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# The Municipality, Section 1983 and Pendent Jurisdiction

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# NOTES

## THE MUNICIPALITY, SECTION 1983 AND PENDENT JURISDICTION

### INTRODUCTION

The Civil Rights Act of 1871 was passed with the purpose of providing a civil remedy for acts of state and local officials which amount to the deprivation of an individual's rights as provided for in the Constitution and laws of the federal government.[1] In *Monroe v. Pape*,[2] the Supreme Court put "teeth" into the Civil Rights Act by holding that police officers, acting in their capacity as police officers but in violation of state law, were acting "under color of law." The civil remedy provided by Section 1983 was intended to supplement the state remedies available to persons whose constitutional rights are violated by state and local officials.[3]

Theoretically, then, a person has two causes of action when a police officer, acting in violation of state law, deprives him of his constitutional rights. Each action, however, is quite different. The state cause of action may arise from the statute violated or from the common law tort principles which provide compensatory damages for that wrong.[4] The joinder of the municipality under the doctrine of respondeat superior is then permitted in many jurisdictions.[5] A cause of action is also available for the recovery of punitive as well as compensatory damages under Section 1983.[6]

When dealing with the joinder of state claims in actions brought under Section 1983, the important federal procedural device of pendent jurisdiction is brought into issue. The use of pendent jurisdiction previously has been limited generally to claims between the same parties.[7]

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1. Civil Rights Act of 1871 § 1, ch. 22, § 1, 17 Stat. 13 (Codified at 42 U.S.C. § 1983 (1964)) [hereinafter referred to as Section 1983].
2. 365 U.S. 167 (1961).
3. *Id.*
4. *See, e.g.*, Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967); City of Lexington v. Yank, 431 S.W.2d 892 (Ky. 1968).
5. *Id.*
6. Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). When actions are brought in both the federal and state courts, the recovery of compensatory damages in one suit may preclude a recovery for compensatory damages in the other. This issue of res judicata, however, is beyond the scope of this note.
7. *See, e.g.*, Rosenthal & Rosenthal, Inc. v. Aetna Casualty & Surety Co., 259 F. Supp. 624 (S.D.N.Y. 1966); Gautreau v. Central Gulf Steamship Corp., 255 F. Supp. 615 (E.D. La. 1966).

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When a plaintiff joins any state claims he may have against a city employee with the Section 1983 claim in federal court, the court will likely exercise pendent jurisdiction and decide all the claims.[8] But because of the Supreme Court's decision in *Monroe v. Pape*,[9] stating that a city is not a "person" within the meaning of Section 1983, the attempt to join the municipality through the doctrine of respondeat superior as a co-defendant in either the Section 1983 or the state claim has not met with much success in federal courts.[10] Without the municipality as a defendant in federal court there may not be a financially responsible defendant as *Monroe* pointed out. This leaves the state courts as the sole forum for holding a municipality liable for the wrongful acts of its officials. The purpose of this note is to suggest that the federal courts do have the power through pendent jurisdiction to *join a municipality under the state claim only* in a suit against a police officer for relief under both Section 1983 and state claims.

## Liability of Police Officers under Section 1983

The civil remedy for deprivation of constitutional rights has existed since 1871 when the Congress passed the Civil Rights Act, which today is known as Section 1983. This Act 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.

This remedy was given substantial vitality by the Supreme Court in the decision in *Monroe v. Pape*.[11]

The *Monroe* case involved an action against thirteen Chicago police officers and the city of Chicago under Section 1983. Mr. Monroe alleged

8. *See, e.g.*, Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969); Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969); Rue v. Snyder, 249 F. Supp. 740 (E.D. Tenn. 1966).

9. 365 U.S. 167 (1961).

10. *See* Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969).

11. *See* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 Nw. U.L. Rev. 277 (1965); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 Harv. L. Rev. 1486 (1969); Comment, *Tort Liability of Law Enforcement Officers Under Section 1983 of the Civil Rights Act*, 30 La. L. Rev. 100 (1969).

that the police officers broke into his home and made his family stand nude in the middle of the living room as the officers ransacked the house. He was then held on open charges for ten hours, questioned in connection with a ten day old murder and subsequently released. Mr. Monroe filed suit in federal court against the police officers for their violation of Section 1983. The complaint, however, was dismissed by the district court and the circuit court of appeals affirmed.[12] The Supreme Court, in reversing the dismissal of the complaint as to the police officers, held that even though the plaintiff had a cause of action against the police officers under Illinois law, he should not be precluded from a Section 1983 action. The Court, quoting *United States v. Classic*,[13] stated:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.[14]

The *Monroe* Court felt that the officers had indeed acted "under color of state law." This decision has brought about an increase in successful suits against individual police officers for misuse of their office.[15]

The Supreme Court limited the impact of the *Monroe* decision by refusing to consider a municipality a "person" within the meaning of Section 1983. The plaintiff had argued that the city of Chicago should be liable under the doctrine of respondeat superior for the acts of its police officers which violated Section 1983.[16] The Court's interpretation hinged on legislative debates prior to the enactment of the Civil Rights Act. These indicated that Congress did not feel they had the power to legislate municipal liability for the acts of city officials.[17] The *Monroe*

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12. 272 F.2d 365 (7th Cir. 1959).

13. 313 U.S. 299 (1941). *See* 15 VAND. L. REV. 267 (1961).

14. 313 U.S. at 326. This view was affirmed by the Supreme Court in *Screws v. United States*, 325 U.S. 91 (1945). The Court in the *Classic* and *Screws* cases dealt with 18 U.S.C. § 242, the criminal counterpart to Section 1983; the Court felt that the criteria applied to civil liability should be the same.

15. *See* Ginger & Bell, *Police Misconduct Litigation-Plaintiff's Remedies*, 15 AM. JUR. TRIALS 555, 579-91 (1968), for a comprehensive compilation of successful litigation brought against police officers under Section 1983 from 1950 through 1966.

16. Summary of Brief for Appellant at 5 L. Ed. 2d 1052, Monroe v. Pape, 365 U.S. 167 (1961).

17. Monroe v. Pape, 365 U.S. 167, 187-92 (1961). Justice Douglas did not express the Court's opinion on this subject but stated:

> Nor do we reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.

*Id.* at 191.

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decision clearly leaves any alteration of municipal liability in a Section 1983 action to Congress.

## MUNICIPAL IMMUNITY

The concept of municipal immunity for the tortious acts of its agents was well ingrained in the American legal system at the promulgation of the Civil Rights Act in 1871.[18] This concept remained judicially intact until 1958 when the Florida Supreme Court, in *Hargrove v. Town of Cocoa Beach,*[19] became the first state court to abolish the distinction between "governmental" and "proprietary" functions in determining the liability of the municipality for the tortious acts of its officials. "Governmental" functions are generally considered to be those which are imposed upon a municipality by law.[20] The performance of these functions in a tortious manner did not impose liability on the municipality.[21] The exercise of "proprietary" functions, or those which might as easily be exercised by a private business, did impose liability on municipalities when performed in a tortious manner.[22]

The trend since the *Hargrove* decision has been to abolish the concept of municipal immunity for the tortious acts of its agents.[23] Indiana, one of the more recent jurisdictions to abandon the concept of municipal immunity, held that "the doctrine of sovereign immunity has no proper place in the administration of a municipal corporation."[24] In *Brinkman v. City of Indianapolis,*[25] a police officer had been summoned to assist Brinkman, who was quite ill, to the hospital. The officer agreed to do so. Once outside Brinkman's house the officer arrested him for drunkenness, being a disorderly person, and having a pre-mental condition. Bail was not allowed that evening, and Brinkman died that night. An

18. *See* CONG. GLOBE, 42nd Cong., 1st Sess. 804 (1872).
19. 96 So. 2d 130 (Fla. 1957).
20. *See, e.g.,* Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228 (1938).
21. *Id.*
22. *See, e.g.,* City of Avon Park v. Giddens, 158 Fla. 130, 27 So. 2d 825 (1946).
23. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. App. 2d 211, 350 P.2d 457, 11 Cal. Rptr. 89 (1961); Moliter v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967); Haney v. Lexington, 386 S.W.2d 738 (Ky. 1964); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Schuster v. City of New York, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958); Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Dakin, *Municipal Immunity in Police Torts,* 16 CLEV.-MAR. L. REV. 448 (1967). *See also* Note, *Municipal Immunity for the Torts of Police Officers in South Dakota,* 11 S.D.L. REV. 87 (1966).
24. Brinkman v. City of Indianapolis, 141 Ind. App. 662, 665, 231 N.E.2d 169, 172 (1967).
25. *Id.* at 662, 231 N.E.2d 169.

autopsy revealed that death was caused by pneumonia and severe congestion of both lungs. The trial court dismissed the city of Indianapolis as a party defendant on the theory of municipal immunity. The Indiana Appellate Court, in reversing, held that a municipality is liable for the torts of a police officer when the relationship of master-servant exists. The liability rests on the doctrine of respondeat superior.[26] The Supreme Court of Indiana supported the *Brinkman* holding by applying it to an action against a county based on negligent bridge construction.[27] The county was held liable for the torts of its officers under the doctrine of respondeat superior.[28]

The doctrine of respondeat superior does not place absolute liability upon a municipality for the tortious acts of its police officers. When a police officer acts outside the scope of his employment in the furtherance of his own purposes, the master-servant relationship ceases to exist.[29] Although a person may succeed in a Section 1983 suit against a police officer, if the theory of respondeat superior does not apply in any state claims arising from the same occurrence, there can be no recovery from the municipality on the state claims.[30] Some states have clarified the liability of municipalities through codification by the legislature,[31] and others have legislatively protected the municipal immunity doctrine.[32]

A person with a Section 1983 claim against a police officer as a result of the *Monroe* decision is left to pursue only state remedies against the municipality. The state remedies may be sought against the police officer and the municipality where the theory of respondeat superior applies.[33] Therefore, in order to get complete relief, a plaintiff may be forced to bring two suits in separate courts for injuries sustained in one occurrence. The state claims against the police officer may be brought in

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26. *Id.*

27. Klepinger v. Board of Comm'rs of County of Miami, —Ind.—, 239 N.E.2d 160 (1968).

28. *Id.*

29. *See, e.g.,* City of Lexington v. Yank, 431 S.W.2d 892 (Ky. 1968).

30. The Supreme Court in *Monroe v. Pape* found police officers acted "under color of law" even though their acts violated state law. The Kentucky Court of Appeals held that when a police officer violates the law, the master-servant relationship is broken and the municipality is not liable for such acts. City of Lexington v. Yank, 431 S.W.2d 892 (Ky. 1968).

31. *See* CAL. GOV'T. CODE § 810-996.6 (West 1966); ILL. REV. STAT. ch. 85, §§ 1-101—10-101 (1965).

32. *See, e.g.,* GA. CODE ANN. § 69-301 (1967), which limited liability of the municipality to "neglect to perform, or improper or unskilled performance of their ministerial duties . . . ." The statute goes on to state in § 69-307 that "[a] municipal corporation shall not be liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law."

33. *See* notes 24, 29 and 31 *supra* and accompanying text.

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either the federal court or state court,[84] but claims against the municipality lack federal jurisdiction and may be brought in the state court. The defendant police officer, as a result, may be forced to defend two suits in separate courts arising from the same occurrence.

### PENDENT JURISDICTION OF STATE CLAIMS

The Constitution, in article III, section 2, grants to the federal courts jurisdiction over claims "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . ." The federal courts have been hesitant to deal in cases arising solely under state law, except where Congress or the Constitution has expressly granted jurisdiction.[85] The Supreme Court recognized, however, that non-federal issues which are ancillary to the federal claim could all be considered in one judicial proceeding in the federal court.[86] The concept of permitting the joinder of a state claim with a federal claim in a federal court is known as pendent jurisdiction. This concept has become more clearly defined through a number of Supreme Court decisions.

The Supreme Court has not limited the power to exercise pendent jurisdiction to merely ancillary, non-federal claims. In *Siler v. Louisville and Nashville Railroad Co.*,[87] the Court decided that when a federal claim involving a constitutional issue and a state claim were present in the pleadings, the federal court could decide the case on the state claim without reaching the merits on the federal claim.[88] The Court did require, however, that the constitutional claim be colorable and made in good faith.[89]

The Supreme Court in *Hurn v. Oursler*[40] attempted to clarify the factors to be considered in determining a federal court's power to exercise pendent jurisdiction over state claims. The plaintiff in *Hurn* alleged

34. *See* note 56 *infra* and accompanying text.

35. *See* 28 U.S.C. § 1332 (1964). This section permits federal jurisdiction of state claims between parties of different states where the amount in controversy exceeds $10,000.

36. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

37. 213 U.S. 175 (1909).

38. *Id.* In the *Siler* case, the railroad claimed that they had been deprived of their property without due process of law in the setting of rates by the State Railroad Commission. The railroad also alleged that the Commission acted in excess of its delegated authority for setting all intrastate railroad rates. The Supreme Court held that the Commission had acted in excess of its delegated state power and ignored the constitutional question even though the Kentucky Supreme Court had not yet ruled on the question.

39. *Id.*

40. 289 U.S. 238 (1933).

that the defendant's play had violated copyright laws by adopting original ideas from the plaintiff's copyrighted play. A state common law claim of unfair business practice was also alleged. The Supreme Court held that where there is a substantial federal question, the Court has pendent jurisdiction over the state claims arising out of a "single cause of action." The Court stated:

> The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character.[41]

The Court made it clear that the federal cause of action must be substantial before the federal courts have jurisdiction over a state cause of action.[42]

The *Hurn* decision was enacted into law by Congress in 1948, thereby codifying the power of pendent jurisdiction in federal copyright, patent or trademark cases over common law claims of unfair competition.[43] The Federal Rules of Civil Procedure had been made effective in 1938.[44] The passage of the statute and introduction of the Rules caused uncertainty as to the status of pendent jurisdiction in federal courts.[45] The *Hurn* decision defined the power to exercise pendent jurisdiction in terms of "causes of action," but the Federal Rules abolished this terminology and couched its pleading guidelines in terms of "claims for relief."[46] This confusion was not resolved until 1965 when the Supreme Court decided the case of *United Mine Workers of America v. Gibbs*.[47] In *Gibbs* the Court redefined the tests for determining the existence of the power to exercise pendent jurisdiction in light of the Federal Rules.

Gibbs sued the United Mine Workers of America under Section

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41. *Id.* at 246. *See generally* Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction of the Federal Courts,* 62 COLUM. L. REV. 1018 (1962).

42. Levering S. Garigues Co. v. Morin, 289 U.S. 103 (1933). In *Morin* the plaintiff alleged that the defendant was interfering with interstate commerce and was in violation of federal antitrust acts. He also alleged a common law count of conspiracy. The Court held the federal claim was not substantial and therefore refused jurisdiction of the state claim.

43. 28 U.S.C. § 1338 (1964).

44. Effective September 16, 1938.

45. *See* FED. R. CIV. P. 18-20.

46. *See* FED. R. CIV. P. 8.

47. 383 U.S. 715 (1965). *See* Note, *U.M.W. v. Gibbs and Pendent Jurisdiction,* 81 HARV. L. REV. 657 (1968).

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303 of the Labor Management Relations Act of 1947.[48] He also sought to join a state claim under the common law of Tennessee for conspiracy to interfere with the employment contract held by Gibbs with the local mine owners. The Supreme Court held that the power existed to join these claims in the federal court and also fashioned the guidelines for determining the federal power to exercise pendent jurisdiction.

The Court held that the power to exercise pendent jurisdiction exists whenever "the entire action before the court comprises but one constitutional 'case.' "[49] The Court pointed out that one "constitutional" case exists when both claims "derive from a common nucleus of operative fact,"[50] and "if considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . . ."[51]

Once it is determined that the state and federal claims are related in such a manner that they could be tried in one judicial proceeding, the Supreme Court pointed out that exercise of pendent jurisdiction is discretionary. The Court felt that in determining whether or not to exercise its discretion a court should consider "judicial economy, convenience, and fairness to the parties."[52] These considerations were further qualified by the comment that "[n]eedless decisions of state law should be avoided both as a matter of comity and to provide a surefooted reading of applicable law."[53] However, the Court explained that

> [t]here may . . . be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.[54]

A court need not determine the issue of pendent jurisdiction at any particular state of the litigation. The Court pointed out that

48. 29 U.S.C. § 187 (1964). Gibbs had an employment contract to haul coal to the nearest railroad. Gibbs was not permitted to fulfill either contract because of violence which resulted from a labor dispute that prevented the opening of the mine.

49. 383 U.S. at 725.

50. *Id.*

51. *Id.*

52. 383 U.S. at 726. *See* Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949) (concurring opinion, Magruder, C.J.).

53. 383 U.S. at 726 (footnote omitted). *See, e.g.*, Rosado v. Wyman, 90 S. Ct. 1207 (1970). In *Rosado* the federal district court interpreted a New York welfare statute after a three-judge district panel determined the constitutional issue to be moot. 304 F. Supp. 1356 (E.D.N.Y. 1969). The Court of Appeals held that this was an abuse of the judge's discretion. 414 F.2d 170 (2d Cir. 1969). The Supreme Court reversed the Court of Appeals and found that the exercise of pendent jurisdiction was proper, citing the *Gibbs* criteria. *See also* Note, *Discretionary Factors in the Exercise of Pendent Jurisdiction: A Setback in the Second Circuit*, 64 Nw. U.L. Rev. 557 (1969).

54. 383 U.S. at 727.

> [t]he question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation.[55]

The application of the doctrine of pendent jurisdiction in federal court under Section 1983 has been limited to state claims against the defendant police officer arising out of the same occurrence which gave rise to the Section 1983 claim.[56] Efforts in federal court to join the municipality to the Section 1983 claims under the theory of respondeat superior have met with no success because of the decision in *Monroe v. Pape*.[57] Since a municipality is not a "person" within the context of Section 1983, the argument that a municipality through pendent jurisdiction may be joined under respondeat superior to the Section 1983 claim was rejected in the Sixth Circuit case of *Patrum v. City of Greensburg*.[58] A Tennessee district court in *McArthur v. Pennington*[59] had previously agreed with the result in *Monroe* regarding the municipal immunity from Section 1983, but held the city liable because it had purchased liability insurance. The court felt that the city had waived its immunity.[60] The Sixth Circuit Court of Appeals was not persuaded by the *McArthur* case. The court did not find any difference between joining a municipality under the theory of respondeat superior to a Section 1983 claim by using pendent jurisdiction, and directly suing the municipality under Section 1983.[61]

While pendent jurisdiction may not be used to join the municipality as a defendant under a Section 1983 claim, pendent jurisdiction may be used to join the state claims against the police officer and also the municipality under respondeat superior. Pendent jurisdiction has been used frequently to join state claims against a police officer along with a

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55. *Id.*

56. *See, e.g.*, Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969) (wrongful death); Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969) (assault and battery, negligence and false imprisonment); Rue v. Snyder, 249 F. Supp. 740 (E.D. Tenn. 1966) (unlawful arrest and imprisonment).

57. *See* notes 8, 10 and 17 *supra* and accompanying text.

58. Patrum v. Martin, 292 F. Supp. 370 (W.D. Ky. 1968), *aff'd sub nom.*, Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969), *cert. denied*, 90 S. Ct. 1125 (1970).

59. 253 F. Supp. 420 (E.D. Tenn. 1963).

60. *Id.* The *McArthur* case has not been followed. While the court came to the conclusion which the appellant in *Patrum* desired, the decision did not discuss pendent jurisdiction or explain the liability in the light of the rationale of *Monroe v. Pape*. The *McArthur* case stands alone.

61. Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969).

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Section 1983 claim arising from the same occurrence.[62] The possibility of joining a municipality under the theory of respondeat superior on the pendent state claim, absent any independent grounds for federal jurisdiction of the municipality, is feasible because of the recent expansion of the concept of pendent jurisdiction.[63]

### PENDENT PARTIES

The federal courts have had considerable difficulty in clearly defining the extent to which pendent jurisdiction may be applied to join parties over which the court has no independent basis for federal jurisdiction. The Supreme Court's criteria for pendent jurisdiction permits the joinder of claims which derive from a "common nucleus of operative fact."[64] The application of pendent jurisdiction of parties has been attempted in two situations: 1) those in which two or more plaintiffs have claims against two or more defendants arising from the same occurrence, but one or more of the plaintiffs have only a state law claim against the defendants; 2) those in which one or more plaintiffs have claims against one or more defendants arising from the same occurrence, but there is no federal jurisdiction over one or more of the defendants. Some courts have flatly stated that pendent jurisdiction of non-federal claims requires the same parties as the federal claim.[65] There is, however, authority to the contrary.[66]

The first category mentioned has met with considerably more success than the second in obtaining pendent jurisdiction of non-federal claims in the federal court. In *Aetna Casualty & Surety Co. v. Hatridge,*[67] the plaintiff husband brought a suit for personal injuries in federal court obtaining jurisdiction by asserting diversity of citizenship with a claim exceeding $10,000.00.[68] The court exercised pendent juris-

62. *See* note 56 *supra* and accompanying text.

63. The joinder of a party in a federal suit in which there is no independent federal jurisdiction of that party, and the claim for or against that party arose out of the same occurrence as the federal claim, is known as the joinder of pendent parties. *See generally* Note, *U.M.W. v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968).

64. *See* notes 49-51 *supra* and accompanying text.

65. *See* Rosenthal & Rosenthal, Inc. v. Aetna Casualty & Surety Co., 259 F. Supp. 624 (S.D.N.Y. 1966); Gautreau v. Central Gulf Steamship Corp., 255 F. Supp. 615 (E.D. La. 1966). There is no basis in the *Gibbs* opinion which would substantiate such a conclusion.

66. *See, e.g.,* Aetna Casualty & Surety Co. v. Hatridge, 282 F. Supp. 604 (W.D. Ark. 1968), *aff'd*, 415 F.2d 809 (8th Cir. 1969); Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3d Cir. 1968); Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968).

67. 282 F. Supp. 604 (W.D. Ark. 1968), *aff'd*, 415 F.2d 809 (8th Cir. 1969).

68. 28 U.S.C. § 1332 (1964).

diction by joining the wife's claim of less than $10,000.00 for loss of consortium.[69] In *Bishop v. Byrne*[70] a husband sought to litigate his claim for hospital expenses with an action by his wife for negligence in the performance of a sterilization operation. The court exercised pendent jurisdiction noting that his claim should "be litigated as subsidiary to the wife's claim . . . ."[71] This type of suit is a particularly strong case for the exercise of pendent jurisdiction, since the state claim of one spouse is dependent upon the success of the other spouse's federal claim.

The Ninth Circuit case of *Hymer v. Chai*[72] is, however, authority against this proposition. In that case a wife's claim for loss of consortium was not allowed to be asserted with her husband's claim for personal injuries. Relying on a pre-*Gibbs* case,[73] the court concluded that the failure to meet the jurisdictional amount, even though there was diversity, would defeat her attempt for a federal forum.[74] The use of pre-*Gibbs* decisions in determining whether the power to exercise pendent jurisdiction exists is of questionable validity.[75] Unfortunately, the issue of judicial power to exercise pendent jurisdiction is seldom finally deter-

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69. In *Hatridge* the husband was injured in a bus accident, and the wife's claim under Arkansas law was contingent on the success of his claim. The court found the claims so intertwined and interdependent that pendent jurisdiction was allowed. The court cited the *Gibbs* case as supportive of its conclusion.

70. 265 F. Supp. 460 (S.D. W. Va. 1967).

71. *Id.* at 466.

72. 407 F.2d 136 (9th Cir. 1969).

73. Katooka v. May Dep't Stores Co., 115 F.2d 521 (9th Cir. 1940). The court found that a plaintiff who sued two defendants as joint tort-feasors, one of whom was from the same state as she, would not support federal jurisdiction because of the lack of complete diversity.

74. The court in the *Hatridge* case was aware of the *Hymer* decision but chose to ignore it. *See also* Campbell v. City of Atlanta, 277 F. Supp 395 (N.D. Ga. 1967). A man brought suit in federal court for personal injuries suffered when the city's bridge collapsed as his truck was crossing. His wife brought suit in a state court for loss of consortium in the amount of $9,999.99. The defendant city sought to remove the wife's claim to the federal court. Jurisdiction was refused in the exercise of the court's discretion. The court noted that determination of either claim was not res judicata as to the other. There were also other issues which clouded the husband's claim, including joinder of the husband's employer in a counterclaim on the theory of respondeat superior. The employer counterclaimed against the city for damage to the truck. The court went on to state:

> But for these circumstances, and in the ordinary case it may well be that the doctrine of pendent jurisdiction should be extended to cases of this character in the interest of judicial economy and convenience. Certainly such a conclusion would seem to be in keeping with the spirit of the Federal Rules relating to joinder of claims and parties [*See* FED. R. CIV. P. 18-20]. We find no authority, however, for such an extension under the precise facts of this case, and we decline to order or to recognize one until sanctioned by higher authority.

277 F. Supp. at 396-97.

75. *See* 3A J. MOORE, FEDERAL PRACTICE § 18.07, at 1953 (2d ed. 1969).

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mined in many cases because the court merely exercises its discretion in the alternative by dismissing the pendent party.[76] This method makes review of the power to exercise pendent jurisdiction of parties in the circuit courts difficult.

In a situation similar to that of the *Hatridge* and *Hymer* cases, the District Courts of the Third Circuit have also refused to invoke pendent jurisdiction. A minor in Pennsylvania who has a personal injury claim against a resident of the state may have a guardian-ad-litem from another state appointed to represent him in court, thus creating diversity of citizenship. If the claim exceeds $10,000.00, the minor may litigate the claim in federal court.[77] *Newman v. Freeman*[78] and *Obney v. Schmalzreid*[79] were two cases which allowed a parent to join a claim for less than $10,000.00, even though no diversity of citizenship existed, under the doctrine of pendent jurisdiction. A three-judge district court in *Oliveri v. Adams*,[80] however, refused to follow these decisions even though they were factually the same. The *Oliveri* court pointed out that although a parent's claim is derivative of the child's claim, when an out-of-state guardian is appointed, the relationship of parent-child is broken. The *Oliveri* case distinguished the Third Circuit's decision in *Wilson v. American Chain & Cable Co.*,[81] by noting that in the *Wilson* case the father's claim for loss of services which was joined to the child's personal injury claim was permitted because the father was the guardian-plaintiff, leaving only one plaintiff with multiple causes of action.

The cases which have allowed the joinder of pendent parties are not limited to joinder of plaintiffs' claims but are supplemented by those which have allowed the joinder of a state claim against a non-federal defendant. The joinder of a third party defendant in some federal courts has permitted the plaintiff to sue that party directly on a state claim,[82]

76. *See, e.g.*, Oliveri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968); Meyerhoffer v. East Hanover Twp. School Dist., 280 F. Supp. 81 (M.D. Pa. 1968).

77. Oliveri v. Adams, 280 F. Supp. 428 (E.D. Pa. 1968). *See* 66 MICH. L. REV. 373 (1966).

78. 262 F. Supp. 106 (E.D. Pa. 1966). In that case a father's claim for medical expenses and loss of services was allowed to be joined with a minor's action for injuries sustained in an automobile accident. *See also* Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966), where a father's claim for incidental damages was permitted to be joined with his suit for his minor child's injuries sustained from a power lawnmower.

79. 273 F. Supp. 373 (W.D. Pa. 1967). In that case the parent's claim for medical expenses was permitted to be joined with a minor's claim for injuries suffered in an automobile accident.

80. 280 F. Supp. 428 (E.D. Pa. 1968).

81. 364 F.2d 558 (3d Cir. 1966). *See* note 87 *supra* and accompanying text.

82. Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968). This

but this procedure has not met with wide acceptance.[83] One of the chief concerns in litigating state claims of any kind in federal courts is the already heavy caseload of the federal courts.[84] This is an important factor in the reluctance of the federal courts to permit the joinder of pendent parties.

The concept of pendent jurisdiction was applied in *Jacobson v. Atlantic City Hospital*[85] to join a defendant over which the court had no independent federal jurisdiction. The plaintiff sued two doctors and the hospital for negligence in federal court on the basis of diversity of citizenship. A state statute limited the liability of the hospital to $10,000.00.[86] This limitation of liability prevented the plaintiff from joining the defendant on the basis of diversity of citizenship since the amount in controversy was not sufficient.[87] The hospital was joined under the doctrine of pendent jurisdiction in a suit in federal court against the doctors. The court held that the negligence of the doctors and the hospital operated concurrently to produce the death of plaintiff's intestate. The court exercised pendent jurisdiction reasoning that:

> [M]ost of the operative facts are common to the coupled claims, and in normal and most convenient and expeditious practice and procedure these claims would be tried together.[88]

The rationale of *Jacobson* has been persuasive in subsequent cases which have permitted the joinder of a defendant when the court does not have independent federal jurisdiction. One such case cited the phraseology of *Gibbs* in allowing such joinder, pointing out that the claims arose from, "a common nucleus of operative fact" and "are such that he [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding."[89]

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decision pointed out that a third party defendant may directly sue the plaintiff absent independent federal jurisdiction. *See* FED. R. CIV. P. 14.

83. *See* Schwab v. Erie Lackawanna R.R. Co., 303 F. Supp. 1398 (W.D. Pa. 1969). An employee sued his employer under the F.E.L.A. The employer joined a crossing guard as a third-party defendant, but the employee was not permitted to directly sue the guard. *See also* Ayoub v. Helm's Express, Inc., 300 F. Supp. 473 (W.D. Pa. 1969); Corbi v. United States, 298 F. Supp. 521 (W.D. Pa. 1969); Palumbo v. Western Md. Ry. Co., 271 F. Supp. 361 (D. Md. 1967).

84. Schwab v. Erie Lackawanna R.R. Co., 303 F. Supp. 1398 (W.D. Pa. 1969).

85. 392 F.2d 149 (3d Cir. 1968). *See* Note, *Jacobson v. Atlantic City Hospital: Liberalizing the Amount of Controversy Requirements of Federal Diversity Jurisdiction for Multiple Defendant Cases*, 30 U. PITT. L. REV. 413 (1968).

86. N.J. REV. STAT. § 2A:53A-7, 8 (1951).

87. *See* 28 U.S.C. § 1332 (1966).

88. 392 F.2d 149, 154 (3d Cir. 1968).

89. Stone v. Stone, 405 F.2d 94, 98 (4th Cir. 1968). *See also* McCormick & Co. v. Redford Industries, Inc., 301 F. Supp. 29, 35 (D. Md. 1969).

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Other federal courts have been reluctant to exercise their discretion in permitting the joinder of pendent parties.[90] The decisions do not show much consistency in legal reasoning, thus leaving some confusion in the area of pendent parties. Although the Supreme Court has not yet decided whether pendent parties may be joined, the Court has indicated that pendent jurisdiction is important in settling the entire dispute between parties when there is a substantial federal question involved. In *Rosado v. Wyman,*[91] the Court decided that even though the federal question had become moot, the district court had the power to decide the state claims involved. The Court felt that federal-state comity was not as important as conserving judicial energy and avoiding multiplicity of litigation. The *Rosado* decision was important because the guidelines for exercising discretion were clarified. Judicial economy and avoidance of multiple litigation seemed to be the primary factors to be considered. These guidelines may become more important in future decisions regarding pendent parties.

The federal courts since the *United Mine Workers of America v. Gibbs*[92] decision have not been as reluctant to join pendent parties as they were in pre-*Gibbs* cases. Unfortunately, however, the pre-*Gibbs* decisions sometimes influence post-*Gibbs* decisions regarding pendent jurisdiction.[93] The court in the *Patrum v. City of Greensburg* decision cited the case of *Wotjas v. Village of Niles*[94] as supporting the conclusion that retaining the city as a party without separate federal jurisdiction was not proper. The *Wotjas* case, however, was decided in 1964 before the *Gibbs* guidelines were decided by the Supreme Court. In *Wotjas* a suit was filed under Section 1983 against city officials. State claims against the city were not permitted to be joined, even though they arose from the same fact situation. The guidelines for determining the power to exercise pendent jurisdiction set out in *Gibbs* may very well have caused the *Wotjas* case to have been decided differently.[95] This decision should not

90. Kletscka v. Driver, 411 F.2d 436 (2d Cir. 1969); Ellicott Machine Corp. v. Wiley Mfg. Co., 297 F. Supp. 1044 (D. Md. 1969); Sayre v. United States, 282 F. Supp. 175 (N.D. Ohio 1967).

91. 90 S. Ct. 1207 (1970). This decision was foreshadowed by federal district court decisions which held that "judicial economy, convenience and fairness to parties" is controlling in determining whether to decide state claims which are local in nature. Scoville v. Board of Educ., 286 F. Supp. 988 (N.D. Ill. 1968); Travers v. Patton, 261 F. Supp. 110 (D. Conn. 1966).

92. 383 U.S. 715 (1966).

93. 3A J. MOORE, FEDERAL PRACTICE § 18.07, at 1953 (2d ed. 1969).

94. 334 F.2d 797 (7th Cir. 1964).

95. *See* Note, *Discretionary Factors in the Exercise of Pendent Jurisdiction: A Setback in the Second Circuit,* 64 NW. U.L. REV. 557, 562-63 (1969). This article analyzes how *Wotjas v. Village of Niles* might have been decided under the *Gibbs* guidelines.

stand in the way of permitting a city to be joined as a party on state claims in a Section 1983 suit against one of its officials where the *Gibbs* guidelines are satisfied.

## CONCLUSION

Pendent jurisdiction may be the basis which will provide complete relief to a party whose civil rights have been violated. In 1871 Congress saw the need to provide a civil remedy for the violation of civil rights by passing Section 1983. In so doing, however, Congress did not attempt to abrogate municipal immunity even though there was feeling among its members that the municipality should be responsible for the acts of municipal officials.[96] Not until 1958 were the courts willing to remove the common law cloak of immunity from the municipality for tortious acts of its employees.[97] Since that time, many other states have followed suit in abolishing this common law concept.[98] A person who has had his civil rights violated by a police officer and brings a suit under Section 1983 may join any state claims he has against the officer under pendent jurisdiction.[99] The newly developing concept of pendent parties should permit the municipality as the employer to be joined as a defendant to the state claims under the theory of respondeat superior.[100]

The power of a federal court to exercise pendent jurisdiction exists when both the state and federal claims arise out of a "common nucleus of operative facts" and are of a nature which ordinarily would be tried in one judicial proceeding.[101] When a police officer violates a person's civil rights, the Section 1983 action and all state claims against the municipality and the officer arise from that incident. Once the state claims against the officer are proved in federal court, only the agency question remains to be determined in the state claim against the municipality.[102] The *Gibbs* and *Rosado* decisions held that once the power to exercise pendent jurisdiction exists, the court should consider *avoidance of multiplicity of litigation, judicial economy* and *convenience of the parties*

96. *See* note 18 *supra* and accompanying text.
97. *See* notes 20-23 *supra* and accompanying text.
98. *See* note 24 *supra* and accompanying text.
99. *See* note 7 *supra* and accompanying text.
100. *See* Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3d Cir. 1968); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); McCormick & Co. v. Redford Industries, Inc., 301 F. Supp. 29 (D. Md. 1969).
101. *See* notes 50-51 *supra* and accompanying text.
102. *See* notes 27, 52 and 53 *supra* and accompanying text. The possibility that the jury will confuse the issues must also be considered.

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in determining whether to exercise its *discretion* and permit the joinder of state claims.

The possibilities of suits in both federal and state courts on a set of facts giving rise to a cause of action against a police officer under Section 1983 and also state claims against the officer and the municipality are the result of the supplemental nature of the Section 1983 recovery.[103] Since plaintiff is entitled to only one recovery for compensatory damages for his injuries, judicial economy and avoidance of multiplicity of litigation would be accomplished by permitting a plaintiff to try all of his claims in the federal court.[104] If both the federal and state claims are tried in one proceeding, the defendant police officer would be convenienced by defending in only the federal court rather than both the state and federal courts.[105] This result should promote fairness to both the plaintiff and defendant police officer by determining all claims in one proceeding. Of course, the municipality is defending only against the state claims and therefore should not be prejudiced by being required to defend in the federal court.

A case such as *Patrum v. City of Greensburg*[106] would appear to be a proper case for a plaintiff to join a Section 1983 claim with all state claims against a police officer and also join the city on the state claims. The exercise of a federal court's discretion to permit pendent jurisdiction of these claims would allow all claims to be adjudicated in one proceeding.[107] This result would be a consistent and proper interpretation of the guidelines for pendent jurisdiction as set out in the *Gibbs* and *Rosado* decisions.[108]

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103. *See* notes 3-4 *supra* and accompanying text.

104. *See* Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). The court in that case permitted only one recovery of compensatory damages where the jury had allowed recovery of compensatory damages under a Section 1983 claim and also for state tort claims.

105. *See* notes 9-10 *supra* and accompanying text.

106. 419 F.2d 1300 (6th Cir. 1969). The plaintiff was allegedly beaten and falsely imprisoned by a Greensburg, Kentucky police officer.

107. *See* note 54 *supra* and accompanying text. *See also* Shakman, *New Pendent Jurisdiction of the Federal Courts,* 20 STAN. L. REV. 262 (1968).

108. There is a possibility of claiming punitive damages on the state claims in a state court. If punitive damages are permitted on the state claims, the result achieved would be similar to permitting the joinder of a city under a Section 1983 claim. This topic, however, is beyond the scope of this article.