THE THIRD CIRCUIT WIDENS THE SCOPE OF SECTION 1983: *ESTATE OF BAILEY v. COUNTY OF YORK*

Section 1983 of the Civil Rights Act of 1870 and 1871[1] provides that a state or state agent may be held liable in federal court for depriving a citizen of his civil rights.[2] Until 1961[3] section 1983 was seldom litigated,[4] due to the courts' strict construction of the statute.[5] Conse-

1. 42 U.S.C. § 1983 (1982). Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.

Id.

2. For an individual to invoke § 1983, he or she must prove that the state has violated a legitimate constitutional right. Thus, traditional tort concepts will not suffice to impose liability under § 1983. *See, e.g.*, Baker v. McCollan, 443 U.S. 137 (1979) (false imprisonment is not a violation of the fourteenth amendment merely because defendant is a state official); Paul v. Davis, 424 U.S. 693 (1976) (more than mere defamation by state official must be involved to establish a claim under § 1983).

3. In 1961 the Court decided Monroe v. Pape, 365 U.S. 167 (1961). In *Monroe* the Court allowed a cause of action under § 1983 when government employees acted outside their official authority. *See infra* notes 5, 22 and accompanying texts.

4. During the period from 1871 to 1920, litigants filed only twenty-one § 1983 suits. *See* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Remedy?*, 26 IND. L.J. 361, 363 (1951). In contrast, claimants filed approximately 8,000 § 1983 suits during the fiscal year 1972. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972 ANNUAL REPORT OF THE DIRECTOR 287, Table C2. *See generally* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 5-8 (1974) (advocating limitations on § 1983 relief due to the increasing volume of § 1983 suits).

5. The courts narrowly construed the requirement that the deprivation of civil rights be "under color of state law." *See, e.g.*, United States v. Classic, 313 U.S. 299, 326 (1941) (an act is considered "under color of state law" when it involves the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law"); Barney v. City of New York, 193 U.S. 430, 437-38 (1904) (because the act complained of was not only unauthorized, but was forbidden by the state legislature, it is not considered taken "under color of state law"). Until 1961, courts held that in order for a person to act "under color of state law," the

quently, the statutory requirements for a section 1983 action remained unclear.[6] During the past two decades, however, the United States Supreme Court has significantly widened the scope of section 1983,[7] generating much controversy over the statute's application.[8] In *Estate*

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act must be within the scope of his official authority. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945) (acts of police officers in the ambit of their personal pursuits or in violation of established state law are excluded from § 1983 liability). *See also supra* note 3, *infra* note 22 and accompanying text.

Courts also narrowly construed the "rights, privileges, and immunities" protected under § 1983. *See* Note, *Governmental Liability Under Section 1983 and the Fourteenth Amendment After* Monell, 53 ST. JOHN'S L. REV. 66, 69-70 (1978). Specifically, courts limited the "privileges and immunities" protected under the fourteenth amendment to rights intimately bound up with the existence of the federal structure. *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-80 (1873) (the main purpose of the thirteenth and fourteenth amendments was to free slaves and protect them from oppression). Due to the narrow construction of the "privileges and immunities" clause, courts limited § 1983 suits to cases challenging race discrimination or restrictions on voting rights. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1156-69 (1977).

6. The language of § 1983 suggests that a cause of action requires proof of two elements. *See supra* note 1 and accompanying text. First, there must be a deprivation of a right "secured by the Constitution." Second, the deprivation must occur "under color of state law." *See* Special Symposium, Section 1983—Introduction, 12 URB. LAW. 227, 228 (1980).

7. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981) (no particular state of mind on behalf of a government official is required to invoke § 1983 liability); Owen v. City of Independence, 445 U.S. 622 (1980) (a municipality may not assert the good faith of its officers as a defense to § 1983 liability); Maine v. Thiboutot, 448 U.S. 1 (1980) (section 1983 encompasses claims based purely on statutory violations of federal law); Scheuer v. Rhodes, 416 U.S. 232 (1974) (state officials only entitled to qualified immunity for purposes of § 1983 liability).

8. The differing results reached among federal circuit courts as to when a municipality is liable for its employees' actions illustrates one such conflict. *See, e.g.*, Williams v. Butler, 746 F.2d 431 (8th Cir. 1984) (city that delegated authority to employee held liable for employee's unconstitutional acts); Rockard v. Health & Hosps. Corp., 710 F.2d 41 (2d Cir. 1983) (court held city liable for the unconstitutional discharge of employee by supervisors who had final authority on personnel decisions for the city health and hospitals corporation); Black v. Stephens, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982) (court held the city liable for policy that police chief promulgated, which led to police officer's filing of false charges against complainant); *but cf.* Bennett v. City of Slidell, 728 F.2d 762 (5th Cir.), *cert. denied*, 469 U.S. 913 (1984) (for purposes of liability under § 1983, the local governing body must have acted unconstitutionally, or have been directly responsible for policy complained of); Losch v. Borough of Parkesburg, 736 F.2d 903 (3d Cir. 1984) (police chief's action in connection with filing of criminal charges against plaintiff was insufficient to constitute municipal policy for § 1983 action without municipal regulation or evidence of repeated action by police chief with regard to filing).

of Bailey v. County of York[9] the Court of Appeals for the Third Circuit continued the trend of broadening the scope of section 1983, holding a municipality liable for its failure to adequately investigate an abused child's home despite the absence of a legal relationship between the child and the county.[10]

York County Children and Youth Services (YCCYS) is a municipal services agency that provides protection for abused and neglected children. YCCYS obtained temporary custody of Aleta Bailey after receiving a report of child abuse.[11] YCCYS returned Aleta to her mother[12] with minimal investigation into the safety of Aleta's home environment.[13] Aleta died one month later due to physical injuries suffered from child abuse.[14] The administrator of Aleta's estate and Aleta's father instituted a suit under section 1983.[15] They claimed that YCCYS's failure to properly investigate Aleta's home environment deprived Aleta and her father of their constitutional rights.[16] Because no

9. 768 F.2d 503 (3d Cir. 1985).

10. *Id.* at 511.

11. *Id.* at 505. A YCCYS employee took Aleta to the hospital, where the examining physician advised the employee not to return Aleta until her mother's boyfriend left the house. *Id.*

12. *Id.* After the hospital exam, YCCYS told Aleta's mother that it would return Aleta to her custody if she removed her boyfriend from the home. *Id.* YCCYS returned Aleta to her mother's home the next day. *Id.*

13. *Id.* YCCYS stated that it made periodic visits to Aleta's home following her return, and ascertained that her mother's boyfriend no longer resided there. *Id.* at 508. The court noted this was a factual dispute that needed to be resolved on remand. *Id.*

14. *Id.* at 505.

15. *Id.* The plaintiffs brought a complaint against the county, YCCYS, and Ora Gruver, the agency's administrator. *Id.* While the court focused on the municipality's liability, it noted a recent Supreme Court decision equating an official's actions with those of the city itself. *See id.* at 507 (citing Brandon v. Holt, 469 U.S. 464 (1985), which held that a judgment against a public servant in his official capacity imposes liability on the entity he represents). The complaint alleged that YCCYS' promulgation and implementation of "policies and proceures" led to Aleta's death. *Id.* at 505. The plaintiffs argued that one of the defective YCCYS policies was the agency's failure to invoke the procedures of Pennsylvania's Child Protective Services Law, 11 PA. CONS. STAT. ANN. §§ 2201-2224 (Purdon Supp. 1984). These provisions provide, *inter alia*, (1) a mechanism for the agency's reports and investigations of abuse; (2) judicial determination of the necessity for protective custody of abused children; and (3) appointment of a guardian ad litem for an abused child. *See id.* §§ 2217, 2208, 2223.

16. 768 F.2d at 505. There was no dispute over the plaintiffs' claim that they had cognizable constitutional rights under the fourteenth amendment. *Id.* at 509. Aleta had a liberty interest in being free from physical assault attributed to the state. *Id.* (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982), holding that claimant had a constitutionally protected liberty interest under the fourteenth amendment's due pro-

one in the Bailey household was under state control at the time of Aleta's death, the district court concluded that section 1983 did not apply,[17] and dismissed the action.[18] On appeal, the Third Circuit ruled that government control or custody is not a prerequisite for municipal liability under section 1983 and remanded the case for further proceedings.[19]

Enacted to combat Ku Klux Klan activities during the Reconstruction Era,[20] section 1983 was to provide a measure of federal control over southern state officials reluctant to enforce the civil rights of newly freed slaves and union sympathizers.[21] Municipalities, however,

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cess clause to be free from bodily restraint); Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (prisoner had constitutionally protected right to be free from physical assault by another inmate).

Aleta's father had a liberty interest in guarding the life and physical safety of Aleta against deprivations caused by state action. This right derives from the parent-child relationship. *See* 768 F.2d at 509 (citing Bell v. City of Milwaukee, 746 F.2d 1205, 1209 (7th Cir. 1984), in which father had constitutionally protected liberty interest in continued association with his son and could recover under § 1983 for police causing his son's death); *but cf.* Jackson v. Marsh, 551 F. Supp. 1091 (D.C. Cir. 1982) (parents had no constitutionally protected right to the companionship, care, custody, support, and protection of their children under § 1983).

17. Estate of Bailey v. County of York, 580 F. Supp. 794 (M.D. Pa. 1984).

18. *Id.* at 797. YCCYS had no legal control or custody of Aleta at the time of her death. *Id.*

19. 768 F.2d at 511.

20. *See* CONG. GLOBE, 42nd Cong., 1st Sess. 804-06 (1871). Section 1983 is modeled after § 2 of the Civil Rights Act of 1866, but differs in two important respects: "(1) it provides a civil remedy; and (2) it covers "all deprivations of rights under color of law, not just those based on race." *See* Walter, *The Ku Klux Klan Act and the State Action Requirement of the Fourteenth Amendment*, 58 TEMP. L.Q. 3, 18 (1985).

In recent years, Congress has unsuccessfully attempted to amend the statute. *See Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 585 and S. 990 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 462 (1981). Senator Hatch introduced two amendments in the 97th Congress designed to narrow the scope of § 1983. *Id.* The first amendment afforded a good faith immunity defense to government entities in actions brought under § 1983, thereby overruling Owen v. City of Independence, 445 U.S. 622 (1980). *Id. See supra* note 7 and accompanying text. The second amendment proposed that "and laws" be changed by inserting "and by any law providing for equal rights of citizens or all persons within the jurisdiction of the United States." *See* 127 CONG. REC. 31,628 (1981). This amendment sought to overrule Maine v. Thiboutot, 448 U.S. 1 (1980). *See generally* Black Sagafi-Nejad, *Proposed Amendments to Section 1983 Introduced in the Senate*, 27 ST. LOUIS U.L.J. 373, 388-89 (1983) (author notes that the widening scope of § 1983 has led Congress to try to narrow the statute's application, but advocates continuing the broadening trend).

21. *See* H.R. REP. NO. 548, 96th Cong., 1st Sess. (1979).

remained immune under the statute[22] until the Supreme Court's landmark decision in *Monell v. Department of Social Services*.[23] In *Monell* the city's official policy compelled pregnant employees to take unpaid leaves of absence if such leaves were taken before medically required.[24] The Court concluded that section 1983's legislative history indicated Congress' intent to subject municipalities as well as officials to the statute.[25] The Court, however, extended liability to municipalities only when an official custom, policy, ordinance, regulation, or deci-

22. *See* Monroe v. Pape, 365 U.S. 167 (1961). The *Monroe* Court concluded that Congress did not intend "person," as used in § 1983, to apply to municipalities. *Id.* at 190. The Court predicated its reasoning on Congress' rejection of the Sherman Amendment. *Id.* at 187-90. *See infra* note 25 and accompanying text.

As a result of the municipal immunity granted in *Monroe*, civil rights claimants based their causes of action directly on violations of the Constitution. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (plaintiff allowed to seek damages against federal officials directly under the fourth amendment). *See generally* Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (discusses *Bivens* method of imposing liability on municipality directly under the fourteenth amendment).

23. 436 U.S. 658 (1978). In *Monell* the court upheld *Monroe*, however, only to the extent "that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees." *Id.* at 663.

24. *Id.* at 661. The city admitted that the policy existed, but stated the policy changed after the plaintiffs instituted suit. *Id.* at 661 n.2.

25. *Id.* at 690-91. Specifically, the Court shifted its interpretation of Congress' rejection of the Sherman Amendment to the original Ku Klux Klan Act. *Id.* In its initial form, the amendment made any inhabitant of a municipality liable for damage inflicted by persons "riotously and tumultuously assembled." *See* CONG. GLOBE, 42nd Cong., 1st Sess. 761 (1871). Senator Sherman explained that the purpose of the amendment was to enlist the aid of property owners in the enforcement of civil rights laws by making their property responsible for Ku Klux Klan damage. 436 U.S. at 667 n.16 (remarks of Sen. Sherman). Congress rejected the Sherman Amendment. The Court in *Monroe* felt this rejection indicated Congress' intent that municipalities remain immune under § 1983. *See* Monroe v. Pape, 365 U.S. 167, 190 (1961). *See generally* Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1492-94 (1977) (advocates a qualified immunity standard for municipalities).

In *Monell*, however, the Court reasoned that if Congress did not want § 1983 to apply to local governments, it would not have specifically imposed liability on state or local officials, 436 U.S. 658, 660 (1978). The Court also examined case law as it existed in 1871 and concluded that Congress, aware of this case law, intended "persons" to apply to municipalities. *Id.* at 688-89 (citing Cowles v. Mercer County, 7 Wall. 118, 121 (1869), which held that a municipal corporation is deemed to be a person capable of being treated as a citizen as much as a natural person). Finally, the Court noted other acts passed in 1871 that explicitly equated the word "person" with corporate bodies. *See* Monell v. Department of Social Servs., 436 U.S. 658, 688-89 (1978) (the word "person" may extend and be applied to "bodies politic and corporate").

sion injured an individual's constitutional rights.[26]

After *Monell*, litigation focused on the issue of what activities, participated in by which officials, constituted official policy for purposes of section 1983 liability.[27] In appropriate circumstances, federal courts inferred official policies from the absence of formal agency conduct or regulations.[28] Such cases generally based liability on two findings:

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26. 436 U.S. at 694. The Court gave the following guidelines on deciphering official governmental policy: (a) a policy statement, ordinance, regulation or decision officially adopted and promulgated by government officers, *id.* at 690; (b) an action or policy that has not received formal approval through the body's official decisionmaking channels, *id.* at 691; (c) an action or a policy made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, *id.* at 694. *See generally* Payment, *Civil Rights Liability of Municipalities in the Wake of* Monell, 53 N.Y. ST. B.J. 562, 564 (1981) (discusses the various possible interpretations of "government policy" for § 1983 suits).

27. *See* Kramer, *Section 1983 and Municipal Liability: Selected Issues Two Years After Monell v. Department of Social Services*, 12 URB. LAW. 232, 241 (1980). While *Monell* provided some guidance to lower federal courts applying § 1983, confusion existed among lower courts as to what constitutes "official policy." *See supra* note 26 and accompanying text.

Although an isolated act on the part of one employee is usually insufficient to establish official city policy, courts have held that the official city policy requirement is met when the police department fails to take disciplinary measures against an officer who acts unconstitutionally. *See, e.g.*, Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981) (policeman was acting "under color of state law" when municipality did nothing to curb his behavior after several citizens filed complaints).

The Supreme Court implied that a single action of a high-ranking official may represent official policy. *See* Rizzo v. Goode, 423 U.S. 362, 367 (1976) (determining government policy turns on degree to which state agent participated in pattern of violation by virtue of knowledge, acquiescence, support, and encouragement). *See generally* Freilich, *1978-79 Annual Review of Local Government Law: Undermining Municipal and State Initiative in an Era of Crisis and Uncertainty*, 11 URB. LAW. 547, 550 (1979) (notes confusion inherent in determining "government policy" for purposes of imposing liability under § 1983).

28. *See, e.g.*, Rymer v. Davis, 754 F.2d 198 (6th Cir. 1985) (court inferred a municipal custom condoning police misconduct due to a series of incidents resulting from the city's failure to set procedures for arrest); Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981) (municipality liable for injury caused by police or custom made by its lawmakers even though custom had not received formal approval through official decision-making channels).

Congressional debates during the passage of § 1983 also indicate that Congress intended the statute to encompass acts of omission. *See* CONG. GLOBE, 42nd Cong., 1st Sess. 78 (remarks of Rep. Perry), 429 (remarks of Rep. Beatly), 448 (remarks of Rep. Butler), 114 (remarks of Sen. Farnsworth), 251 (remarks of Sen. Morton). These debates reveal that Congress' primary purpose for enacting § 1983 was to force southern officials to actively protect the civil rights of newly freed slaves. *See id.* at 604, 608 (remarks of Sen. Poole). Southern states were criticized for failing or neglecting to curb Ku Klux Klan activities. *See id.* at 338 (remarks of Rep. Witthorne), 368 (remarks of

first, the absence of formal agency conduct or regulation was a substantial factor leading to the denial of a constitutionally protected right,[29] and second, the officials in charge of the agency displayed a mental state of "deliberate indifference."[30]

Post-*Monell* decisions imposing liability on municipalities for their failure to act[31] focused on the complex issue of whether a municipality owes an affirmative duty to protect its citizens from constitutional violations.[32] In *Martinez v. California*[33] the Supreme Court found that an

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Rep. Sheldon). *See generally* Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 229 (1979) (advocates an interpretation of § 1983 that covers all acts of omission which lead to the deprivation of citizens' constitutional rights).

29. *See, e.g.*, City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (there must, at the very least, be an affirmative link between municipality's policy and particular constitutional violation alleged).

30. *See, e.g.*, Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (to impose § 1983 liability on municipality, a prisoner must show intentional, deliberate, or reckless indifference to his safety by prison officials); Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979) (premeditated nature of prison beating, and the number and rank of officers involved, indicated deliberate indifference by county to violence of prison officials).

31. Actually, a pre-*Monell* decision, Estelle v. Gamble, 429 U.S. 97 (1976), is credited with propelling the debate on whether an affirmative duty to protect exists. Not until the Supreme Court decided *Monell*, however, did federal courts begin to directly discuss the affirmative duty issue. *See* Note, *Municipal Liability Under 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304, 305 (1979).

32. Confusion arises in this context over the differences between causation and duty. Causation concerns the connection between the defendant's conduct and the plaintiff's injury. Duty, on the other hand, focuses on whether the defendant owes any obligation to protect the plaintiff from the threatened harm. *See* W. PROSSER, LAW OF TORTS § 42, at 274-75 (5th ed. 1984).

Courts addressing constitutional torts issues based on § 1983 often blur the distinction between causation and duty, resolving the threshold duty question in terms of causation. *See, e.g.*, Sims v. Adams, 537 F.2d 829 (5th Cir. 1976) (court held that supervisory officials "caused" physical assault committed by individual officers, but court was actually concerned with whether the defendants were under any obligation to prevent the harm). *See generally* Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 478-79 (1982) (advocates clearer line-drawing by courts between duty and causation questions).

The label "constitutional tort" given to § 1983 actions is attributed to Marshall Shapo. *See* Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 323-24 (1965). Shapo defines a constitutional tort as "not quite a private tort, yet [it] contains tort elements; it is not 'constitutional law,' but employs a constitutional test." *Id.* at 324.

Causation and duty questions, of course, emerge only when claimants assert that a municipality was negligent. See W. PROSSER, *supra*, § 42, at 274. Municipal policy may serve as the basis for negligence if it is so severe or long-standing as to demonstrate city policy-making officials' deliberate indifference to constitutional deprivations. *See supra* note 30 and accompanying text. *See also* Glannon, *Recovery for Civil Rights Vio-*

affirmative duty to protect may exist provided there is a special relationship between the municipality and the claimant.[34]

In *Martinez* a parolee murdered the plaintiffs' decedent five months after the state released the parolee.[35] The Court reasoned that absent some special relationship between the state and the decedent, section 1983 did not apply because the government no longer controlled the parolee.[36] The Court, however, offered no specific guidelines as to what constitutes a special relationship.[37] Rather, the Court stated that "the parole board was not aware that the plaintiffs' decedent, as distinguished from the public at large, faced any special danger," and dismissed the suit on proximate cause grounds.[38] *Martinez* thus left open the possibility that in another setting a right of affirmative protection might prevail.

The Second Circuit Court of Appeals attempted to resolve the question *Martinez* left open in *Doe v. New York City Department of Social Services*.[39] In *Doe* two victims of sexual abuse filed a section 1983 suit against the city. They alleged that a child services agency violated an affirmative duty to protect them when it failed to inspect and recertify

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lations in Massachusetts: A Comparison of Section 1983 with State Tort Remedies, 18 SUFFOLK U.L. REV. 247, 290-93 (1984) (discusses the elements of a § 1983 claim against municipal supervisors for negligent conduct).

33. 444 U.S. 277 (1980).

34. *Id.* at 285. Although the *Martinez* Court never articulated what constitutes a special relationship, it noted that the murderer-parolee was "in no sense an agent of the parole board." *Id.* The parolee's action five months after his release, therefore, cannot be characterized as state action. *Id.* "Also, the parole board was not aware that the [plaintiff's] decedent, as distinguished from the public at large, faced any special danger." *Id.*

35. *Id.* at 279.

36. *Id.* at 285.

37. *Id.* The court merely stated that the parolee was not an agent of the state and Martinez, the victim, was not connected to the state in any way. *Id. See supra* note 34 and accompanying text.

38. 444 U.S. at 285. Perhaps the Court's unstated reason for referring to the remoteness of the consequences is the view that the government is responsible only for events "that it either intended or reasonably should have anticipated." In other words, the Court felt the municipality owed no duty to the plaintiff's decedent. *See* Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861, 920 (1982). *See also supra* note 32 and accompanying text (noting the distinction between causation and duty and courts' frequent confusion over that distinction).

39. 649 F.2d 134 (2d Cir. 1981).

the foster home to which the city had assigned them.[40] The court ruled the city had an affirmative duty to protect,[41] but only in cases in which the individual was under government custody or control.[42]

One year later, the Seventh Circuit Court of Appeals narrowed *Doe*'s recognition of an affirmative duty to protect in *Bowers v. DeVito*.[43] In *Bowers* a state mental hospital released a schizophrenic with a history of criminal violence who subsequently murdered the plaintiff's decedent.[44] Bowers' estate filed a section 1983 suit against the hospital, claiming the state had reason to know the danger presented by discharging its former patient.[45] According to the court, no affirmative duty of protection exists unless the state takes an active role in placing an individual in danger.[46] Because the state never affirmatively placed

40. *Id.* at 137.

41. *Id.* at 143-45. While the court did not explicitly state the degree of culpability necessary to impose an affirmative duty to protect, it did suggest that the defendant's conduct should reveal "deliberate indifference." *Id.* at 145. *See supra* note 30 and accompanying text. In *Doe* the plaintiffs did not need to show that the agency had specific knowledge of their mistreatment in their foster home. 649 F.2d at 145. The court imposed liability on the basis of the agency's deliberate indifference in the face of what officials should have known. *Id. See generally* Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement*, 46 CIN. L. REV. 45, 50-53 (1977) (advocates flexible state of mind requirement for purposes of holding municipalities liable for negligence under § 1983). *But cf.* Comment, *Civil Rights: The Supreme Court Finds New Ways to Limit Section 1983*, 33 U. FLA. L. REV. 776, 778-79 (criticizes trend in cases holding that § 1983 claimants need not prove that defendants "willfully" or "with specific knowledge intentionally" violated their constitutional rights).

42. 649 F.2d at 141. The facts in *Doe* indicated that the agency retained supervisory control over the plaintiffs while in their foster home. *But cf.* White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (police held liable under § 1983 for infringing on children's constitutional rights by abandoning them, despite having no physical or legal control over them).

43. 686 F.2d 616 (7th Cir. 1982).

44. *Id.* at 617. The schizophrenic murdered the plaintiff's decedent one year after release from the state mental hospital.

45. *Id.* The facts indicated that the state had released the patient several years earlier and he killed someone at that time. *Id.* Afterwards, the state committed the patient again to the mental hospital and released him before Bowers' death. *Id.*

46. *Id.* at 618. The court noted that the state merely failed to adequately protect Bowers, as a member of the general public, from a dangerous madman. *Id.* While *Bowers* never explicitly referred to the "special relationship" rationale advocated in *Martinez*, the court implied that an affirmative duty to protect may arise in cases in which the claimant was under government custody and control. *Id.* See *supra* text accompanying notes 31-36 for a discussion of *Martinez*. Specifically, the court recognized that state prison personnel are sometimes liable under § 1983 for their failure to protect inmates. *See* 686 F.2d at 618 (citing Spence v. Staras, 507 F.2 554, 557 (7th Cir. 1974), which held prison officials liable under § 1983 for neglecting to stop a beating of

Bowers in danger, the court dismissed the plaintiff's section 1983 action.[47]

The Fourth Circuit Court of Appeals addressed the affirmative protection issue in *Jensen v. Conrad*.[48] In *Jensen* the administratrix of a child's estate brought a section 1983 suit against a child services agency for failing to protect the child from her abusive parents.[49] The court

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one prison inmate by another). In *Bowers*, however, the state retained an informal relationship with the patient after his release. *Id.* at 619. At the time of Bowers' death, the patient returned to the mental hospital periodically for medication and counseling. *Id.*

The majority opinion in *Bowers* prompted a dissent. *Id.* (Wood, J., dissenting). The dissent argued that *Martinez* applied, but felt that a relationship existed between the hospital and the mental patient. *Id.* at 620. The dissent also questioned whether knowledge of a special danger to a particular person in parole cases was relevant in mental cases. *Id.*

47. *Id.* at 618.

48. 747 F.2d 185 (4th Cir. 1984). While *Jensen* was at the appellate stage, the Fourth Circuit decided another case on the issue of an affirmative duty to protect. *See* Fox v. Custis, 712 F.2d 84 (4th Cir. 1983). In *Fox* a parolee seriously injured three women. The women brought a § 1983 suit against the parole board, alleging that the parole officers failed to adequately supervise the parolee. *Id.* at 86. The court, however, never discussed the "special relationship" problem extensively. *Id.* at 87. Rather, the court explicitly followed *Martinez* and held that because the claimants were simply members of the public at large with no special relationship with the state, they had no constitutional right to state protection. *Id.* at 88.

49. 747 F.2d at 187. The complaint alleged that the agency failed to supervise the Browns' home while the abused child was under the agency's care and that, consequently, the child's parents beat her to death. *Id.* at 188.

Over the past few years, child services agencies have become particularly susceptible to § 1983 suits based on acts of omission. *See Liability of Child-Serving Agencies*, 3 CHILD LEGAL RIGHTS J. 4, 17 (1981). Typically, claimants allege that an agency or agency official failed to follow a state's child protection statute and as a result of this negligence, a child suffered physical harm or death. *Id.* at 4.

The increasing amount of attention paid to the legal responsibilities of child services agencies is a result of changes in the law recognizing childrens' constitutional rights. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (school children are "persons under the Constitution," and as such are entitled to constitutional rights consistent with the legitimate requirements of their educational institutions); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (children as well as adults have a constitutionally protected right to privacy). *See generally* C. ROSE, SOME EMERGING ISSUES IN THE LEGAL LIABILITY OF CHILDREN'S AGENCIES 3-5 (1978) (advocates balance between protecting childrens' constitutional rights and allowing child services agencies to use their discretion without fear of legal liability).

Recent government reports reveal the threat felt by the child services industry due to the increasing number of lawsuits filed against them. *See, e.g.*, NATIONAL CENTER OF CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES (1981) (recognizing the more active role courts play in child protection cases, the author recommends a frame-

considered various factors to determine the existence of a special relationship.[50] First, the court concentrated on whether the victim or the perpetrator was in the legal custody of the state at the time of the incident, or had been in the state's legal custody prior to the incident.[51] Second, the court questioned whether the state expressly stated its desire to provide affirmative protection to a particular class or specific individuals.[52] Last, the court focused on whether the state knew of the claimant's plight.[53] After delineating these special relationship guidelines, however, the court declined to rule on whether such a relationship existed in *Jensen*.[54]

In *Estate of Bailey v. County of York*[55] the Court of Appeals for the Third Circuit began its opinion with a synopsis of what constitutes government policy or custom for purposes of municipal liability under

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work for judges to follow when litigating child abuse issues); NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD PROTECTION: PROVIDING ONGOING SERVICES (1980) (provides guidelines for social workers to follow in child abuse cases in an effort to curb legal liability faced by child services agencies).

50. 747 F.2d at 194-95 n.11.

51. *Id.* at 194 n.11. The court found *Martinez* controlling. *Id.* Thus, when the state is unaware that the claimant, as opposed to a member of the public at large, faces a special danger, § 1983 liability does not apply. *Id.* Also, the court indicated that the lack of a past or present custodial relationship between the state and the perpetrators precludes the finding of a special relationship. *Id.*

52. *Id.* at 195 n.11. The court implied that a municipality must explicitly state its desire to offer protection to an ascertainable class before a claimant may invoke § 1983. *Id.*

53. *Id.* This factor addressed the "extent to which the state intended to protect or watch over the particular claimant involved." *Id.* Thus, if the state actually knew that the parents were beating a former child-patient, a special relationship is present. *Id.*

Implicit in this third factor is the court's concern with the foreseeable plaintiff. *Id.* Although *Jensen* never frames its reasoning in terms of foreseeability, the court implies that a claimant must show that the municipality could reasonably foresee the particular injury suffered before the court will recognize an affirmative duty to protect. *Id.* See W. PROSSER, *supra* note 32, § 42, at 275 for a general discussion on foreseeability in negligence claims.

54. 747 F.2d at 195. Instead, the court held that the defendants were entitled to a good faith immunity defense against § 1983 liability. *Id.* Although *Jensen* never offered explicit reasons for granting qualified immunity to agency officials, the court noted that the employees "could not have known" that a failure to protect the decedents would lead to a violation of their constitutional rights. *Id.* The court stated, however, that without the foreseeability problem, a right of affirmative protection arising out of a special relationship might exist in *Jensen*. *Id.*

55. 768 F.2d 503 (3d Cir. 1985).

section 1983.[56] After emphasizing prior cases that inferred government policy from omissions to act,[57] the court questioned whether section 1983 includes an affirmative duty to protect.[58] The court acknowledged the special relationship rationale advocated in *Martinez*,[59] but noted that no consensus existed among the federal courts regarding the parameters of that relationship.[60] Absent defined limits, the court reasoned that a special relationship could exist with or without state custody or control.[61] The *Bailey* court held that YCCYS owed Aleta an affirmative duty to protect under section 1983 even though she was never in the agency's legal custody.[62] The court narrowed its decision, however, by refusing to extend its holding beyond the special circumstances present in *Bailey*.[63]

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56. *Id.* at 506-08.

57. *Id. See supra* note 28 and accompanying text. The court noted that the plaintiffs must prove that YCCYS' failure to monitor Aleta's home resulted in the deprivation of her constitutional rights and that the officials in charge displayed a mental state of deliberate indifference. 768 F.2d at 509. *See supra* note 30 and accompanying text.

58. 768 F.2d at 509-11. The court focused specifically on whether the facts indicated that YCCYS owed a duty to Aleta. *Id.* at 509. It noted that YCCYS knew Aleta was an abused child, took her into temporary custody, and returned her without adequately investigating her home environment. *Id.* at 510.

59. *Id.*

60. *Id.* at 510-11. The court cited dicta from various cases that implied a custodial relationship was not required in order to find an affirmative duty to protect. *Id.* For instance, the court noted that Thurman v. City of Torrington, 595 F. Supp. 1521, 1527 (D. Conn. 1984), held that police officers are under an affirmative duty to protect all people in the community, even without any custodial relationship. *Bailey* also interpreted language in Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982), that implied a right of affirmative protection could arise under the fourteenth amendment, provided some relationship, not necessarily custodial, existed. 768 F.2d at 510.

61. *Id.* at 511. The court noted that YCCYS knew that Aleta faced a special danger from her home environment. *Id.* According to the court, this danger was sufficient to establish a special relationship. *Id.* at 510-11.

62. *Id.* at 511. At least one commentator implicitly supports *Bailey*'s expansion of the affirmative duty doctrine. *See* Note, *supra* note 31, at 313 (the legislative history of § 1983 shows the statute imposes on states a duty of protection which applies to all citizens). *But cf.* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 32 (1974) (concern with an overly broad application of § 1983 requires that limitations be placed on statute); Comment, *Strict Liability Under Section 1983 for Municipal Deprivations of Federal Rights?* 55 ST. JOHN'S L. REV. 153, 163-66 (1980) (opts for adopting traditional negligence standards for § 1983 liability because claimants are able to recover without proving that the state's conduct was responsible for their harm). *See generally* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 30-40 (1980) (discusses the relationship between constitutional torts and common law torts).

63. 768 F.2d at 511. The court never defined the exact circumstances it relied on for its holding, but implied that YCCYS should have foreseen that Aleta was in special

Justice Adams offered a strong dissent,[64] premised on his belief that *Martinez* was controlling.[65] After outlining the causation problems involved in *Bailey*,[66] Justice Adams relied on *Martinez* to show that even if YCCYS owed a duty to Aleta, its inaction did not deprive her of any constitutional rights.[67] The dissent then criticized the majority's inference of a special relationship between YCCYS and Aleta when none existed.[68] Justice Adams concluded that because the majority had extended the statute beyond that which Congress intended, it ignored the purpose of section 1983.[69]

The importance of the Third Circuit's decision in *Bailey* is particularly pronounced when compared to past cases addressing the "special relationship" issue.[70] *Martinez* and later federal court opinions[71] limited municipal liability under section 1983 when a claimant's injuries seemed too far removed from government conduct.[72] Rather than dismiss a claimant's action on purely causation or foreseeability grounds, however, these cases established a legal or custodial relationship re-

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danger. *Id.* at 510. The court noted that YCCYS received a specific confirmation of child abuse from the examining physician and knew the individuals who beat her. *Id.*

64. *Id.* at 511 (Adams, J., dissenting).

65. *Id.*

66. *Id.* at 512. The dissent argued that questions of causation under § 1983 do not turn on whether the defendant owed a duty to the plaintiff or proximately caused the injury. *Id.* Rather, the dissent felt issues of causation should be resolved with reference to the policies and values pertinent to § 1983, as opposed to common law tort concepts. *Id.* The dissent, however, offered no guidelines as to what policies and values were pertinent to § 1983. *Id.*

67. *Id.* at 513. Justice Adams stressed that Aleta's death occurred five months after YCCYS returned her home and that her life was taken by persons who were not under state control. *Id.* These factors, he concluded, indicated that Aleta's death was a consequence too remote from the agency's actions to hold YCCYS responsible under § 1983. *Id.*

68. *Id.*

69. *Id.* Justice Adams emphasized that Congress enacted § 1983 primarily to redress state officials' acts of discrimination. *Id.* The majority opinion, the dissent argued, transgressed the original purpose of § 1983 by creating, in effect, a national state tort claims act administered in the federal courts. *Id.*

70. *See supra* text accompanying notes 33-54 (discusses the various cases addressing the affirmative duty to protect issue under § 1983).

71. *See* cases cited *supra* notes 33-54 and accompanying text.

72. *Id.* For instance, in Martinez v. California, 444 U.S. 277 (1980), the parolee murdered the plaintiff's decedent five months after the state released the parolee. *Id.* at 279. In Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982), the decedent was killed by the former mental patient one year following the patient's release. *Id.* at 617.

quirement.[73] *Bailey* modifies this special relationship rationale through its conclusion that municipal custody or control is no longer necessary to establish an affirmative duty to protect.[74] With its removal of the government control or custody requirement, however, *Bailey* offers no clear guidelines to delineate a special relationship on other grounds, such as foreseeability or causation.[75]

The Third Circuit's failure to decide *Bailey* on clear alternate grounds warrants criticism because the court's holding casts doubt on the vitality of the special relationship rationale.[76] In *Martinez* the Supreme Court placed certain limits on municipal liability for negligence under section 1983.[77] *Bailey*'s willingness to relax those limits without offering alternative tests allows claimants to pursue successful section 1983 negligence actions that are otherwise inadmissible under traditional tort standards.[78] Taken to its extreme application, *Bailey*'s holding could turn section 1983 into a national tort claims act,[79] opening the floodgates to frivolous negligence suits.[80] Congress never intended for section 1983 relief to stretch that far.[81]

The result in *Bailey* also threatens the discretion and flexibility of

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73. *See supra* text accompanying notes 33-54. The custodial relationship requirement, however, is essentially predicated on the foreseeable plaintiff rationale in common law tort actions. *See supra* notes 32, 53 and accompanying text (discusses the causation and duty distinction as it relates to the foreseeable plaintiff issue).

74. 768 F.2d at 511. *See supra* text accompanying notes 55-62.

75. 768 F.2d at 511.

76. *See supra* notes 33-62 and accompanying text. Importantly, the court never completely rejected the special relationship requirement advocated in *Martinez*. Rather, the court felt a special relationship exists in *Bailey* because the agency was aware of Aleta's condition and knew that she faced a special danger in her home environment. 768 F.2d at 510-11. *See supra* notes 60-61 and accompanying text.

77. *See supra* notes 33-38 and accompanying text (discusses the special relationship requirement advocated in *Martinez*).

78. *See supra* note 62 and accompanying text. For a general discussion on the relationship between constitutional and common law torts, see Whitman, *supra* note 62, at 30-40.

79. Justice Adams feared that the court's holding would create a national tort claims act. *See supra* note 69 and accompanying text.

80. Many commentators fear that allowing § 1983 claimants to invoke the statute without meeting traditional *prima facie* negligence standards will overload the courts and stretch the Act far beyond what Congress intended. *See supra* note 62 and accompanying text.

81. Recent congressional amendments narrowing the accessibility to § 1983 suits show the government's concern with the statute's widening scope. *See supra* note 20 and accompanying text.

municipal services agecies.[82] In *Bailey* the court allowed the plaintiffs to successfully assert section 1983 liability against a municipal child abuse center when the agency no longer had legal custody of the abused child.[83] The court's holding thus provides an impetus for future litigants to successfully sue children's agencies for abuse-related deaths over which the agencies have no physical or legal control.[84] Trapped between the threat of lawsuits for failing to intervene and lawsuits claiming negligent interventions, child services agencies might find it difficult to effectively exercise their discretion.[85] *Bailey*'s concern was to protect children from child abuse.[86] Ironically, the court's holding may lead to adverse consequences far removed from that goal.

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82. Agencies already exhibit an increasing fear of § 1983 liability in the wake of *Monell*. *See* C. ROSE, *supra* note 49, at 2 (discusses the effect of the expanding number of § 1983 suits on child service agencies).

83. 768 F.2d at 511. If YCCYS never actually investigated Aleta's home before returning her, then perhaps the claimants would have had a strong argument for imposing liability. As noted before, however, whether YCCYS investigated Aleta's home was a factual dispute to be resolved on remand. *Id.* at 508. *See supra* note 13 and accompanying text.

84. *See supra* note 49 and accompanying text (discusses the increasing volume of § 1983 suits filed against child services agencies and the threat felt by these agencies due to this heightened litigation).

85. While the threat of lawsuits, arguably, may make municipal agencies more cautious, inter-agency articles reveal that agencies are becoming more afraid to intervene in delicate situations, such as cases involving child abuse. *See Liability of Child-Serving Agencies, supra* note 49, at 5.

86. 768 F.2d at 510.

RECENT DEVELOPMENTS