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Tort Liability of Law Enforcement Officers Under Section 1983 of the Civil Rights Act

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held that an owner of a fractional interest in the minerals under a tract who does not participate in the drilling expenses must pay his share of costs before he can claim his share of production.[56]

If the courts do allow compensation to the lessee for well costs, they will have to decide whether he can claim the amount due him in cash or must wait to be paid out of production. The courts encountered a similar problem in deciding whether the provision of the Conservation Act[57] regarding the sharing of unit well costs by non-unit operators required payment in cash or permitted payment out of production. The problem has not yet been resolved but the most recent case[58] indicates that when the non-unit operator is instrumental in causing the unit to be created, he must pay in cash. It could be argued that where a lessor seeks the resolution of a lease so that the economic benefit accruing to him from the well's production will be increased, he too should have to pay in cash the costs of the well. This result might, however, be harsh on a lessor who was impecunious. Moreover, the fact that it is the lessee's fault that the contract is resolved suggests that the lessee could hardly justifiably complain if he were required to collect his costs out of production.

M. Hampton Carver

TORT LIABILITY OF LAW ENFORCEMENT OFFICERS UNDER SECTION 1983 OF THE CIVIL RIGHTS ACT

Since the United States Supreme Court decided *Monroe v. Pape*[1] in 1961, a growing area of tort law under Section 1983[2] of the Civil Rights Act has developed governing the conduct of police officers. One court has said: "The Civil Rights Act created a new type of tort: the invasion, under color of law, of a citi-

1963); *see* Comment, 15 TUL. L. REV. 291 (1941). The Supreme Court has recently shown a liberal attitude in allowing suits based on unjust enrichment. *See* Minyard v. Curtis Prod., 251 La. 624, 205 So.2d 422 (1967); Comment, *Action de in rem Verso in Louisiana*, 43 TUL. L. REV. 263 (1969).

56. *See* note 55 *supra.*

57. LA. R.S. 30:10(A)(1)(c) (1950).

58. Superior Oil Co. v. Humble Oil & Ref. Co., 165 So.2d 905 (La. App. 4th Cir. 1964). *See also* Hunter Co. v. McHugh, 202 La. 97, 11 So.2d 495 (1942); Jorden, *Unit Well Costs*, FOURTEENTH ANNUAL INSTITUTE ON MINERAL LAW 15 (1967).

1. 365 U.S. 167 (1961).

2. 42 U.S.C. § 1983 (1958).

zen's constitutional rights."[3] This developing civil liability is likely to have a far greater effect than the "exclusionary rule" in regulating police conduct. Whether this control is beneficial is of major significance. Depriving a police officer of funds through civil liability strikes home far more markedly than depriving the prosecutor of the right to use certain evidence. As one United States Court of Appeals has said: "The Civil Rights Act, of course, was not enacted to discipline local law enforcement officials. . . . Nevertheless, local law enforcement officials are subject to civil liability under Section 1983. . . ."[4] Civil liability and discipline go hand in hand and cannot be disassociated.

Section 1983 of the Civil Rights 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 persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[5]

The act has contained substantially the same provisions since it was originally enacted in 1871 as the Ku Klux Act. It was "born of an outrageous situation"[6] and was to cope with protecting the newly granted rights of Negroes. It was to provide a federal remedy where state remedies were practically unavailable. Legislative debates over the original bill reveal the extreme nature of the conditions which Congress sought to remedy.[7] The act was not designed to control police handling of sus-

3. Bowens v. Knazze, 237 F. Supp. 826, 828 (N.D. Ill. 1965).

4. Stringer v. Dilger, 313 F.2d 536, 540 (10th Cir. 1963). It should be noted that jurisdictional amount need not be alleged in suits under 42 U.S.C. § 1983 (1958). Bussie v. Long, 383 F.2d 766 (5th Cir. 1967); Rue v. Snyder, 249 F.Supp. 740 (E.D. Tenn. 1966).

5. 42 U.S.C. § 1983 (1958).

6. Shapo, *Constitutional Tort:* MONROE v. PAPE, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 279 (1965).

7. An excellent discussion is found in *id. Cf.* Monroe v. Pape, 365 U.S. 167, 173 (1961): "'A condition of affairs now exists in some states of the union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous . . . that the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure, life, liberty, and property, and the enforcement of law in all parts of the United States.'" [quoting President Grant from *Congressional Globe*, 42d Cong., 1st Sess. 244 (1871)].

pects, and until *Monroe* was decided, there was a dearth of jurisprudence regarding the application of the Act to law enforcement officers.

In *Monroe*, defendants, thirteen Chicago police officers, entered plaintiff's residence at night without a warrant, searched the premises, and brought him to the station where he was questioned for ten hours, and released without charge. The circumstances were extreme. The complaint alleged plaintiff and his family were routed from bed and forced to stand naked while defendants ransacked their home. Plaintiff sued under Section 1983 alleging violation of his fourth and fourteenth amendment rights by the unlawful search and arrest without probable cause. The Court of Appeals for the Seventh Circuit[8] dismissed the complaint for failure to state a claim on which relief could be granted. The finding was reversed by the United States Supreme Court's holding that such conduct was actionable under Section 1983 despite the unlawfulness of the conduct under state law and the availability of an effective state remedy. Justice Douglas, speaking for the majority, rejected the notion that the Act should be interpreted to give a remedy only where state law authorized the prohibited conduct or where state law did not provide an adequate remedy. The Court saw Section 1983 as legislation to enforce the provisions of the fourteenth amendment. Viewed in that context, violation by a police officer of any constitutional right made applicable to the state by the fourteenth amendment is covered by Section 1983.

The purpose of this Comment is to present a general discussion of some of the constitutional rights which the federal courts have protected against police violations under Section 1983. It will also present a brief discussion of the persons whose conduct is covered.

Rights Protected

The act clearly provides a remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[9] *Monroe* stands for the proposition that the statute is to be given a broad reading. Thus, as courts determine that conduct violates constitutional rights this conduct will, likewise,

8. Monroe v. Pape, 272 F.2d 365 (7th Cir. 1959), affirming the district court's dismissal of the complaint.

9. 42 U.S.C. § 1983 (1958).

be actionable against police officers as well as all others who act under color of law.[10]

Courts do not seem overly concerned with specifying which constitutional rights are involved or with specifically how the constitutional right is violated. The cases discussed represent a sample of the cases handled as violations by police of persons' constitutional rights. Section 1983 does not specify which constitutional rights it protects or what conduct it seeks to prevent. It broadly prohibits any conduct in violation of any person's federal constitutional or statutory rights.[11]

Suits against police officers have alleged violations of fourteenth, fourth, sixth, eighth, and first amendment rights. The cases falling under these amendments are illustrative of the manner in which federal courts handle Section 1983 actions against law enforcement officials.

Fourteenth Amendment

The general due process grounds have usually been urged where an officer used unreasonable physical violence.[12] In one case,[13] defendant police officers in arresting plaintiff used night sticks to dislodge him from a crowd. The court said that "a person unlawfully beaten by an arresting officer is denied the right of due process of law."[14] The Court of Appeals for the Seventh Circuit[15] had held earlier that plaintiff's claim that he was battered by Chicago police for his refusal to take a drunkometer test was actionable under Section 1983. The court cited Frankfurter's dissent in *Monroe* which argued that "most courts have refused to convert what would be ordinary state-law claims for

10. For a fuller discussion *see* note 60 *infra.*

11. The author discusses no cases dealing with federal statutory rights. This area will not be discussed because § 1983 applies to state officers. Federal officers enjoy some immunity for their wrongful conduct, but this area is not settled. *See* Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964).

12. "Due Process" has also been used to base false arrest claims under § 1983. *See* Attreau v. Morris, 357 F.2d 871 (7th Cir. 1966), involving internal investigations within a police department.

13. Morgan v. Labiak, 368 F.2d 338 (10th Cir. 1966).

14. *Id.* at 340. The court went on to say that "it was a question for the jury whether or not the force was unnecessary, unreasonable or violent." *Id.* at 340. It cited as the test for determining reasonableness of the force 6 C.J.S. *Arrest* § 13 (1955) which states that "the reasonableness of the force used in making an arrest under all the circumstances is a question of fact for the jury, and the standard is the conduct of ordinary, prudent men under the existing circumstances."

15. Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961). The court was still licking its wounded pride from reversal by the Supreme Court in *Monroe v. Pape.*

. . . assault and battery into civil rights cases on the basis of conclusory allegations of constitutional violation."[16] However, the court felt bound by *Monroe.*

Although these cases indicate that unreasonable physical violence is sufficient, they concerned instances where the violence was excessively unreasonable. In *Daly v. Pederson,*[17] an attorney was arrested on warrants charging him with failure to honor a traffic summons. He sued, alleging that officers needlessly shoved him down the hallway of the courthouse. Noting that courts have taken "cognizance of physical beatings and violence resulting in deprivations of due process,"[18] the court stated:

> "Because of the brutality of the attacks in those cases, they were clear deprivations of due process. Here, however, plaintiff has neglected to allege any more than a trivial battery at best. Such a showing lacks the severity found in Screws by far, and the purpose to coerce a confession seen in Williams. In approaching Fourteenth Amendment due process questions, the court may consider the severity of the act. While it is true that the Civil Rights Act is to be read in the context of tort liability, . . . nevertheless, the plaintiff herein has failed to show the requisite degree of harm needed to constitute a denial of rights 'implicit in the concept of ordered liberty.' . . . [M]any, if not most, arrests are bound to involve some touching of the person arrested by the officer. It becomes a 'battery' in violation of Constitutional Rights only when excessive under the circumstances, certainly if the arrest be a lawful one."[19]

It is submitted that the latter view limits a due process violation to only those batteries which involve such brutality as to shock the court. This seems reasonable based on the gross and excessive factual situations from which the action arose.[20] This should prevent every battery from becoming a civil rights violation but would not prevent recovery in an aggravated case.[21]

16. Monroe v. Pape, 365 U.S. 167, 240 (1961).
17. 278 F. Supp. 88 (D. Minn. 1967).
18. *Id.* at 94.
19. *Id.*
20. In Screws v. United States, 325 U.S. 91 (1945), defendant, a Georgia sheriff, beat a Negro suspect to death.
21. Courts have, for example, refused prisoners the right to bring § 1983 action against prison guards for alleged batteries. In Cullum v. California Dep't of Corrections, 267 F. Supp. 524, 525 (N.D. Cal. 1967), the court said to permit a prisoner to sue for an alleged assault would be "to inject the

Courts are faced with complaints by prisoners alleging that they have been denied due process under the fourteenth amendment by prison regulations and conduct which they claim denies them access to the courts. In *DeWitt v. Pail*,[22] the court said: "[W]hen the efforts of a state prisoner to obtain an available state appellate review of his conviction are frustrated by the action of penal officials, there has been a violation of the due process clause of the fourteenth amendment. Reasonable access to the courts, state and federal, is guaranteed by that clause."[23] This does not mean that reasonable regulations restricting mail and possession of legal materials are invalid.[24] But rules which penalize prisoners for filing writs are invalid.[25]

The fourteenth amendment due process clause has been cited as giving rise to a claim under Section 1983 for police officers' violations of a citizen's right to privacy. In *York v. Story*,[26] plaintiff alleged that she reported an assault to defendants who then required that she be photographed in nude obscene poses. When plaintiff discovered that the photographs, which served no evidentiary purpose, had been duplicated and distributed to

Federal Courts into prison administration by virtue of its role as the referee in prison-guard disputes." The prisoner must bring his battery under the eighth amendment prohibition against cruel and unusual punishment. *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968). *But see* Wiltsie v. California Dep't of Corrections, 406 F.2d 515 (9th Cir. 1968), where prisoner's allegation that guards unjustifiably beat him does state a cause of action under 42 U.S.C. § 1983 (1958).

22. 366 F.2d 682 (9th Cir. 1966) (prisoner's copy of transcript of his trial seized from him).

23. *Id.* at 685. Plaintiff alleged that defendant confiscated legal papers in his cell (including copy of transcript which he was using in his appeals). The court said: "It is immaterial that the acts accomplishing such frustration may have been performed pursuant to prison rules. . . . On the other hand, prison regulations, customs and usages limiting the times and places in which inmates may engage in legal research and preparation of legal papers, and forbidding or restricting the assistance one inmate may render to another on legal matters, involve no violation of civil rights, provided the purpose or effect thereof, or the means adopted in enforcing them, is not unreasonably to hamper inmates in gaining access to the courts." *Id.* *See also* Jenks v. Henys, 378 F.2d 334 (9th Cir. 1967). *But see* Johnson v. Avery, 393 U.S. 483 (1969) (prison officials cannot enforce rule prohibiting inmates assisting other inmates in preparation of writs unless some reasonable alternative is provided for furnishing assistance).

24. Labat v. McKeithen, 361 F.2d 757 (5th Cir. 1966) (mail regulations upheld involving condemned men); Walker v. Pate, 356 F.2d 502 (7th Cir. 1966) (rule prohibiting possession of law books in prisoner's cell held valid); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965) (correspondence regulations valid).

25. Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967) (rule denying parole for prisoner who files writ of habeas corpus of an additional year beyond normal parole date not valid, injunction from enforcement under § 1983 granted). However, no constitutional right is violated by denial of "good time" if not for improper motive. Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967).

26. 324 F.2d 450 (9th Cir. 1963).

members of the department, she brought suit. The court held that such conduct if proved would constitute "an arbitrary intrusion upon the security of her privacy, as guaranteed to her by the Due Process Clause of the Fourteenth Amendment."[27]

Claims under Section 1983 may also arise under the "equal protection" and "privileges and immunities" clauses.[28] Denial of equal protection due to the negligence of police officials was alleged in *Huey v. Barloga.*[29] The court held that the allegation of an unreasonable omission of police to protect plaintiff's son (a Negro) during a racially tense period was sufficient to state a claim under Section 1983:[30]

> "City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community. This duty applies equally to negroes, as well as to white persons. If such officials have notice of the possibility of racial disorder and the possibility of attacks upon negroes or other persons, they are under an affirmative duty to take reasonable measures to protect the personal safety of such persons in the community. Their failure to perform this duty would constitute both a negligent omission and a denial of equal protection

27. *Id.* at 456. "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity. A search of one's home has been established to be an invasion of one's privacy against intrusion by the police, which, if 'unreasonable', is arbitrary and therefore banned under the Fourth Amendment. . . . We do not see how it can be argued that the searching of one's home deprives him of privacy, but the photographing of one's nude body, and distribution of such photographs to strangers does not." *Id.* at 455. *See also* Katz v. United States, 389 U.S. 347 (1967), on constitutional protection of privacy.

28. In Moss v. Hornig, 314 F.2d 89, 92 (2d Cir. 1963), the court said: "Taking 42 U.S.C. § 1983 by itself, there seems to be no reason to limit the scope of the 'any rights, privileges, or immunities' clause to that of the 'privileges or immunities of citizens' clause of the Fourteenth Amendment. The immunity from denial by the state of the equal protection of the laws is one secured by the Constitution of the United States. This view is supported by the language of Mr. Justice Stone in his separate opinion in Hague v. C.I.O., 307 U.S. 496, 526, 59 S. Ct. 954, 969, 83 L.Ed. 1423 (1939): '[42 U.S.C. § 1983] thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment.'"

For cases alleging deprivation of privileges and immunities or denial of equal protection, *see* Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967); Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967); Haifetz v. Rizzo, 178 F. Supp. 828 (E.D. Pa. 1959).

29. 277 F. Supp. 864 (N.D. Ill. 1967).

30. Plaintiff's son was killed by four or more white youths in a racially inspired incident.

of the laws. Accordingly, an unreasonable omission of this nature would be actionable under Section 1983."[31]

Fourth Amendment

The fourth amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and is applicable to state law enforcement officers through the fourteenth amendment.[32] Under Section 1983 claims have been brought alleging illegal arrest and illegal search.

The Court of Appeals, Third Circuit, said that since *Monroe*, it is "no longer open to question" that a person may not be deprived of federally protected rights by unlawful arrest and detention. In the opinion of the court, Justice Douglas said that "the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." Thus, it is clear that officers who arrest without probable cause[33] or a warrant[34] are liable under Section 1983. Probable cause does not amount to proof required to convict;[35] but if an officer acts in good faith without probable cause, he is nevertheless liable.[36] One case held, however, that probable

31. Huey v. Barloga, 277 F. Supp. 864, 872-73 (N.D. Ill. 1967).

32. Monroe v. Pape, 365 U.S. 167 (1961). It is to be noted that the Court does not seem concerned specifically with whether the claim is brought under the fourth or fourteenth amendments due process clause. The reader gets the feeling that a general reference to both or either is sufficient.

33. Monroe v. Pape, 365 U.S. 167 (1961); Notoras v. Ramon, 383 F.2d 403 (9th Cir. 1967); Beauregard v. Wingard, 362 F.2d 901 (9th Cir. 1966); Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965); Selico v. Jackson, 201 F. Supp. 475 (S.D. Cal. 1962).

34. Cases hold that officers arresting under a warrant valid on its face are protected. *Cf.* Link v. Greyhound Corp., 288 F. Supp. 898 (E.D. Mich. 1968); Daly v. Pedersen, 278 F. Supp. 88 (D. Minn. 1967); Quinnette v. Garland, 277 F. Supp. 999 (C.D. Cal. 1967); Rhodes v. Huston, 202 F. Supp. 624 (D. Neb. 1962).

35. *See* Pierson v. Ray, 386 U.S. 547 (1967); Notoras v. Ramon, 383 F.2d 403 (9th Cir. 1967); Hebert v. Morley, 273 F. Supp. 800 (C.D. Cal. 1967); Beauregard v. Wingard, 362 F.2d 901 (9th Cir. 1966).

36. "Of course the contention of the officers that they acted in good faith and without malice can be no defense in the civil action brought under 1983 for, . . . 'we may assume that the officers acted in good faith in arresting the petitioner. But good faith on the part of the arresting officers is not enough' . . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and the people would be secure in their persons, houses, papers, and effects only in the discretion of the police'." Anderson v. Haas, 341 F.2d 497, 501-02 (3d Cir. 1965). The court cites Ker v. California, 374 U.S. 23 (1963), for the proposition that the federal standard must be applied in determining probable cause and that federal courts will make independent findings of fact in reference to constitutional issues.

In Basista v. Weir, 430 F.2d 74, 81 (3d Cir. 1965), the court said: "While

cause protects the officer even if the arrest was inspired by malice and the plaintiff was subsequently acquitted.[37] Therefore, it can be said that an officer arresting in good faith but without probable cause is liable while the officer arresting in bad faith with probable cause is protected. The only issue in establishing liability is probable cause, not the good or bad faith of the officer.

Under *Monroe*, police officers who conduct unreasonable searches in violation of fourth amendment prohibitions are liable under Section 1983.[38] In *Cohen v. Norris*,[39] any unlawful search was held to be actionable, the court stating that there need not be an allegation that the search "shocked the conscience" or offended the court's sense of justice. The court said that *Monroe* is a definitive interpretation giving a broad reading to the legislation, and that even though officers search in good faith and without malice, if the search is unreasonable by fourth amendment standards, they are liable.[40]

Sixth Amendment

Denial of counsel during the accusatory stage of investigation was the basis for plaintiff's claim in *Brozowski v. Randall*[41] that his sixth amendment rights were violated, giving rise to a claim under Section 1983. The court felt that although no evi-

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a specific intent to deprive a person of his constitutional rights is required under criminal sections of the Civil Rights Acts, 18 U.S.C. §§ 241, 242, neither specific intent nor purpose to deprive an individual of his civil rights is a prerequisite to civil liability under the civil provisions of the Civil Rights Act."

37. In Beauregard v. Wingard, 362 F.2d 901 (9th Cir. 1966), plaintiff was arrested for bookmaking, tried, and acquitted. The Investigation was inspired by bad blood between plaintiff and defendant. The court nevertheless said: "Although the circumstances under which an arrest without probable cause gives rise to a claim under the Civil Rights Act may not yet be clearly established, see, e.g., Note; The Civil Rights Act of 1871: Continuing Vitality, 40 Notre Dame Law., 70, 80-84 (1964), it should in any event be clear that where probable cause does exist civil rights are not violated by an arrest even though innocence may subsequently be established.

"The jury's findings do not establish that appellant was arrested without probable cause. Quite to the contrary, it was expressly found that Michael had probable cause for the arrest. As for Wingard's involvement, it may simply be said that if an investigation succeeds in producing evidence of crime, probable cause for arrest is not nullified by the fact that the otherwise successful investigation was maliciously inspired." *Id.* at 903.

38. *See also* Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1968) (allowance of punitive damages for illegal search of a policeman's residence by other police); Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); Houghton v. Scranton, 257 F. Supp. 557 (E.D. Pa. 1966).

39. 300 F.2d 24 (9th Cir. 1962).

40. *See* Anderson v. Haas, 341 F.2d 497 (3d Cir. 1965); Houghton v. Scranton, 257 F. Supp. 557 (E.D. Pa. 1966).

41. 281 F. Supp. 306 (E.D. Pa. 1968).

dence was secured against plaintiff during the period when he was denied the opportunity to consult with counsel, the deprivation alone (during the accusatory stage of the investigation) while he was in custody was sufficient to violate his sixth amendment right to counsel.[42]

Eighth Amendment

Cases dealing with prisoners' complaints of subjection to cruel and unusual punishment in violation of their eighth amendment rights have been decided based on Section 1983. In one case,[43] a prisoner challenged his being placed in the "hole" for disciplinary reasons as cruel and unusual punishment.[44] The court said "the Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency"[45] and granted an injunction prohibiting prison officials' use of that disciplinary measure. Similarly, the Court of Appeals for the Eighth Circuit[46] held that the use of the strap for prison discipline was cruel and unusual punishment and enjoined its use under Section 1983.

First Amendment

Cases under Section 1983 have arisen based on violations of first amendment rights.[47] In *Nesmith v. Alford*,[48] plaintiff was arrested for disorderly conduct. His conduct consisted of eating lunch peacefully in a public cafe with an integrated group. The position taken by police was that plaintiff's conduct "outraged" a group of local citizens. The court said:

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42. The court cites Escobedo v. Illinois, 378 U.S. 488 (1964), for the proposition. *But see* Thornton v. Buchmann, 392 F.2d 870 (7th Cir. 1968), and Ambrek v. Clark, 287 F. Supp. 208 (E.D. Pa. 1968), for the proposition that mere failure to advise defendant of *Miranda* rights is not actionable under § 1983.

43. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

44. *Id.* at 526.

45. *Id.* at 522. The court points out the fact that "[u]ntil recently the federal courts refused to review charges instituted under the Civil Rights Act and arising out of state prison disciplinary procedures."

46. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968): "[W]e have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in the last third of the 20th Century, runs afoul of the Eighth Amendment; that the strap's use . . . offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess . . . ."

47. Cooper v. Pate, 378 U.S. 546 (1964); Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963); Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963); Hughes v. Rizzo, 282 F.Supp. 881 (E.D. Pa. 1968); Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966).

48. 318 F.2d 110 (5th Cir. 1963).

> ". . . liberty is at an end if a police officer may without a warrant arrest, not the person threatening violence, but those who are its likely victims merely because the person arrested is engaging in conduct which, though peaceful and legally and constitutionally protected, is deemed offensive to settled social customs and practices. When that day comes, freedom of the press, freedom of assembly, freedom of speech, freedom of religion will all be imperiled. For the exercise of each must then conform to what the conscientious policeman regards the community's threshold of intolerance to be."[49]

A similar problem was faced by a district court when an injunction was sought enjoining Philadelphia police from "mass arrests" of "hippies" in the Rittenhouse Square area.[50] The plaintiffs alleged that their conduct, appearance, and attitudes were offensive to police and that the purpose of the arrests was to rid the park of "hippies." In censuring the police conduct, the court was sympathetic to the problem presented.[51] It nevertheless held that the "use of a public park may not be denied merely because the governing body disapproves of the views or objectives of those barred."[52] Other cases have allowed Section 1983 actions for denying a prisoner religious material,[53] for harassment of a group of Negro attorneys by a legislative committee,[54] and for seizing and refusing to allow distribution of literature protesting government policies.[55]

Persons Covered by the Act

Persons who under color of state law deprive others of their statutory or constitutional rights are liable under the Act. This

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49. *Id.* at 121.

50. Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968).

51. *Id.* at 884: "One can almost take judicial notice of the fact that many hippies experiment with narcotics and dangerous drugs. And the hearings in this case were persuasive that some are promiscuous; some are overtly homosexual; and some have so completely rejected the middle-class value of cleanliness that their very presence in the courtroom was an olfactory affront. These factors may help to explain, if not to legally justify, conduct by law enforcement personnel which would otherwise be incredible."

52. *Id.* at 885.

53. Cooper v. Pate, 378 U.S. 546 (1964); Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966). *See also* Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947) (suit against town marshal to enjoin interference with Jehovah's Witnesses' use of public park for meeting).

54. Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963).

55. Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962) (plaintiff went to Los Angeles Airport to distribute pamphlets protesting the arrival of a Russian diplomat; the pamphlets were seized and destroyed by police).

clearly covers state and local law enforcement officers.[56] Even if the conduct of the officers is proscribed by state law, it is still "under color of law." In *Monroe*, the defendants attempted to defeat federal jurisdiction by alleging that their conduct was prohibited by state law. It was argued that "under color of" state law excluded acts of a policeman who could show no authority under state law, custom, or usage authorizing his conduct. This argument was rejected by the Court which 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."[57]

In *Basista v. Weir*,[58] words between an officer investigating a family disturbance and plaintiff led to a fight and the arrest of plaintiff. The court of appeals said, "assuming arguendo that Scalese's actions were in fact motivated by personal animosity that does not and cannot place him or his acts outside the scope of Section 1983 if he vented his ill feeling toward Basista by subjecting him to physical beating, to humiliation before his neighbors, and to incarceration, all under color of a policeman's badge."[59]

Private persons who act in conjunction with officers also act under color of law.[60] However, if the individual is merely "obliging" an officer, he is not liable.[61] "Section 1983 has been held to apply solely and exclusively to acts by state officers who use their authority, or misuse it, or purport to use their authority

56. Monroe v. Pape, 365 U.S. 167, 184 (1961); Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962). Only suits against individuals may be brought under § 1983, not suits against municipalities or police departments. Monroe v. Pape, 365 U.S. 167 (1961); Cuiksa v. Mansfield, 250 F.2d 700 (6th Cir. 1957); Burmeister v. New York City Police Dep't, 275 F. Supp. 690 (S.D. N.Y. 1967).

57. Monroe v. Pape, 365 U.S. 167, 184 (1961). The Court is quoting from its decision in United States v. Classic, 313 U.S. 299, 326 (1941).

58. 340 F.2d 74 (3d Cir. 1965).

59. *Id.* at 80-81.

60. "Private persons jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the State or its agents." United States v. Price, 383 U.S. 787, 794 (1966). *See also* Johnson v. Crumlish, 224 F. Supp. 22 (E.D. Pa. 1963) (suit against attorney and client who sought issuance of bench warrant for plaintiff).

61. Duzynski v. Nosal, 324 F.2d 924 (7th Cir. 1963); Weyandt v. Mason's Stores, 279 F. Supp. 283 (W.D. Pa. 1968); Henig v. Odorioso, 256 F. Supp. 276 (E.D. Pa. 1966); Craska v. New York Tel. Co., 239 F. Supp. 932 (N.D. N.Y. 1965) (no claim under § 1983 against the telephone company for wiretapping at officers' instructions where state law provided for wiretaps).

(although, in fact, acting outside their official function) to deprive a person of federally protected rights. Private persons, although they may in fact deprive another person of federally protected rights, are not liable under Section 1983."[62] For example, court-appointed attorneys have been held not liable for alleged constitutional rights violations.[63] One acting in the capacity of a witness cannot be sued under Section 1983 for testifying against a criminal defendant.[64] Likewise, the allegation that an individual has maliciously and without probable cause sworn out a warrant for another does not state a cause of action under Section 1983.[65] Although generally one must be a state officer to be covered by Section 1983,[66] some cases do hold private persons liable under certain circumstances.[67] For example, one court found a store detective who held a special deputy sheriff's commission was acting under color of law and hence was covered by section 1983.[68] Another court found that store employees arresting shoplifters under a state statute authorizing merchants to arrest for theft of their goods was acting under color of law.[69]

In *Pierson v. Ray*,[70] the Supreme Court held that Section 1983 did not abrogate the traditional judicial immunity of the bench.[71] Standing between the judiciary and the police is the district attorney. The doctrine of quasi-judicial immunity protects prosecutors from suits involving their official prosecutorial conduct and has been retained "in connection with their quasi-

62. Dyzynski v. Nosal, 324 F.2d 924, 930 (7th Cir. 1963).

63. United States *ex rel.* Gittlemacker v. Pennsylvania, 281 F. Supp. 175 (E.D. Pa. 1968); Reinke v. Richardson, 279 F. Supp. 155 (E.D. Wis. 1968).

64. Pritt v. Johnson, 264 F. Supp. 167 (M.D. Pa. 1967).

65. Motley v. Virginia Hardware, 287 F. Supp. 790 (W.D. Va. 1968).

66. Wallach v. Cannon, 357 F.2d 557 (8th Cir. 1966); Kregger v. Posner, 248 F. Supp. 804 (E.D. Mich. 1966).

67. Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); Weyandt v. Mason's Store, 279 F. Supp. 283 (W.D. Pa. 1968) (held private detective employed by store who holds special deputy commission is acting under color of law, but merely being licensed as a private detective and "detaining" under a merchant's detention statute does not constitute action under color of law); DeCarlo v. Joseph Horne, 251 F. Supp. 935 (W.D. Pa. 1966) (store employee who deprives another of rights secured by § 1983 under a statute authorizing arrests by private citizen store employee is liable under § 1983). *See also* LA. CODE CRIM. P. art. 215 (1966).

68. Weyandt v. Mason's Stores, 279 F. Supp. 283 (W.D. Pa. 1968).

69. DeCarlo v. Joseph Horne, 251 F. Supp. 935 (W.D. Pa. 1966).

70. Pierson v. Ray, 386 U.S. 547 (1967).

71. The dissent by Justice Douglas was grounded on the fact that by its use of the phrase "any person" Congress did eliminate judicial immunity. *See also* dissent in Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), which argues that the district attorney's immunity was abrogated by § 1983.

judicial duties."[72] The Court of Appeals for the Third Circuit clearly presented the issue in *Bauers v. Heisel*:[73]

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are sufficiently judicial as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement as to amerce him with potential civil liability for his actions. Analogy could support either conclusion, but we believe that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent; his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself."[74]

The court also stated that "the immunity of the prosecutor is not without limitation, . . . it is not absolute."[75] It does not extend to conduct which is clearly outside his jurisdiction.[76] In *Dodd v. Spokane*,[77] the court held that a cause of action under Section 1983 is stated against a prosecutor if it is alleged that he committed the acts pursuant to investigatory duties. In that case, an assistant district attorney and a deputy sheriff allegedly beat a prisoner to exact testimony from him against a fellow inmate.[78]

72. Dodd v. Spokane, 393 F.2d 330, 335 (9th Cir. 1968); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966) (a wealth of authority is collected by the court in *Bauers* at 586-87 n.7); Link v. Greyhound Corp., 288 F. Supp. 898 (E.D. Mich. 1968).

73. 361 F.2d 581 (3d Cir. 1966). The district attorney prosecuted a juvenile who later sued, alleging that his prosecution was unlawful.

74. *Id.* at 589-90.

75. *Id* at 590.

76. *Id.* at 591: "The clear-absence-versus-mere-excess-of-jurisdiction distinction has, in substance, been adopted and applied in Civil Rights Act cases brought against judges and other judicial officers . . . . Because immunity is conferred on an individual solely by virtue of the office he holds, reason requires us to adopt a rule which does not provide immunity for those acts which are done clearly outside the authority or jurisdiction of the office."

77. 393 F.2d 330 (9th Cir. 1968).

78. *Id.* at 335: "Defendants prosecuting attorney and deputy prosecuting attorney are immune from suit under the Civil Rights Act if the acts complained of were performed in connection with their quasi-judicial duties. On the other hand, if such acts were committed pursuant to their investigatory duties, then their role is substantially the same as that of policemen or county sheriffs, in which case they have the same defense . . . ." *See*

While state and local police officers may be held under Section 1983, it is clear that federal law enforcement agents are not within its scope.[79] In *Norton v. McShane*,[80] the court denied liability of United States Marshals under the Civil Rights Act, because "the person must be acting under color of state law for the section to apply, whereas the defendants in the instant suits were acting under color of federal law."[81]

Conclusions

As stated earlier, the Court of Appeals for the Tenth Circuit has said, "The Civil Rights Act, of course, was not enacted to discipline local law enforcement officials. Nevertheless, local law enforcement officials are subject to civil liability under Section 1983 . . . ."[82] This resultant civil liability will have the effect of disciplining law enforcement officers. Needless to say, the threat of suit for violations of constitutional rights will have a "chilling effect" on enthusiastic officers who, in their zeal for law enforcement, might think more of the apprehension of the suspect than the validity of the procedures employed. Under a broad interpretation of the Civil Rights Act, officers may find themselves in a situation where they are not sure how to proceed. It is submitted that as future court decisions hold certain conduct violative of constitutional rights for any purpose that same conduct will give rise to liability under Section 1983. Thus, for example, the same test of constitutionality will apply for exclusion of evidence and for liability under Section 1983. This is the meaning of *Monroe*.

It is not argued that this interpretation of the Act is in error. Its broad language certainly encompasses many claims not heretofore accepted.[83] The writer contends that the statute is too

also Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955) (district attorney liable for coerced confession).

79. Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965) (held no cause stated under § 1983 but held constitutional rights violation by federal agent actionable in damages in contrast to the holding in *Norton v. McShane*); Sheridan v. Williams, 333 F.2d 581 (9th Cir. 1964); United States v. Faneca, 332 F.2d 872 (5th Cir. 1964); Norton v. McShane, 332 F.2d 855 (5th Cir. 1964); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 276 F. Supp. 12 (E.D. N.Y. 1967); Carey v. Settle, 256 F. Supp. 547 (W.D. Mo. 1966).

80. 332 F.2d 855 (5th Cir. 1964).

81. *Id.* at 862. To discuss the claim under common law, the Fifth Circuit Court of Appeal relied on the doctrine of immunity: "By the great weight of authority law enforcement officers (federal) are immune from civil suits based on allegedly malicious acts." *Id.* at 859-60.

82. Stringer v. Dilger, 313 F.2d 536, 540 (10th Cir. 1963).

83. For example, Justice Douglas, dissenting in Pierson v. Ray, 386 U.S. 547, 559 (1967), stated that § 1983 abrogates traditional judicial immunity. "To most 'every person' would mean every person, not every person except judges."

broad. As it has been argued,[84] the purpose of the exclusionary rule is to serve as a shield against unconstitutional invasions. The award of damages is a more drastic remedy which acts as a sword against those who do commit the violations. It is submitted that there are two distinct purposes which need not be co-extensive with one another. The exclusionary rule should be broadly drawn to prevent the use of illegally seized evidence in securing convictions thereby providing a shield for the victim to protect his rights. The remedy of civil damages should be defined narrowly as a tool with which the offended party strikes out against law enforcement officers. The shield should protect and prevent any violation being used against the individual; the sword should only be available to strike back at the most outrageous offenses.

In an area where legislation is sparse and constitutional standards changing rapidly, the policeman is in a difficult situation. If he is liable whenever he fails to use constitutionally proper procedures (and cannot point to some decision or law not yet held unconstitutional[85] at the time of the act), then he is in a restricted situation. Yet, in many situations, if the officer hesitates, his efforts may be lost.

This argument is not that the injured person should be without rights. It is simply that the officer frequently must make quick decisions which do not allow him an opportunity for reflection and consideration of legal problems. Certainly the fear that a court might later find an officer's conduct violated constitutional standards although in good faith and without malice should have a discouraging effect on police. In opposition to this view, it is argued that these considerations are weighed by courts in determining liability. Nevertheless, even in a relatively clear case, the fear of liability alone should be a deterrent to vigorous law enforcement. Judge Learned Hand said in *Gregoire v. Biddle*:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny

84. Shapo, *Constitutional Tort:* MONROE V. PAPE, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965).
85. Pierson v. Ray, 386 U.S. 547 (1967).

> recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrong done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[86]

The objectives of enforcing constitutional safeguards and still relieving the individual officer of the burden of personal liability can be accomplished. One way to achieve this result would be to include a requirement that the Civil Rights violation under 1983 be done "willfully and knowingly." This would punish malice and bad faith conduct while allowing the officer who is acting honestly and in good faith freedom from civil liability. As a corollary to this, the defense of "good faith" could be accorded to the officer charged with a Section 1983 violation.

Another suggested solution would be to provide a direct cause of action against the employing agency (*i.e.*, City Police, Sheriff's Office, District Attorney's Office, State Police, *etc.*). This would serve to protect the individual policeman from fear of personal expense (arising from suits filed whether factually grounded or not) while leaving the victim with a solvent claimant from whom to seek restitution.

A combination of these approaches would be the most effective. Constitutional standards, unlike legislative standards, are not amenable to definitive statements in the form of rules. The situations which confront police in their duties are too diverse for broad constitutional provisions to give police meaningful guidance. Balanced against this is the fact that individuals' rights must be protected even against well-meaning efforts of police which violate constitutional rights. Unfortunately, due to the complex nature of police activity, courts have not ruled concerning every possible factual situation in which an officer might

86. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). Although *Gregoire* dealt with the liability of federal officers, the same logic should apply to state and local police as well.

find himself. This leaves the police officer to decide in situations where even judges and attorneys may not agree. Yet, if the "hindsight" of the judiciary disagrees with the officer, he is liable. Although courts may say that they try to consider the situation from the point of view of the officer, this does not alter the fact that the officer must act *first* with the judge deciding *later* whether the officer's conduct was constitutionally proper.

It is submitted that it is unfair to require policemen to evaluate the constitutionality of their conduct except in the most obvious situations, as for example, beating a confession from an accused. The test of willful violation of constitutional rights should be required for findings of personal liability. For situations involving "honest or good faith" violations of constitutional safeguards liability on the employing agency itself would provide an adequate remedy. Expenses incurred for violations of individual rights due to honest mistakes of police officers is certainly a legitimate cost of law enforcement. Society will be paying for its own errors. This will allow the vigorous law enforcement officer freedom to act quickly without fear of financial reprisal for his honest attempts to enforce the law.

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INSANITY—THE BURDEN OF PROOF

Article 652 of the Louisiana Code of Criminal Procedure establishes the procedural rule that an accused who claims insanity as a defense has the burden of proving his insanity by a preponderance of the evidence. This rule is followed in twenty-four states.[1] However, in the rest of the states[2] and in federal

1. These are: Alabama, Knight v. State, 273 Ala. 480, 142 So.2d 899 (1962); Alaska, Bowker v. State, 373 P.2d 500 (1962); Arkansas, Kelley v. State, 154 Ark. 246, 242 S.W. 572 (1922); California, People v. Monk, 14 Cal. Rptr. 633, 363 P.2d 865 (1961); Delaware, Longoria v. State, 53 Del. 311, 168 A.2d 695 (1961); Georgia, Ross v. State, 217 Ga. 569, 124 S.E.2d 280 (1962); Iowa, State v. Drosos, 253 Iowa 1152, 114 N.W.2d 526 (1962); Kentucky, Tungent v. Commonwealth, 303 Ky. 834, 198 S.W.2d 785 (1947); Maine, State v. Park, 159 Me. 328, 193 A.2d 1 (1963); Minnesota, State v. Finn, 257 Minn. 138, 100 N.W.2d 508 (1960); Missouri, State v. King, 375 S.W.2d 34 (1964); Montana, State v. DeHann, 88 Mont. 407, 292 P. 1109 (1930); Nevada, State v. Behiter, 55 Nev. 236, 29 P.2d 1000 (1934); New Jersey, State v. Kudzinowski, 106 N.J.L. 155, 147 A. 453 (1929); North Carolina, State v. Swink, 229 N.C. 123, 47 S.E.2d 852 (1948); Ohio, State v. Stewart, 176 Ohio St. 156, 198 N.E.2d 439 (1964); Oregon, 14 ORE. REV. STAT. 136.390 (1960); Pennsylvania, Commonwealth v. Upedgrove, 413 Pa. 599, 198 A.2d 534 (1964); Rhode Island, State v. Gunnites, 91 R.I. 209, 161 A.2d 818 (1960); South Carolina, State v. Tidwell, 100 S.C.