of Malden*\(^2\) stated:

>[I]t would seem to make no difference that the conduct of the defendants might not have been tortious at common law; for the Act, if read literally, creates a new federal tort, where all that has to be proved is that the defendants as a result of their conduct under the color of state law have in fact caused harm to the plaintiff by depriving him of rights . . . secured by the Constitution of the United States.\(^3\)

The court also said that the Act merely expresses a prima facie liability, leaving to the courts the task of deciding on an *ad hoc* basis the defenses of official immunity which might be appropriate to each particular case. Since the creditor has no official immunity, he stands squarely within the broad sweep of the Act if he cannot claim any other defense.

This apparently was the view of the courts in *McMeans v. Schwartz*\(^4\) and *Collins v. Viceroy Hotel Corp.*\(^5\) Such a literal reading was especially evident in *McMeans*, where the defendant creditor acting in good faith merely filed suit and requested prejudgment garnishment. He filed the appropriate affidavit, affirming the validity of the debt, and posted the required bond. Moreover, the state, not the defendant, issued and served the writ. The court held the Alabama garnishment statute to be unconstitutional, and without discussion of the issue of damages, granted plaintiff’s motion for summary judgment as to the creditor’s liability under section 1983.\(^6\) The decision in *McMeans* had the apparent effect of expanding the *Monroe* theory of tort liability. *McMeans* appears to be the only case directly concerning the actions of a creditor. Two cases expressing a contrary view and setting forth more stringent criteria for liability under section 1983 arose from charges concerning conduct of police officers.

In *Mullins v. City of River Rouge*,\(^7\) it was held that an officer could be exposed to section 1983 liability only upon a showing of gross negligence; specifically the defendant police officer was held not liable for

\(^{232}\) 202 F.2d 701 (1st Cir. 1953).
\(^{233}\) Id. at 706.
\(^{236}\) Id. at 398.
his failure to diagnose and treat plaintiff's injuries, where the injuries were not obvious and no request for aid was made. A closer case to the situation in issue is Bowens v. Knazzee,238 in which the plaintiff brought an action under section 1983 seeking damages for an illegal search of his person. The court held that the officer was not liable where the legality of the particular search technique had never been considered by the Illinois Supreme Court and the officer could not reasonably have foreseen that a deprivation of constitutional rights might have resulted from his conduct. In its decision, the court reviewed general principles of tort liability and the test for tortious conduct. It observed that in ordinary tort litigation, the jury is allowed to define and apply its own standard of reasonableness appropriate in the circumstances of the defendant's conduct. The court concluded, however, that the tort created by the Civil Rights Act is not amenable to such treatment:

The measure of a citizen's constitutional rights is not left to the determination of the community-at-large. It is determined by the courts. If that standard has not yet been enunciated by a court in a manner which makes its applicability to the incident at hand clear, the potential defendant cannot be expected to conform his conduct to it. Unlike the requirements of a statute or the judgment of the community which can be applied retroactively, the retroactive application of the judgment of a court as to the requirements of the Constitution—based not on community standards but on legal reasoning—would place a defendant in an impossible position.239

The logic of Bowens certainly is compelling in terms of general application to actions prosecuted under section 1983. It is submitted, however, that the MeMeans decision should receive hospitable acceptance in situations involving creditors who deprive debtors of their property in violation of Sniadach, Fuentes, and Lynch. The mere fact that a creditor's home state has been delinquent about responding to federal constitutional standards of creditor conduct should not protect local creditors against liability. In other words, all creditors should be held to the standards of Sniadach, Fuentes, and Lynch regardless of local procedures for creditor attachment. A creditor should not be heard to say that he acted in good faith if his conduct violated the teachings of Sniadach, even if such conduct satisfied state procedural requirements.

239. Id. at 829.
Any departure from *McMeans* would allow local creditors to benefit from a "lag" in state responsiveness to the Supreme Court's elucidations concerning the debtor-creditor relationship. Moreover, the result in *McMeans* should not be construed as a retroactive application of changing Constitutional standards—whereas retroactivity would compensate pre-*Fuentes* deprivations, *McMeans* merely holds all creditors to the *Sniadach* standard irrespective of state procedures.

*Additional Recovery—Costs and Attorney's Fees*

As a separate element of recovery, aggrieved debtors should seek attorney's fees. The Supreme Court in *Newman v. Piggie Park Enterprises, Inc.* stated that one who succeeds in a suit under Title II of the Civil Rights Act of 1964, "should ordinarily recover attorney's fees unless special circumstances would render such an award unjust." 243

240. The *McMeans* decision may be said to employ a new standard retroactively only to the extent that it holds creditors liable for their conduct despite adherence to established state procedures. In a larger sense, however, it does not employ new standards retroactively at all; the constitutional rationale of *Sniadach* had been promulgated well in advance of the creditor's activity in *McMeans*.

Retroactive application of changing constitutional standards has had a checkered history in the Supreme Court. Compare, e.g., *Norton v. Shelby County*, 118 U.S. 425 (1886) with *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). *See also* *DeStefano v. Woods*, 392 U.S. 631 (1968), where the Court discussed several factors involved in determinations of retroactivity. Foremost among these factors is the purpose to be served by the new constitutional rule. *Desist v. United States*, 394 U.S. 244, 249 (1969). In the *Sniadach-Fuentes* situation, the clear design of the Court was to deter unconstitutional creditor action. More specifically, the rules might have been intended to be corrective or compensatory, in which case retroactive application of *Sniadach* and *Fuentes* could be argued. It seems clear, however, that widespread reliance on long-standing rules concerning debtor-creditor relations militates against retroactive application of the new rules.

It seems just as clear, however, that reliance on unconstitutional state procedures should not be tolerated in the wake of *Fuentes*. As a practical matter, almost all creditors involved in attachment or garnishment proceedings retain legal counsel. Thus, they should be presumed to know the rules evolved in *Sniadach* and *Fuentes*, and they should not be allowed to flaunt the new constitutional standard by adhering to the kinds of state procedures banned by the Supreme Court. In this context, then, what might seem to be a harsh result in *McMeans* is not harsh at all; indeed, *McMeans* merely commands immediate adherence to constitutional standards of creditor conduct.


242. 42 U.S.C. §§ 2000a-3(b) (1970). This section provides for the court's discretion in the awarding of attorney's fees. Although the case involved a suit under a different civil rights act, the court's reasoning is considered to be pertinent as a supporting argument.

243. 390 U.S. at 402.
The Court stated that a plaintiff acts "not for himself alone but also as a 'private attorney general' vindicating a policy that Congress considered of the highest priority" in bringing litigation challenging racial discrimination.244

Further, the Supreme Court in *Mills v. Electric Auto-Lite Co.*,245 after considering the general rule of nonrecoverability in the absence of statutory authorization, awarded attorney's fees to a shareholder who brought a derivative action alleging the use of deceptive proxy statements in a pending merger. The Court stated that by vindicating the statutory policy against misleading proxy statements, the plaintiff "rendered a substantial service to the corporation and its shareholders."246 By analogy, in bringing an action challenging the constitutionality of a state statute, the plaintiff-debtor also is vindicating a policy Congress considered of the highest priority—protection of the fundamental right of due process.

The debtor also should seek an award of the costs incurred in litigation; such costs might properly be included in the measure of damages, since they clearly were occasioned by the civil rights infringement. For example, if a debtor brings an action in a state court to enjoin an attachment or garnishment and loses, he should claim the costs incurred in that litigation as a collateral injury to his constitutional right violation when he files suit in the appropriate federal district court under section 1983. A case in point by way of analogy is *McArthur v. Pennington*,247 in which the plaintiffs were awarded costs incurred in defending a prior criminal action which was the source of the civil rights litigation.248 A further justification lies in the fact that state courts generally agree that where an attachment is used to secure *quasi in rem* jurisdiction over the party or is used only for security purposes, costs incurred in defense or dissolution of the attachment (as distinguished from a defense on the underlying debt) are allowed as damages in a subsequent suit for wrongful attachment.249 A parallel can be drawn between a subsequent suit

246. *Id.* at 396.
for a wrongful attachment and a subsequent suit for an unconstitutional attachment under section 1983.

CONCLUSION

Considering the abuses inherent in the creditor-debtor relationship—whether they be in financing, repayment, defective merchandise, or fraudulent sales schemes—perhaps nothing hits the credit purchaser harder than having his wages frozen or seeing his household goods being carried away without having been afforded the opportunity to have his day in court. Although it certainly may be true that most debtors have no justifiable reason for defaulting, the potentiality for harm to those debtors who are able to raise a valid defense compels the conclusion that the predominance of the former class of debtors should not impair the procedural protection afforded the latter. More importantly, minimum constitutional safeguards cannot be made to vary among the situations of particular purchasers.

Prior to 1969, the debtor who had his wages frozen or property removed without prior notice and hearing had but one avenue of redress; it was necessary to convince a state court that the creditor had violated the Constitution. In most cases he was unsuccessful. In 1973, however, it is established law that one may not be deprived of his property without the procedural protection granted in the Constitution; if, in fact, there is a seizure made in contravention of this principle, the wronged debtor can sue in a federal court and obtain damages or injunctive relief under section 1983 of the Civil Rights Act. Therefore, a creditor who deprives his debtors of property under authority of a garnishment, attachment, or replevin statute will be doing so at his own risk. Although it has not been determined definitively, it is possible that secured parties following peaceful repossession procedures outlined in the Uniform Commercial Code could encounter the same peril.

In a debtor's section 1983 complaint, the plaintiff must show that he has been deprived of his property without due process of law. To do so necessitates a showing that the seizure was made by the state, or by an individual acting under color of state law. If the creditor acts pursuant to an allegedly unconstitutional state statute, the courts will ordinarily deem that action sufficient to satisfy the requirement of "color of law." Undeniably, the creditor has retained the protection of certain defenses; significantly, however, the defense of immunity will be unavailable to him.
Ultimate success, of course, lies with both the debtor's attorney and a sympathetic court. Despite the decades of analogous precedent supporting him, the plaintiff deprived of constitutional rights must be able to correlate his specific fact situation with others which have been remedied in the past. A debtor may never become an actual victim of a wrongful taking, but in any case he can be secure in the knowledge that, should it ever occur, federal law has afforded him adequate legal machinery with which to redress his deprivation.