To: Justice Powell Date: July 14, 1977

From: Charlie

Ingraham and § 1983

In his letter of May 19, 1977, Professor Monaghan suggested to you that §1983 might be limited to "certain substantive claims" and all procedural claims. He apparently would require substantive claims to be linked in some way to the historical purposes of the statute in order to state a cause of action. While such a requirement might help to block many §1983 claims that would better be heard in state courts, it would appear to suffer a number of defects. Principally, it has no support in the cases and indeed has been specifically rejected in Monroe v. Pape, 365 U.S. 167 (1961); it gives inadequate recognition to the implications of the process by which the Bill of Rights was held to be incorporated in the Fourteenth Amendment; and it is practically impossible to refine into a test capable of neutral application by District Judges.

In his article, On "Liberty" and "Property", 62 Cornell L. Rev. 407, Monaghan says:

> "Surely, when read in light of its historical origins and the demands of "Our Federalism," section 1983 could have been read less than literally--read so as not to encompass all of the interests encompassed by the "liberty" (and "property") of the due process clause." Id., at 429.

He notes that "statutory language cast in constitutional terms need not be read to embody the full range of constitutional interests" and relies on the analysis

in Shapo, Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, 60 Nw. U.L. Rev. 277 (1965). Shapo in turn takes the view that §1983 should be limited to cases involving "outrageous" violations of constitutional rights akin to the outrageous abuses of power that led to enactment of the statute:

> "Harking to the legislative history, this standard would call for a brutality or arbitrariness which goes beyond the garden variety state tort action. . . . [T]he statute should operate only in cases involving extraordinarily offensive conduct--which surely was the case in Monroe. The issue, laden as it is with problems of federalism, seems to call for a new analogue to the "concept of ordered liberty." 60 Nw. U.L. Rev., at 327-328.

Although Monaghan's suggestion that you might distinguish among the interests protected by the due process clause is ambiguous, I take it to mean that he would separate constitutional rights into two classes: those that can only be asserted defensively (e.g. Mrs. Moore's liberty interest was properly asserted in defending against conviction) and those that can form the basis of a cause of action under §1983 (Mrs. Moore cannot now sue East Cleveland officials for any damages she may have suffered as a consequence of enforcement of the statute). All rights under the constitution may be asserted defensively; only those that bear some relation to the abuses of the Reconstruction South may be asserted in an offensive § 1983 action. Monaghan apparently places the interest of a schoolchild in not being beaten by his teacher in a public institution into

the category of constitutional rights that are unprotected by §1983.

Such a classification of rights for § 1983 actions was squarely rejected by Monroe, where the Court held that it was sufficient to allege facts "constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment." 365 U.S., at 171. All rights guaranteed by the incorporated provisions of the first eight Amendments were included. Justice Frankfurter, while dissenting on the "color of law" issue, agreed with the majority on the nature of the protected rights:

> "If petitioners have alleged facts constituting a deprivation under color of state authority of a right assured them by the Fourteenth Amendment they have brought themselves within [the statute]." Id., at 206.

The same approach prevailed in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), where the Court rejected the view that property interests could be excluded from the protection of §1983. The Court refused "to pare down . . . the substantive scope of § 1983--by means of the distinction between personal liberties and property rights, or in any other way." Id., at 549 (emphasis added). Justice Stewart explicitly relied on the parallel interpretation of §242, the criminal analogue to §1983, to embrace "all of the Constitution and laws of the United States." Id., at 549 n. 16, citing United States v. Price, 383 U.S. 789, 797. Given the importance of stare decisis in

statutory interpretation, I would say that it is too late to adopt Professor Monaghan's suggestion.

Moreover, even apart from precedent, it would seem to me unwise to distinguish among rights protected by the Constitution as a means of limiting § 1983. For a long time the Court resisted holding that substantive rights protected by the first eight Amendments against the federal government were protected to the same extent against the states by the Fourteenth. For better or worse, however, that bridge ultimately was crossed, with the result that with certain exceptions (juries and grand juries) the Bill of Rights is fully applicable to the states. The implication is that those who framed the Fourteenth Amendment intended to incorporate in its protection the specific guarantees of the Bill of Rights. It seems to me impossible to accept that implication without also agreeing with the Court in Monroe and Lynch that the draftsmen of §1983 intended that statute to encompass the full range of constitutional protection. To argue, as Shapo does, for an "implicit in the concept of ordered liberty" standard, seems to me simply to resuscitate the incorporation debate long after it has been settled.

Equally important, limiting the substantive protection of § 1983 would seem to me to invite unprincipled decisionmaking. If one assumes, for example, that Justice White was correct that the Eighth Amendment reaches school paddlings, how can one say whether

the claim in Ingraham is or is not within the protection of §1983? If the test is the degree of offensiveness involved in the alleged deprivation of rights, reasonable men could disagree on its application to a case of "twenty licks" as in Ingraham. If the test is the nexus between the asserted right and the evils that led to passage of § 1983, the outcome will depend on whether the court focuses on the fact that physical beatings by state officials are involved or on the fact that the setting is an educational one and the officials are teachers. It is not clear to me, as it is to Professor Monaghan, that his approach would result in exclusion of "the right to be free from grossly excessive discipline" from the protection of § 1983.

This is not to say that there is no room for limitation of § 1983 by closer attention to its historical purposes. There is still broad leeway for interpretation of the requirement of a "deprivation" that occurs "under color of" state law. But I see no basis for picking and choosing among acknowledged constitutional rights in defining the scope of protection of the statute.