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Book Review of Section 1983: Sword and Shield

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Book Reviews

Section 1983: Sword and Shield

Edited by Robert H. Freilich and Richard G. Carlisle

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ROBERT H. FREILICH AND RICHARD G. CARLISLE have collected sixteen essays from Volumes 11 through 15 of *The Urban Lawyer*—the journal which has most consistently followed developments in the law of section 1983[1]—and published them as *Section 1983: Sword and Shield.*[2] Prepared for the Section of Urban, State, and Local Government Law of the American Bar Association, this helpful volume provides a contemporary history of the development of the 1871 Civil Rights Act,[3] from which section 1983 was derived.

The Urban Lawyer's unique obsession with the old civil rights act began with the eleventh volume in 1979 as in the preceding year the Supreme Court caught section members' attention by making municipal and other local governments liable in damages under section 1983 for many constitutional violations committed by their officials. Reversing the only serious restriction read into the statute when the Court originally resurrected it in *Monroe v. Pape*,[4] a

1. 42 U.S.C. § 1983 (Supp. V 1981). The section provides in pertinent part:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisidiction 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.
2. The reviewer wishes to disclose his friendship with the authors, the fact of which explains why it would be fulsome to praise this work. This review, therefore, seeks more to inform about the book's contents and section 1983's problems then to evaluate the former.
3. 1871 Civil Rights Act, ch. 22, § 1, 17 Stat. 13 (1871).
4. 365 U.S. 167 (1961).

majority in *Monell v. Department of Social Services*[5] held that a city is a "person" able to cause deprivations of federal rights. That decision led in turn to a series of totally unforeseen developments as the reputedly conservative Burger Court transmuted into the Brennan Court and broadly construed section 1983 to provide even further opportunities for federal judicial intervention against errant governments and their officers.

Sword and Shield provides a sustained introduction to section 1983 for the interested and inquiring practitioner. These are consistently useful essays. Some are scholarly in tone, but most speak more directly to practicing municipal attorneys who need the volume's information and insights.

The articles collected in *Sword and Shield* cover substantially all of the post-*Monell* developments in the late 1970s and early 1980s. Freilich and Carlisle themselves have written about *Monell* and its aftermath,[6] including the *Owen v. City of Independence* rejection[7] of immunity for municipalities similar to the immunity accorded officials.[8] Works by Kramer, Weeks, Kushnir, and Peters also cover these developments. The specter of municipal liability raised by *Monell* grew more intense when the Court in *Maine v. Thiboutot*[9] initially read the "and laws" language in section 1983 to permit suits not only for violation of constitutional norms, but also deviation from federal statutorily prescribed standards, such as those in welfare statutes and other grant and contract legislation.[10]

5. 436 U.S. 658 (1978).

6. Three new introductory pieces, not previously published, provide an overall introduction to the several articles collected. Carlisle, *Section 1983: The Preeminent Issue—A Species of Tort or Statutory Liability in* SECTION 1983 SWORD AND SHIELD 3 (R. Freilich & R. Carlisle eds. 1983) (introducing tort background of § 1983); Jeans, *The Symposium Articles and Six Major Issues of Section 1983* in SWORD AND SHIELD, at 13 (describing format of book); Lansford, *Comment: Municipal Liability under the Ku Klux Klan Act of 1871—an Historical Perspective* in SWORD AND SHIELD, at 23 (historical introduction to interpretation of § 1983).

7. 445 U.S. 622 (1980).

8. *See id.* at 638; *cf.* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (immunities for real persons); Pierson v. Ray, 386 U.S. 547 (1967).

9. 448 U.S. 1 (1980).

10. *See, e.g.*, Lynch v. Dukakis, 719 F.2d 504, 509–12 (1st Cir. 1983) (relief granted in social security case). *But see* Boatowners and Tenants' Ass'n v. Port of Seattle, 716 F.2d 669 (9th Cir. 1983). Since the Supreme Court's decision in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), the lower federal courts have narrowed the list of collateral statutes which can be enforced through section 1983, and thus have alleviated the fears raised in *Thiboutot*. *Boatowners*, *supra*, at 671–73 (collecting cases).

Robert Manley's and Richard Cappalli's articles on this topic are among the most literate and thoughtful in the volume.[11] A third development, Congress's adoption of the Attorney's Fees Award Act[12] and its strict enforcement in the courts,[13] extended the fears of municipal accountants to the same degree that it heightened the hope of civil rights groups. John Witt covers that topic with considerable skill and balanced judgment.

This five-year survey of developments under section 1983 is complemented by two other topics covered by *Sword and Shield*. First, essays by Mahoney, Rushing, and Bratcher and Jaron cover the essentials of plaintiffs' prima facie case and defendants' immunities and defenses in terms which litigators will find information. Substantive essays by Freilich, Manley, and Bley also discuss an area of section 1983 litigation which has exploded in federal courts in this time period, land use controls.[14] While inclusion of these essays is very commendable, it points out the major limitation of *The Urban Lawyer*'s coverage and this book—the failure to cover the other major substantive areas of concern to municipal lawyers, primarily police misconduct cases[15] and procedural due process problems relating to regulatory[16] and personnel decisions.[17]

11. Manley, *The Next Thirty Years of Civil Rights Litigation* in SWORD AND SHIELD, *supra* at 139, Cappalli, *Federal Grants and the New Statutory Tort: State and Local Officials Beware!* in SWORD AND SHIELD, *supra* at 187. Cappalli's article actually deals not with the "and laws" language of section 1983, but with the related development of "implied" causes of action for damages. Reading Manley and Cappalli together shows that, regardless of whether the damage claim is implied directly from a federal supervisory statute or is collaterally created by section 1983, the role of federal judicial oversight is essentially the same.

12. 42 U.S.C. § 1988 (1976).

13. *See* Maher v. Gagne, 448 U.S. 122 (1980) (Act applies to settlements and to nonconstitutional as well as Constitution-based claims under section 1983); Hutto v. Finney, 437 U.S. 678 (1978) (fees may be awarded state even though not explicitly covered by Act).

14. Freilich's piece in particular shows the substantial need for rethinking section 1983's overlap with traditional state-court remedies. It is the most scholarly essay in the book.

15. *See* Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1983); Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981). *Brewer* exemplifies appellate courts' attempts to deal with Parratt v. Taylor, 451 U.S. 527 (1980) (no section 1983 remedy for property deprivation when postdeprivation remedy adequate in state court). The cases may revolutionize police misconduct litigation under section 1983.

16. *See* Plyler v. Doe, 457 U.S. 202 (1982) (school residency regulations); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (billboard regulation presents first amendment problems); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (regulation of nude dancing).

17. *See* Bishop v. Wood, 426 U.S. 341 (1976) (discharge for noncompliance with grooming code); Board of Regents v. Roth, 408 U.S. 564 (1972) (discharge without a hearing).

Section 1983 has been an intellectual enigma ever since Justice Douglas in *Monroe v. Pape* stated that the section "should be read against the background of tort liability which makes a man responsible for the natural consequences of his acts."[18] That unfortunate bit of dictum spawned a style of thinking and a label—the "constitutional tort"[19] which has threatened to skew section 1983's proper development.

Monroe's facts and defendants' peculiar argument made the tort analogy seem initially attractive. Defendant police officers had violated not only federal constitutional law but also, by their own confession, state law.[20] Thus, the usual balancing of federal and state interests which is at the core of virtually all traditional constitutional law[21] was hidden in *Monroe*: there could be no respect given to state interests where the defendants conceded that they violated state law.

Such misconduct cases, however, represent only one group of section 1983 suits. The others are the traditional constitutional law cases in which state or local officials have obeyed state law and the question is not whether they behaved culpably as individuals, but whether local interests should, in the constitutional balance, outweigh national interests.[22] That decision-making process is fundamentally different from traditional tort analysis, and analogies to traditional concepts of torts must be rejected for at least two reasons.

These two reasons show the difference between tort law and constitutional law. First, tort law usually balances the interests of two private persons,[23] whereas constitutional law balances private

18. Monroe v. Pape, 365 U.S. 171, 187 (1961).

19. *See* Shapo, *Constitutional Tort*: Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965).

20. 365 U.S. at 172 n.6.

21. *See* Plyler v. Doe, 457 U.S. 202 (1982); San Antonio Ind. Sch. Dist. v. Rodriquez, 411 U.S. 1, 125 (1973) (Marshall, J., dissenting) ("sliding scale"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 8–9, 18, 559–631 (1978); *cf.* G. GUNTHER, CONSTITUTIONAL LAW 1318 (10th ed.) (balancing and free speech).

22. *See* Plyler v. Doe, 457 U.S. 202 (1982) (undocumented alien children's educational rights); Roe v. Wade, 410 U.S. 113 (1973) (state abortion laws, substantive-due-process analysis at strict level of scrutiny). Indeed, these cases, which often arise under section 1983, are the grist from which constitutional law textbooks are compiled.

23. *See* Marsh Wood Products Co. v. Babcock and Wilcox, 207 Wis. 209, 240 N.W. 392 (1932) (negligent manufacturing process); King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918) (parent's liability for son's use of automobile). Of course, the same is true for other areas of private law. *See* Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1921) (contract). Of course, the public's interest is reflected

interests and collective (or governmental) interests.[24] Even when tort law deals specifically with private suits against governmental officers, as in false imprisonment cases,[25] constitutional law may be different because it reestablishes the balance from the perspective of federal supervisory goals.[26] The degree to which a state may make rules binding its officials derives from its appreciation of local misconduct, state (or official) ability to pay judgments, or perhaps even its willingness to have policy less effectively enforced in fear of judgments. A federal decision on the same problem must not only be made in view of national problems but also with due regard for the facts that (1) states may have decided the issue differently and (2) the efficacy of enforcement of general state policies will be affected. This is not to say that a federal rule will be narrower or less protective of individuals; it is simply recognition that the federal act of balancing may reach a result different from state law[27]—and unwarranted analogizing to state tort law subverts the independent federal decision-making process.

Lurking beneath the surface of the resurgence of section 1983 in Monell's official policy cases, therefore, is a replay of many of the same issues of federal versus local control raised in the incorporation and other due process controversies earlier in this century.[28] Talk of tort analogues tends to confuse courts' analyses of these cases rather than aid them.[29]

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in the balance, but the competing persons have otherwise individual and equal claims to have law reflect their interests.

24. *See* note 21 *supra*.

25. *See, e.g.*, Garvin v. Muir, 306 S.W.2d 256 (Ky. 1957); Birdsall v. Lewis, 246 A.D. 132, 285 N.Y.S. 146 (N.Y. App. Div. 1936); Ulvestad v. Dolphin, 152 Wash. 580, 278 P. 681 (1921) (standards and defenses considered). *Cf.* Hill v. City of Glenwood, 124 Iowa 479, 100 N.W. 522 (1904) (negligence-based tort; use of sidewalk by blind person).

26. *See* Estelle v. Gamble, 429 U.S. 97 (1976) (negligence standard applicable under state law not adopted in prisoner's claim against doctor for improper medical care); Jackson v. Joliet, 715 F.2d 1200 (7th Cir. 1983) (duties applicable under state tort law not applicable in section 1983 suit for constitutional deprivation).

27. *Cf.* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (states may choose to be more protective on state constitutional grounds).

28. *See* Adamson v. California, 332 U.S. 46, 62–68 (1947) (Frankfurter, J., concurring); Palko v. Connecticut, 302 U.S. 319 (1937) (per Cardozo, J.); New State Ice Co. v. Liebman, 285 U.S. 262, 311 (Brandeis, J., dissenting).

29. *See* Dollar v. Harralson County, 704 F.2d 1540 (11th Cir. 1983) (judgment "informed, although not controlled," by state law; little consideration of federal constitutional considerations). Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969) (no analysis of constitutional goals, federal interests, or institutional limitations).

Sword and Shield provides a well-selected introduction to what has become perhaps the most important and intellectually challenging area facing state and local governments—insuring that their practices measure up to an evolving constitutional consensus concerning federal minimum standards of care. The tendency of many practitioners and judges has been to recycle their knowledge of ordinary tort law and apply it to these new problems, but that effort, like most easy solutions, cannot succeed.

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