The Civil Rights Act of 1871: Continuing Vitality

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NOTES

The Civil Rights Act of 1871: Continuing Vitality. — The passage of the Civil Rights Act of 1964 is recent history. Certain of its provisions, particularly the “public accommodations” section, are currently being tested in the federal courts. The constitutionality of this great social experiment may soon be affirmed. Whatever the merits of the Act might be, its legislative history and final passage have been accompanied by an unprecedented degree of public consciousness. The attendant publicity may even have drawn certain members of the legal profession to the conclusion that the 1964 effort represents the only significant piece of Civil Rights legislation in existence. Others, more or less vaguely aware of pre-existing Civil Rights legislation, may have incorrectly assumed that the new Act was designed as a comprehensive replacement measure. To the extent that such impressions exist, recent years of significant and effective implementation of the fourteenth amendment and its concomitant guarantees of personal liberty are being overlooked.

The “public accommodations” section of the Civil Rights Act of 1964 represents a dramatically different approach to the problems of individual freedom through its basic utilization of the commerce clause to bring the power of the federal government to bear upon private persons. A strong foundation of legislative guarantees against encroachment of individual rights by public officials, however, has long been in existence, albeit only quite recently effective. This note will seek to expose one of these remedies, explore its operation, and document its continued vitality in the wake of the new Civil Rights Act. The discussion will primarily be concerned with a single section of the Civil Rights Act of 1871, currently designated as section 1983 of Title 42 U.S.C. Section 1983 is a broad fourteenth amendment-based provision which has assumed considerable importance in recent years. It creates a civil action for damages and/or equitable relief against any person acting “under color of” state law who deprives another person of the rights, privileges or immunities secured by the Constitution or federal laws. The present treatment will concern itself with the history, and more importantly, with the development of section 1983 since the recent pivotal decision of Monroe v. Pape. It will conclude with a brief discussion of the general relationship of section 1983 to the projected scope of the Civil Rights Act of 1964, and, in particular, with a discussion of the complementary character of these two measures.

Section 1983: Its Early History Through Monroe v. Pape

The five-year period immediately following the Civil War saw the proposal and ratification of three amendments to the Constitution which were designed to guarantee certain fundamental rights to the emancipated Negro. The thirteenth amendment declared the abolition of slavery and other forms of involuntary servitude. Through a portion of the fourteenth amendment, the Negro was granted his citizenship and guaranteed the equal enjoyment of the rights and privileges possessed by other citizens. The fifteenth amendment assured the Negro that he would not be denied the right to vote because of his race. All three of these amendments contained clauses investing Congress with the power to pass legislation in support of their terms. The immediate result was a series of five Civil Rights

4 17 Stat. 13 (1871).
Acts,\textsuperscript{6} passed between 1866 and 1875. Only one of these legislative efforts, section 1 of the Civil Rights Act of 1871, was to achieve significant success in subsequent years, and only then following a long dry spell of restrictive interpretation by the Supreme Court.\textsuperscript{7} The Court, notably in \textit{United States v. Cruikshank}\textsuperscript{8} and the \textit{Civil Rights Cases},\textsuperscript{9} substantially emasculated the broad purposes of the post-Civil War amendments and legislation by holding that the amendments were directed only against "state action," as opposed to action by private individuals. In fact, in the \textit{Civil Rights Cases},\textsuperscript{10} the Supreme Court struck down a provision of the Civil Rights Act of 1875 which, but for its underlying constitutional basis, was quite similar to the "public accommodations" section of the Civil Rights Act of 1964.\textsuperscript{11}

The first section of the Act of 1871, currently section 1983, remained on the books, however, having been spared by its reference to action taken "under color of" state law. As presently constituted, section 1983 provides:

\begin{quote}
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.\textsuperscript{12}
\end{quote}

Although some deviation from a strict interpretation of section 1983 may have taken place during the first few decades of the present century, no singularly noteworthy interpretation of the provision manifested itself until \textit{Hague v. CIO}\textsuperscript{13} was decided in 1939. In that case, the plaintiffs, members of a labor union, sought an injunction against certain Jersey City, New Jersey municipal officials to restrain them from interfering with a claimed right to free speech and peaceful assembly. The municipal officials had refused to grant the union permission to conduct a campaign publicizing the National Labor Relations Act. Although his was not the opinion of the Court, Justice Stone set the mood for the years to come by asserting that the rights of free speech and peaceful assembly were rights secured against state action by the due process clause of the fourteenth amendment and made actionable by section 1983.\textsuperscript{14} Two other crucial decisions were handed down shortly after the decision in \textit{Hague}. In \textit{United States v. Classic}\textsuperscript{15} and \textit{Screws v. United States},\textsuperscript{16} both of which involved the interpretation of the criminal counterpart of section 1983,\textsuperscript{17} the Supreme Court held that "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" within the meaning of the statute.\textsuperscript{18}

\textsuperscript{6} 14 Stat. 27 (1866); 16 Stat. 140 (1870); 16 Stat. 433 (1871); 17 Stat. 13 (1871); 18 Stat. 335 (1875).


\textsuperscript{8} 92 U.S. 542 (1875).

\textsuperscript{9} 109 U.S. 3 (1883).

\textsuperscript{10} Ibid.

\textsuperscript{11} Section 1 of the Act of 1875, 18 Stat. 335, read in part: "[A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement...." Section 201(a) of the Act of 1964, 78 Stat. 241, reads in part: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation...."


\textsuperscript{13} 307 U.S. 496 (1939).

\textsuperscript{14} Id. at 527. \textit{Hague v. CIO} was a 5-2 decision, presenting three separate opinions for the majority and one dissenting opinion. Three members of the majority felt that free speech and peaceful assembly were "privileges" of citizens of the United States.

\textsuperscript{15} 313 U.S. 299 (1941).

\textsuperscript{16} 325 U.S. 91 (1945).

\textsuperscript{17} 18 U.S.C. § 242 (1948).

The decisions in the *Hague, Classic* and *Screws* cases undoubtedly began a period of greater acceptance of section 1983 in the lower federal courts. This receptivity is evidenced by the scores of claims appearing in the federal courts during the 1950's. The most significant and authoritative treatment of this section by the Supreme Court, however, did not occur until 1961 in the landmark decision of *Monroe v. Pape*.19

In *Monroe* the plaintiffs, a Negro family, alleged that a squad of Chicago policemen, investigating a two-day-old murder, broke into their home at an early hour, awakened them, and forced them to stand naked in the living room while ransacking the house. Their complaint further alleged that Mr. Monroe was taken to police headquarters and interrogated for about ten hours while being held incommunicado. It specified that he was neither taken before a magistrate nor permitted to call an attorney, and that he was eventually released without criminal charges being filed. Finally, the plaintiffs alleged that although the officers had procured neither a search warrant nor an arrest warrant, they had nevertheless acted "under the color of" the laws of Illinois and the City of Chicago in depriving them of their "rights, privileges, and immunities secured by the Constitution." The action for damages under section 1983 was brought in the district court against the City of Chicago and the police officers. The district court granted a motion to dismiss made by all the defendants on the ground that the complaint failed to state a cause of action, and the Seventh Circuit affirmed.20 On certiorari, the Supreme Court affirmed as to the City of Chicago, asserting that municipalities were not "persons" within the meaning of section 1983.21 It reversed as to the police, however, on the ground that a cause of action was stated under section 1983 when the plaintiffs alleged a denial of due process by the officers,22 even though the latter may have acted in violation of state law.23

In addition, the Supreme Court made at least two other significant pronouncements with respect to the interpretation of section 1983. It declared that the remedy afforded by section 1983 is supplementary to any relief available in the state courts,24 and that it is not necessary for relief under section 1983 that the defendants have acted with the specific intention of depriving the plaintiff of some constitutional guarantee.25

The lasting importance of the decision may not rest upon any of the grounds just stated. *Monroe* did much more than sound a note of encouragement for victims of conduct theretofore only apparently proscribed by the language of section 1983. The point is not that it was departing radically from prior interpretations of the provision, for as will be seen, several of its conclusions were anticipated by lower court opinions. Rather, the Supreme Court in *Monroe* exhibited a sweeping change in the judicial attitude toward the reading of complaints under section 1983. As a result of *Monroe*, public officials must at least respond affirmatively to allegations of abuses amounting to constitutional deprivations. Dispositions of these claims will take place at the hearing or trial stage, rather than on the paper pleadings, as was so often the case before *Monroe*. Thus, the progress which section 1983 had been making since *Hague v. CIO*26 was judicially approved.

Section 1983: Jurisdictional and Procedural Problems

Section 1983 does not of itself confer jurisdiction on the federal courts to entertain suits for deprivations of constitutional rights. It merely creates the claim

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20 Monroe v. Pape, 272 F.2d 365 (7th Cir. 1959).
22 Id. at 171.
23 Id. at 172.
24 Id. at 183.
25 Id. at 187.
26 307 U.S. 496 (1939).
or cause of action. The requisite jurisdiction is established by a statute whose wording is nearly identical. 28 U.S.C. § 1343, in its relevant part, provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: ... (3) to redress the deprivation, under color of any state law, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. 27

The slight variations in statutory language from that of section 1983 have posed no real difficulties. 28 In fact, many federal courts have apparently based their jurisdiction on section 1983 itself. 29 It should be noted that section 1343(3) contains no requirement of jurisdictional amount, and it is well settled that a claimant need not make any allegation respecting the amount in controversy. 30 This conclusion is almost inescapable, since the nature of the interests sought to be protected defies monetary valuation. 31

Congress also failed to provide a statute of limitations applicable to section 1983 claims. There is no longer any question that in these circumstances, while the Federal Rules of Civil Procedure govern the tolling of whatever statute is applicable, 32 the forum state provides the statute limiting the period within which the action may be brought. 33 Since, of course, none of the states have statutes specifically limiting claims for constitutional deprivations, holdings involving statute of limitations questions often resolve themselves into disputes as to which of the various limiting statutes of a state is "most applicable." 34 On this point irreconcilable conflict exists, partly due to the almost infinite variety of state statutes of limitation, and partly due to frequent attempts to conceptualize the nature of the claim which has been asserted. Some courts, for example, have taken the position that since the cause of action did not exist at common law and would not exist but for a federal statute, the applicable period of limitations is defined by the state provision governing actions involving a "liability created by statute." 35 Other courts have looked upon certain section 1983 claims as involving a demand for relief from injury suffered as a result of tortious conduct, and have applied the state statutes of limitation accordingly. It has been held, for example, that a claim alleging a denial of due process stemming from police brutality should be governed by the statute limiting actions for "wrongful injury" or assault and battery. 36 Still other courts have solved the limitation of actions problem by lumping section 1983 claims in the catch-all category of "actions not otherwise provided for." 37 No criticism can

31 See the discussion of this problem by Justice Stone in Hague v. CIO, 307 U.S. 496, 531 (1939) (concurring opinion).
32 E.g., Jackson v. Duke, 259 F.2d 3, 6 (5th Cir. 1958); Mohler v. Miller, 235 F.2d 153, 155 (6th Cir. 1956); Bomar v. Keyes, 162 F.2d 136, 140 (2d Cir.), cert. denied, 322 U.S. 825 (1947).
34 E.g., Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962); Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Cal. 1964).
37 Crawford v. Zeitzer, 326 F.2d 119, 121 (6th Cir. 1964); Wakat v. Harlib, 253 F.2d 59, 63 (7th Cir. 1958). A related statute of limitations problem is whether the statute runs
realistically be directed against any of these interpretations. Given the unique nature of the statutory right created and the diversified state statutes of limitations, consistent holdings should not be expected. The only alternative for future claimants, aside from the prompt filing of lawsuits, lies in congressional action.

Section 1983 indicates that suits may be brought for constitutional violations by the “party injured,” who must be a “citizen” or “other person.” The interpretation of the word “person” has presented a few, relatively academic, difficulties. A good share of the discussion concerns the inclusion of artificial entities as “persons” whose fundamental “rights” may have been deprived. Generally, corporations and other artificial persons have been successful. In fact, the only consistently unsuccessful “person” has been the United States. Its desire to take effective action, however, should be satisfied by the Civil Rights Act of 1964, which provides for suits at the instance of the Attorney General to protect constitutional rights in the areas of public education and public accommodations.

The problem of whether or not the cause of action created by section 1983 survives the death of the injured party has also posed some procedural difficulties, again because Congress has not committed itself. Generally the claim has been held to survive the death of the person whose rights have been infringed, although the reasons given have not been consistent. Some courts have refused to attribute to Congress an intention to permit the vindication of lesser claims while withholding relief at the deprivation of life itself. Another court, in allowing survival, has fallen back on the common law rule which permits the action to survive only when a property right, as opposed to a personal right, has been affected. The latter reasoning is clearly unsatisfactory in that it permits the personal representative of the deceased to bring an action under section 1983 only if his death was completely unrelated to the deprivation which gave rise to the claim. The former view, permitting the survival of those claims which arose from conduct resulting in death, should be preferred, even in the face of the statutory language which refers only to the “party injured.”

One of the most persistent problems of our federal system involves the maintenance of a delicate balance in federal-state relationships. The federal judiciary, as the final arbiter of the limits of federal power, has, of course, been deeply involved in this continuing effort. It is no surprise that section 1983 has contributed to the difficulty of assessing the proper role of the federal government in state activities. A provision which demands protection of federally created rights from state infringement is necessarily vulnerable to the judicial doctrines of abstention and exhaustion of administrative remedies. Prior to Monroe v. Pape the law was clear that a person who sought relief in the federal courts under section 1983 to against the § 1983 claim of a prison inmate. Compare Diaz v. Chatterton, 229 F. Supp. 19 (S.D. Cal. 1964) with Conrad v. Stitzel, 225 F. Supp. 244 (E.D. Pa. 1963).


44 Lane v. Wilson, 307 U.S. 268, 274 (1939), had held that a claimant under § 1983 need not exhaust possible judicial remedies in a state before invoking the jurisdiction of the federal courts.
Section 1983: Immunity

The language of section 1983 clearly authorizes the bringing of claims for violations of fundamental rights against "every person" who misuses some position of public trust. The development of the law in this area, however, has been quite complex. Primarily responsible for the complexity are the doctrines of municipal and official immunity and the concept of action taken "under color of" state law.

The doctrine of municipal immunity is one of long standing. It had been used several times before *Monroe v. Pape* to defeat claim section 1983 damage claims against municipalities. Thus the determination in *Monroe* that the City of Chicago was immune from a civil damage claim was not a difficult one. The Court, however, did place its basic reliance on the legislative history of section 1983 claims, namely, "where strands of local law are woven into the case that is before the federal court." The area of permissible federal abstention has thus become quite restricted. Lower federal courts have generally accepted the developments in *Monroe* and *McNeese*, though isolated abdications have occurred.

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45 E.g., Baron v. O'Sullivan, 258 F.2d 336, 337 (3d Cir. 1958); People v. Bibb, 252 F.2d 217, 219 (7th Cir. 1958); Davis v. Arn, 199 F.2d 424, 425 (5th Cir. 1952). But cf., Bruce v. Stilwell, 206 F.2d 554, 556 (5th Cir. 1953) (state administrative agency clearly attempting to act in excess of its authority).

46 Cobb v. City of Malden, 202 F.2d 701, 704 (1st Cir. 1953) (state policy strongly opposed); Galfas v. City of Atlanta, 193 F.2d 931, 934 (5th Cir. 1952) (to permit state courts to interpret zoning ordinances); Cooper v. Hutchinson, 184 F.2d 119, 124 (3d Cir. 1950) (to avoid interruption of state proceedings).


49 Id. at 673. See generally, Note, 40 NOTRE DAME LAWYER 101 (1964).

50 E.g., Powell v. Workmen's Compensation Bd., 327 F.2d 131 (2d Cir. 1964); Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963); Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962); Brazier v. Cherry, 293 F.2d 401 (5th Cir.), cert. denied, 368 U.S. 921 (1961).


52 E.g., Cuiska v. City of Mansfield, 250 F.2d 700, 703 (6th Cir. 1957), cert. denied, 356 U.S. 937 (1958); Cobb v. City of Malden, 202 F.2d 701, 703 (1st Cir. 1953); Charlton v. City of Hawthorne, 189 F.2d 421, 422 (5th Cir. 1951). But cf., Bart v. City of New York, 156 F.2d 791, 793 (2d Cir. 1946).

53 Monroe v. Pape, 365 U.S. 167, 188 (1961). The inclusion of municipal liability, had been attempted, but had been ultimately rejected by the House of Representatives.

to other municipal corporations.\textsuperscript{55} The fact that \textit{Monroe v. Pape} involved a claim for damages left open the question of whether the equitable relief afforded by section 1983 was to be available in a suit against a municipality. Despite a contrary inference in a footnote to the Court's opinion in \textit{Monroe},\textsuperscript{56} the Seventh Circuit subsequently argued that the doctrine of municipal immunity does not prevent the granting of an injunction against threatened actions of a city. In \textit{Adams v. City of Park Ridge}, \textsuperscript{57} the plaintiffs sought to enjoin enforcement of a discriminatory ordinance prohibiting charitable solicitations. The court first discussed the rationale of immunity in the following terms:

\begin{quote}
The facts in \textit{Monroe v. Pape} suggest[s] several inherent reasons for excluding municipalities from liability for damages, such as unauthorized misconduct of the officers, lack of power of city to indemnify plaintiffs for such misconduct, and a city's governmental immunity in the exercise of its police powers, from liability for injuries inflicted by policemen in the performance of their duties.\textsuperscript{58}
\end{quote}

It then found that such considerations were not persuasive when the question involved the issuance of an injunction to restrain unconstitutional action. In the following year, the Supreme Court itself, in \textit{Turner v. City of Memphis},\textsuperscript{59} directed equitable relief under section 1983 against enforced segregation in a restaurant held under a lease from the defendant. It did so without making any reference to the doctrine of municipal immunity or \textit{Monroe v. Pape}.

The doctrine of official immunity has undoubtedly gone farther toward limiting the effectiveness of section 1983 as a damage remedy than any single factor. The doctrine stems from a considered policy of the common law that judges, legislators, and other public officers should not be held responsible in damages for wrongs committed by them while in pursuance of their respective duties. The Supreme Court has been confronted with a claim of official immunity in a suit for damages under section 1983 only once. In \textit{Tenney v. Brandhove},\textsuperscript{60} it held that the Civil Rights Acts had not abrogated the traditional immunity of legislators from civil liability. The federal courts have interpreted this holding as indicating a general retention of common law official immunity. The immunity of judges is the most deeply rooted. By the great weight of authority, judges,\textsuperscript{61} officers of the court,\textsuperscript{62} and indeed all persons connected with the judicial process\textsuperscript{63} are

\begin{footnotes}
\item[55] Harvey v. Sadler, 331 F.2d 387, 390 (9th Cir. 1964) (school district); Sires v. Cole, 320 F.2d 877, 879 (9th Cir. 1963) (state and county); Roberts v. Trapnell, 213 F. Supp. 47, 48 (E.D. Pa. 1962) (township).
\item[56] Monroe v. Pape, 365 U.S. 167, 191, n. 50 (1961). The Court referred to Douglas v. City of Jeannette, 319 U.S. 157 (1943), and Holmes v. City of Atlanta, 330 U.S. 879 (1945), vacating 223 F.2d 93 (1955), in which equitable relief against municipalities had been granted under § 1983. It noted that the question had not been raised in those cases, and added: "Since we hold that a municipal corporation is not a 'person' within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases."
\item[57] 293 F.2d 585 (7th Cir. 1961).
\item[58] Id. at 587.
\item[60] 341 U.S. 367, 379 (1951).
\item[63] E.g., Rhodes v. Meyer, 334 F.2d 709, 718 (8th Cir. 1964); Agnew v. Moody, 330 F.2d 868, 870 (9th Cir. 1964); Duzyński v. Nosal, 324 F.2d 924, 929 (7th Cir. 1963) (court-
immune from section 1983 damage suits in connection with their judicial functions. Occasionally the language of the traditional doctrine has been qualified to indicate that the immunity only attaches when the judge has at least colorable jurisdiction over the person and the subject matter under inquiry. In the non-judicial areas, official immunity has been tempered somewhat, encompassing only the good faith discretionary acts of officials done within the scope of their authority. In one recent case a blanket immunity was granted to all public officials, although this may be explained by noting that the section 1983 claim was found to be spurious.

As indicated above, the doctrine of official immunity is a common law principle which has been superimposed upon the early Civil Rights Acts. The invocation of this principle in any given case represents a judgment between two competing considerations. As one court stated, these considerations are:

the protection of the individual citizen against damage caused by oppressive or malicious action on the part of public officers, and the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities.

Since the policy in our law favoring immunity is so well established, only the lower echelons of public servants are subjected to damage claims under section 1983 with any consistent success. Public officials, however, are vulnerable to the equity powers of the federal courts under section 1983. Indeed the flexibility provided by this equity power probably represents the saving feature of the provision. The danger of harassment of public officials is greatly diminished, and at the same time a vehicle for the disposition of claims of unconstitutional acts ranging from flagrant abuses to good faith infringement is maintained.

Section 1983: “Under Color of” State Law

Section 1983 requires that the “person” being sued must be one whose actions were taken “under color of any statute, ordinance, regulation, custom, or usage of any State or Territory,” and an allegation to this effect is required. The language clearly excludes federal officials and other persons acting pursuant to federal statutes. Private persons are also excluded as a matter of course, although this statement is made subject to later modification. The “person” required must not only be a public official, but he must be acting in an official capacity at the time the deprivation of rights takes place.

appointed physician); Bartlett v. Weimer, 268 F.2d 860, 862 (7th Cir. 1959), cert. denied, 361 U.S. 938 (1960) (physician testifying in commitment proceeding).

64 E.g., Sarelas v. Sheehan, 326 F.2d 490 (7th Cir. 1963), cert. denied, 84 S. Ct. 1334 (1964); Johnson v. MacCoy, 278 F.2d 37 (9th Cir. 1960); Ryan v. Scosgin, 245 F.2d 54 (10th Cir. 1957). In Yates v. Village of Hoffman Estates, 209 F. Supp. 757, 759 (N.D. Ill. 1962), the court rejected a defense of judicial immunity. It asserted that judges are immune only when in the exercise of judicial functions, and that “it is not a judicial function in this State for a magistrate to direct a police officer to arrest and take into custody a person not named in a warrant . . . .” The Yates decision was cited with approval in Luttrell v. Douglas, 220 F. Supp. 278, 279 (N.D. Ill. 1963).

65 E.g., Hoffman v. Halden, 268 F.2d 280, 300 (9th Cir. 1959); Nelson v. Knox, 256 F.2d 312, 314 (6th Cir. 1958).


67 Norton v. McShane, 332 F.2d 855, 857 (5th Cir. 1964).


69 Hallmark Prods., Inc. v. Mosley, 190 F.2d 904, 908 (8th Cir. 1951).

70 E.g., Wheeldin v. Wheeler, 373 U.S. 647, 650 (1963); Sheridan v. Williams, 333 F.2d 531, 582 (9th Cir. 1964); Norton v. McShane, 332 F.2d 855, 862 (5th Cir. 1964).

71 E.g., Sarelas v. Porikos, 320 F.2d 827, 833 (7th Cir. 1963), cert. denied, 375 U.S. 985 (1964); Cooper v. Wilson, 309 F.2d 153, 154 (6th Cir. 1962); Kenney v. Fox, 232 F.2d 288, 290 (6th Cir.), cert. denied

72 Watkins v. Oaklawn Jockey Club, 183 F.2d 440, 442 (8th Cir. 1950) (off-duty police officers).
It is important to remember that the interpretation of the language of section 1983 may not exceed the boundaries of "state action" outlined in the fourteenth amendment. However, the limits of "state action" have expanded considerably in recent years through the liberal efforts of the federal courts. At issue is the degree to which such discrimination may be said to constitute "state action" or action taken "under color of" state law. The vanguard decision in this area, until quite recently, was Burton v. Wilmington Parking Authority. There it was held that the exclusion of a Negro from a restaurant operated by a private individual under a lease from a state agency constituted "state action" and a denial of equal protection within the meaning of the fourteenth amendment. The Court in Burton also expressed a hesitancy to further extend the doctrine. The fact remains, however, that the "state action" had amounted to no more than an acquiescence in discriminatory practices occurring on state property.

If a state law requires segregation in places of public gathering, unconstitutional "state action" is undoubtedly involved, and equitable relief is unquestionably appropriate. But the question of whether a private person in such a situation, who complies with the segregation ordinance, may successfully be sued for damages under section 1983 as having acted "under color of" state law is not so clear. This question might have been confronted in Williams v. Hot Shoppes, Inc. There the plaintiff, a Negro, alleged that he had been discriminated against by a private restaurant manager because the latter felt compelled to do so by a statute of Virginia requiring segregation in places of "public entertainment or public assemblage." The Circuit Court for the District of Columbia decided to abstain from resolving the question, pending a determination by the Supreme Court of Virginia of the applicability of the state segregation ordinance to restaurants. Two judges dissented, indicating not only that the private restaurant owner would be technically liable under section 1983 for segregation compelled by state law, but also that the court should have considered and decided the plaintiff's claim that the

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73 One of the most liberal of the many lower federal court decisions in recent years which have tested the limits of the concept of "state action" and have not reached the Supreme Court is Todd v. Joint Apprenticeship Comm. of Steel Workers, 223 F. Supp. 12 (N.D. Ill. 1963). There the district court found a discriminatory scheme instigated by the defendant labor union against Negro applicants for membership. An injunction was granted admitting the Negro plaintiffs to the union and apparently enjoining all future discrimination by the defendants on the ground that certain federal and state agencies had passively acquiesced in the discrimination. Federal acquiescence was traced to the failure of its agencies adequately to police an antidiscrimination clause in a government contract on which the union was working. The state participation had consisted entirely in the permission granted by the Chicago Board of Education to the union for the use of its facilities as part of an apprenticeship training program. The Seventh Circuit vacated the district court order, however, on the ground that since the original complaint was directed solely toward enjoining further work on the government contract, and the contract had terminated, the question was moot. Todd v. Joint Apprenticeship Comm., 332 F.2d 243 (7th Cir. 1964).

74 The discussion following assumes sufficient noncoverage of the Civil Rights Act of 1964, 74 Stat. 241, § 201 (1964), governing facilities subject to the commerce power, to give continuing importance to the term "state action" in this area.


76 Id. at 724.

77 The Court stated: [R]espondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "Differences in circumstances [which] beget appropriate differences in law." Id. at 726.

actions of certain law enforcement officials amounted to a compulsion of the defendant to segregate his facilities.80

In 1963 the Supreme Court, in Lombard v. Louisiana,81 reversed the conviction of certain negro and white college students convicted of criminal mischief for staging a "sit-in" demonstration in a privately owned restaurant on the grounds that highly publicized statements of New Orleans public officials, directing a continued policy of segregation in private restaurants, constituted "state action" in violation of the fourteenth amendment. Shortly thereafter, in Williams v. Howard Johnson's, Inc.,82 the Fourth Circuit remanded a section 1983 damage claim for a further hearing on the question of state involvement in Virginia segregation practices. However, no further disposition has resulted.

Thus no apparent resolution has been made of the precise question of the liability of a private person in a case wherein he was "compelled" to act by state law.83 The injustice of holding such a person liable for damages under section 1983 is more apparent than real. A private person will seldom be forced to choose between becoming a defendant in a state criminal action for violation of its segregation laws, where the defense of unconstitutionality of the law is clearly available, and becoming a defendant in a civil suit for damages under section 1983 in a federal court. To the degree that state compulsion might actually exist, however, the federal courts will find themselves in a difficult situation. In such a case they might easily sympathize with the defendant84 recalling perhaps the felt impropriety of assessing damages against a public official whose good faith conduct nevertheless results in some constitutional deprivation. The dissenters in Williams v. Hot Shoppes, Inc.,85 anticipating this difficulty, made the following comments:

"In the last twenty years the expansion of the state action concept and of the area of rights protected by the Federal Government have made this section an increasingly flexible vehicle for enforcing the Constitution's guarantees of individual liberties against encroachment by the states and their representatives. The relief provisions of the statute are strikingly adaptable for that purpose. The present case demonstrates this. If, in fact, appellee's refusal to serve appellant was compelled against his will, principles of equity combine with the purpose of the Act to dictate relief which would also shield appellee against such compulsion, rather than penalize appellee by imposing damages for surrendering to it.86"

Another aspect of action taken "under color of" state law should be considered. The Court in Monroe, following the Classic and Screws decisions, held that a municipal officer may be acting "under color of" state law though in direct contravention of state statute. Justice Frankfurter dissented on this point and urged a re-evaluation of these precedents on the ground that they had not accurately reflected the legislative history of the criminal counterpart of section 1983.87 The Court's decision on this point, however, has not been seriously questioned. Most courts have either assumed the existence of the principle or summarily deferred to

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80 Id. at 843 (dissenting opinion).
82 323 F.2d 102 (4th Cir. 1963).
83 But cf., Fleming v. South Carolina Electric and Gas Co., 224 F.2d 752, 753 (4th Cir. 1955), appeal dismissed, 351 U.S. 901 (1956). There the court held that a § 1983 damage suit was proper against a bus company whose driver was made a police officer by state statute for the purpose of enforcing a segregation policy on public carriers.
84 Harrison v. Murphy, 205 F. Supp. 449, 452 (D. Del. 1962), suggests that a distinction should be made between the phrases "state action" and action taken "under color of" state law. The court indicated that state-compelled discrimination may constitute "state action" but not action taken "under color of" state law on the part of the person compelled to discriminate. In practice such a distinction would require a refusal to grant any relief under § 1983, while permitting equitable relief under general federal question jurisdiction, 28 U.S.C. § 1331 (1958), based upon the fourteenth amendment violation.
86 Id. at 847.
An interpretation that would have precluded relief when the action of the state officials was in violation of state law would have greatly minimized the effectiveness of section 1983. The need for relief of the variety afforded by section 1983 is, after all, greatest in those instances in which the states are reluctant to discipline law enforcement officers for conduct violative of due process guarantees. If section 1983 were confined solely to authorized activity on the part of the public official involved, relief would seldom be granted, since public officers normally operate under a shield of immunity for good faith execution of duty.

Section 1983: Requisite Intention of the Actor

The most significant and controversial statement made by the Supreme Court in Monroe v. Pape in its interpretation of section 1983 may well turn out to be that made in reference to the requisite intention of the actor. Since the word “wilfully,” found in the criminal provision which was interpreted in the Classic and Screws cases, does not appear in section 1983, the Court concluded that a specific intent to deprive the plaintiff of a right protected by the fourteenth amendment was not necessary. It said that since section 1983 is a civil provision, it “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” Justice Frankfurter added that “allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.”

Because the thrust of these statements came somewhat unexpectedly, considerable room has been left for speculation. Where comment has been offered by the lower federal courts thus far, it has consistently indicated an unwillingness to accept this language of the Supreme Court at face value.

The Seventh Circuit, in Hardwick v. Hurley, appeared somewhat disgruntled by the tort liability language in Monroe. It declared that these words could be taken to mean that the intention of the actor is totally irrelevant, as well it might be. Then, most unrealistically, the court declared: “However, it is difficult to believe that the Supreme Court intended to go to the extent, for instance, of saying that an officer who struck a prisoner in self defense was, in some way, violating the constitutional rights of the prisoner.” Of course it did not, for self defense does not under any circumstances amount to a constitutional deprivation, and a constitutional deprivation must be established, whatever the intention of the actor. The Supreme Court, perhaps unwittingly, but fairly understood, has indicated that the officer need only do the act which amounts to a denial of some constitutional safeguard. The intention of the actor is only relevant insofar as a natural likelihood exists, if indeed it does, that a constitutional deprivation will be accompanied by malicious conduct.

Although chiding the Hardwick court, the Ninth Circuit failed to produce a much more palatable interpretation of the “natural consequences” statement in

91 Id. at 208 (dissenting opinion).
92 Prior to Monroe, good faith on the part of the actor was apparently a defense to a § 1983 claim for damages. Cobb v. City of Malden, 202 F.2d 701, 707 (1st Cir. 1953) (concurring opinion); Downie v. Powers, 193 F.2d 760, 764 (10th Cir. 1951). In fact, in Francis v. Lyman, 216 F.2d 583, 587 (1st Cir. 1954), Judge Magruder suggested that if the broad language of § 1983 were interpreted literally, Congress would be shocked into passing amendatory legislation.
93 The only decision which has taken the language regarding the mental disposition of the actor at face value is Johnson v. Crumlish, 224 F. Supp. 22, 25 (E.D. Pa. 1963).
94 289 F.2d 529 (7th Cir. 1961).
95 Id. at 530-31.
Monroe. In Cohen v. Norris, it suggested that "there may well be defenses, such as self defense and unforeseeability due to defects in a warrant, or by reason of other circumstances" which could be made in the answer to a complaint. Certainly "self defense" is a good defense to a section 1983 damage claim, for, as suggested earlier, in such a case no constitutional deprivation can be proved. But defects in a warrant can hardly be considered "unforeseeable" in modern tort parlance. Permitting the actor to escape liability in these situations is really no more than a recognition of good faith conduct, and good faith conduct as a defense is difficult to square with the "natural consequences" language of Monroe. Ultimately, then, the Ninth Circuit had stated only the obvious proposition previously mentioned, that is, that the complaint need not allege a specific purpose on the part of the defendant to deprive the plaintiff of a constitutional right.

A statement made in Selico v. Jackson may give some insight into the general refusal of the lower federal courts to give full sway to the "tort liability" approach. In that case, the plaintiff's claim clearly contained allegations which, if established, would entitle him to relief under section 1983. He alleged facts tending to establish an arrest without a warrant and without probable cause, and a wrongful detention accompanied by a beating at the hands of Los Angeles police officers. The district court dismissed a contention by the defendants that the complaint was defective in failing to allege a specific intent to deprive the plaintiff of some constitutional right, citing the language of Monroe v. Pape presently under consideration. But it then added:

The court is cognizant of the fact that not every case involving a wrongful arrest gives rise to a federal right of action against the arresting officers and that state police officials must be protected from tort actions based upon honest misunderstandings of statutory authority and mere errors of judgment.

Apparently by way of demonstrating that its approach was well founded, the court concluded with a statement discussing the traditional immunity of public officials from civil suit based upon acts undertaken within the scope of their authority.

A somewhat different approach was taken recently in Campbell v. Glenwood Hills Hospital, Inc., but the problem of the requisite intention of the actor was again treated without clarification. The plaintiff sued the superintendent and the attending physician of a private hospital to which he had been committed by order of the probate court. The constitutional infringements alleged were a denial of the right to seek counsel and a withholding of the notice of a probate court hearing. The court based its dismissal on the ground that the defendants were not acting "under color of" state law. It added the further argument, however, that even if they were assumed to be acting "under color of" state law, the superintendent and physician would not be liable. The court's argument was based on the "tort liability" language of Monroe v. Pape. It reasoned:

An essential element in tort liability is the breach of a legal duty owed by the wrongdoer to the injured party. Consequently, to recover under these statutes it is implicit that the alleged deprivation of civil rights must result from a breach of a duty owed by the wrongdoer, and the duty must be one possessed by virtue of state law.

The latter statement is not entirely correct. It may well be true that the deprivation of civil rights must result from a breach of a legal duty owed to the plaintiff by the defendant, but it is not true that the duty must have been possessed by virtue of state law. The authority by virtue of which the defendant was able to take action must have come to him from the state. Thus it is said that a person

96 300 F.2d 24 (9th Cir. 1962).
97 Id. at 29.
99 Id. at 476.
100 224 F. Supp. 27 (D. Minn. 1963).
101 Id. at 32.
can become liable under section 1983 only while acting in an official capacity. But the duty the defendant breaches when he deprives another of a constitutional right is imposed upon him by the fourteenth amendment and made actionable by section 1983, not by state law. A private physician ordinarily cannot be sued under section 1983 because the fourteenth amendment imposes no legal duty upon one who does not carry the badge of state authority.

Thus the court in Campbell v. Glenwood Hills Hospital, Inc., used the language of Monroe most relevant to determining the requisite intention of the actor to support its conclusion that the defendants were not acting “under color of” state law. Such usage can only add to the primary problem posed in the clarification of this language. The problem involves limiting the broad language of Monroe in order to exclude public officials from liability for good faith conduct.¹⁰² The Supreme Court may well “clarify” its previous holding with this problem in mind. It could do this by pointing out that it was only necessary to the decision in Monroe to say that a specific intention to deprive a person of some constitutional guarantee need not be alleged or proven. Alternatively, the Court might take the suggestion of the dissenters in Williams v. Hot Shoppes, Inc.¹⁰³ and affirm the peculiar adaptability of section 1983 to individual cases. Either nominal damages for vindication of the constitutional right or a restriction to equitable relief would be an acceptable compromise in many instances.

Section 1983: Due Process and Equal Protection

Section 1983 purports to remedy only deprivations of “rights, privileges, or immunities secured by the Constitution and laws” of the United States. Taken in the context of the fourteenth amendment, this means that only those interferences by public officers which reach the level of denials of due process and equal protection, or deprivations of the “privileges and immunities” of citizens can be redressed.¹⁰⁴ The words “privileges and immunities” of citizens have never retained much significance. This is in great part due to the restricted application given them in The Slaughterhouse Cases.¹⁰⁵ Monroe v. Pape, however, reasserted the principle that the elusive fourteenth amendment concept of due process of law was within the coverage of section 1983.¹⁰⁶ This of course meant that the continued expansion of the fourteenth amendment to encompass fundamental freedoms of the first eight amendments, previously protected only against action by the federal government, would be reflected in increased litigation under section 1983. This reflection was quickly forthcoming. The Supreme Court applied the eighth amendment’s proscription against cruel and unusual punishment to the states through the fourteenth amendment to the states through the eight amendment in Robinson v. California.¹⁰⁷ The Court held invalid a state law which punished the “status” of narcotics addiction as a crime. In

¹⁰² Many other decisions have suggested a refusal to apply the tort liability language in Monroe literally. E.g., Striker v. Pancher, 317 F.2d 781, 784 (6th Cir. 1963); Beauregard v. Wingard, 230 F. Supp. 167, 183 (S.D. Cal. 1964).
¹⁰⁴ For “abuses” falling short of constitutional deprivations see Tabor v. Hardwick, 224 F.2d 526, 529 (5th Cir. 1955), cert. denied, 350 U.S. 971 (1956) (prisoner does not have absolute right to file civil action); Wall v. King, 206 F.2d 878, 884 (1st Cir.), cert. denied, 346 U.S. 915 (1953) (wrongful revocation of driver’s license).
¹⁰⁶ Denials of due process had, of course, been recognized as being subject to § 1983 claims before Monroe. E.g., Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958) (illegal search, unlawful arrest and detention); Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953) (coerced confession); Wall v. King, 206 F.2d 878 (1st Cir.), cert. denied, 346 U.S. 915 (1953) (procedural due process in license revocation).
United States ex rel. Hancock v. Pate, a prisoner in a state penitentiary sought injunctive relief against his warden, alleging that to be deprived of eligibility for parole for a year and a half for having acted in self defense during a prison scuffle constituted a cruel and unusual punishment. This allegation was held sufficient to survive a motion to dismiss. On the other hand, in Colon v. Grieco, a motion by the defendant police officer for summary judgment on a section 1983 complaint for damages was granted partially on the ground that the sixth amendment's guarantee of a speedy trial, which had been extended to include prompt commitment before a magistrate, had not been made applicable to the states by the fourteenth amendment.

Another interesting example of the reflection on section 1983 of the expansion of the concept of due process is provided by York v. Story. There the plaintiff brought an action under section 1983 against certain Chico, California, police officers. She claimed that certain unnecessary and unconsented photographs were taken of her nude body in connection with an assault charge she had filed. The purpose of the photographic exhibits was allegedly to evidence certain nonexistent bruises. These photos were later copied and distributed to various members of the Chico police department. The Ninth Circuit, with one judge dissenting, reversed a dismissal of the complaint. It held that the plaintiff had successfully stated a claim for deprivation of the guarantees of freedom from unreasonable search and seizure and invasion of privacy within the due process clause of the fourteenth amendment.

Nor have recent developments in section 1983 litigation ignored the equal protection area of the fourteenth amendment. In Marshall v. Sawyer, the plaintiff alleged discriminatory treatment at the hands of a conspiracy headed by the Governor of Nevada, the members of the Gaming Control Board and Gaming Commission of Nevada, and certain private individuals associated with the Desert Inn Hotel in Las Vegas. He alleged that through the efforts of the named public officials a "black book" containing the names of certain "undesirables," including himself, was circulated among Nevada casino operators. He further alleged that the private operators were urged to refuse to permit the plaintiff to patronize their establishments. The district court relied on the doctrine of abstention in dismissing the complaint for damages and injunctive relief under section 1983. The Ninth Circuit reversed, holding that the doctrine of abstention was inapplicable since the constitutionality of a state statute was not involved. The court added, significantly, that the plaintiff had successfully stated a claim for relief based upon a denial of equal protection, at least as to the named public officials.

Further amplification of the concept of equal protection was made in Butler v. Crumlish. There the plaintiffs were being held in custody at the Philadelphia Detention Center while awaiting trial on various criminal charges. They resisted police attempts to place them in a "line-up" with their fellow inmates. The prisoners alleged that they had remained in custody solely because of an inability to furnish bail. They further alleged that since other accused persons who had been able to

110 324 F.2d 450 (9th Cir. 1963), cert. denied, 376 U.S. 939 (1964).
111 Id. at 456. It has also been held that the due process clause guarantees penitentiary inmates "reasonable access" to the courts. Stiltner v. Rhay, 332 F.2d 314, 316 (9th Cir. 1963), cert. denied, 376 U.S. 920 (1964); United States ex rel. Mayberry v. Prasse, 225 F. Supp. 752, 754 (E.D. Pa. 1963). But in Stein v. Oshinsky, 224 F. Supp. 757, 760 (E.D. N.Y. 1963), a mandatory injunction was granted permitting the voluntary recitation of a prayer in a public school on the ground that such recitation did not tend toward the establishment of a religion by the state within the meaning of the first amendment.
112 301 F.2d 639 (9th Cir. 1962).
113 Id. at 645.
114 Id. at 647.
furnish bail were not subjected to police "line-ups," the plaintiffs were being denied the equal protection of the laws. The district court granted the prisoners' request for a temporary injunction.\(^{116}\)

Any discussion of section 1983 and the equal protection clause of the fourteenth amendment would be incomplete without at least passing reference to the school desegregation and reapportionment decisions. Since \textit{Brown v. Board of Education}\(^{117}\) and \textit{Baker v. Carr},\(^ {118}\) literally hundreds of similar suits for equitable relief have been filed, the great percentage of which claim violations of section 1983 and invoke the jurisdiction of the federal courts under section 1343 (3).\(^ {119}\)

Section 1983: Impact of the Civil Rights Act of 1964

As was suggested earlier, the passage of the Civil Rights Act of 1964 has prompted this re-evaluation of section 1983, a provision derived from the Civil Rights Act of 1871. A brief comparison of these legislative efforts leads to the conclusion that their respective operations will be more complementary than contradictory. The Act of 1964, first of all, was not intended as a replacement. It specifically provides that existing remedies relating to the protection of individual rights are to continue in effect.\(^ {120}\) The 1964 effort was instead directed at the failure of existing civil rights laws, including section 1983, to deal adequately with the problem of private discrimination, particularly in the areas of public services\(^ {121}\) and employment opportunities.\(^ {122}\) The new Act also seeks to strengthen existing civil rights laws dealing with voting\(^ {123}\) and to speed up the process of desegregation in the public schools.\(^ {124}\) The implementation of the Act of 1964 in the latter areas will no doubt diminish the utility of section 1983 somewhat by providing an alternate remedy for abuses. But it is submitted that a broad basis of effective operation for section 1983 will remain.

It is important to point out that the direction of the public accommodations and employment opportunity provisions of the Civil Rights Act of 1964 is quite different from that of section 1983. The former provisions, drawing upon the commerce power, are projected at action by private individuals which has a certain relationship to interstate commerce. Section 1983, limited by the "state action" concept drawn from the fourteenth amendment, is directed only toward conduct of those persons who in some way may be said to be acting pursuant to state authority. For example, the public accommodations section of the 1964 Act would reach private discrimination practiced by motel owners, which discrimination is normally outside the purview of section 1983. It would not, however, reach the discriminatory treatment of prison inmates by the warden of a state penitentiary. The latter conduct remains within the exclusive province of section 1983.

The Civil Rights Act of 1964 and section 1983 may also be distinguished by the nature of the interests they seek to protect. The Act of 1964 is designed to insure that equality of treatment will be afforded to all persons in certain defined areas. More specifically stated, it is directed at redressing all instances of racial discrimination occurring, for example, in places of public accommodation, schools,

\(^{116}\) Id. at 567. In another somewhat novel decision, an allegation that school officials had refused the plaintiff permission to use public school buildings for certain functions while granting similar permission to others was held sufficient to state a cause of action under § 1983 for a denial of equal protection. \textit{Lee v. Hodges}, 321 F.2d 480, 486 (4th Cir. 1963).

\(^{117}\) 347 U.S. 483 (1954).

\(^{118}\) 369 U.S. 186 (1962).


\(^{120}\) 78 Stat. 241 §§ 701-16 (1964).


labor unions, and voter registration booths. On the other hand, section 1983 covers a much greater spectrum of interests. It is aimed not only at denials of equal protection, but also at deprivations, through the conduct of public officials, of any and all rights which individuals are guaranteed by the fourteenth amendment. Both the Civil Rights Act of 1964 and section 1983, for example, may effectively prevent a registrar of voters from requiring a higher standard of accomplishment of colored applicants than is required of white applicants. But only section 1983 is available to redress the injury of a person who is denied a proper hearing on a liquor license application, or who is thrown in jail for an extended period without formal charges being filed, or who is refused the right to express his views on religious matters. Finally, the relief afforded by the two measures under discussion is also distinguishable. The Civil Rights Act of 1964 provides for equitable relief from discriminatory treatment at suit of the person aggrieved or the Attorney General. It does not provide a civil damage remedy, as does section 1983. As has been pointed out, the damage provisions of section 1983 have been considerably restricted by the doctrine of official immunity. Even so, the possibility of recovering civil and punitive damages in limited cases of malicious conduct by public officials remains. Should the occasion arise wherein both section 1983 and some portion of the new Act are applicable to a given instance of malicious discrimination, the former section would provide a very desirable alternative to the injured party.

Conclusion

The history of section 1983 of the Civil Rights Act of 1871 parallels the history of the fourteenth amendment, which it was enacted to implement. The recent expansion and development of both is characteristic of our legal system. Section 1983 has certainly progressed far beyond the limits which might have been envisioned in the post-Civil War years. The decision of the Supreme Court in *Monroe v. Pape* has tested, and future decisions will continue to test, the outer limits of due process and equal protection. Certain areas of conflict in the interpretation of section 1983 remain, however, involving important considerations of public policy. These areas of conflict include the possible further amplification of the phrase “under color of” state law, the doctrine of immunity of public officials, and the intention required of the actor to constitute a violation of section 1983. The germane policy considerations revolve around grass-roots attitudes toward public officials and conceptions of federal-state relationships. No manner of resolution of these problems, however, nor the passage of the Civil Rights Act of 1964, is likely to return section 1983 to any approximation of its prior insignificance. The remedy is firmly entrenched, and awaits further development.

Frank J. Walz

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125 Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).
127 *Oney v. Oklahoma City*, 120 F.2d 861 (10th Cir. 1941).