NOTES

CONSTITUTIONAL LAW: "UNDER COLOR OF" LAW AND THE CIVIL RIGHTS ACT

THE KU KLUX ACT of 1871,[1] largely embodied in present federal civil rights legislation, provides a civil remedy in the federal courts for deprivation of constitutional rights by anyone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. . . ."[2] The United States Supreme Court recently held in *Monroe v. Pape*[3] that acts of a state official while performing his duties, even if unauthorized by state law, are actions taken "under color of" law within the meaning of this Civil Rights Act.[4] When a state official violates federal constitutional rights by conduct which constitutes state action but is unauthorized by state law, a civil action normally is available against him in the state courts. Under the *Monroe* decision, if the official's conduct violates the Civil Rights Act,[5] then a civil action will also lie against him in the federal courts[6] despite the availability of a state court remedy.

[1] An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes 17 Stat. 13 (1871). Sections 1, 2, and 6, of the Ku Klux Act are incorporated with minor changes in present federal civil rights legislation. Section 1 is now REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958) (civil action for deprivation of rights), § 2 is now REV. STAT. § 1980 (1875), 42 U.S.C. § 1985 (1958) (action for conspiracy to interfere with civil rights), and § 6 is now REV. STAT. § 1981 (1875), 42 U.S.C. § 1986 (1958) (action for failure to prevent interference with civil rights).

[2] "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." REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

[3] 365 U.S. 167 (1961).

[4] *Id.* at 172.

[5] REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958) of the present Civil Rights Act primarily protects rights secured against state action by the fourteenth amendment. Such rights include freedom of religious worship, freedom of lawful assembly, freedom of the press, freedom from unlawful search and seizure, and freedom from arbitrary discrimination. See Douglas v. City of Jeannette, 319 U.S. 157 (1943); Hague v. CIO, 307 U.S. 496 (1939); Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958); cases collected in 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 37, at 198-200 (rev. ed. 1960); *cf.* Hunt v. Arnold, 172 F. Supp. 847 (N.D. Ga. 1959); Lopez v. Seccombe, 71 F. Supp. 769 (S.D. Cal. 1944). See also note 46 *infra*.

[6] The federal district courts have original jurisdiction of actions brought under the

In the *Monroe* case, a resident of Chicago[7] brought an action in the federal district court against certain Chicago policemen and the City of Chicago to recover damages under the present Civil Rights Act[8] for an alleged deprivation of his federal constitutional rights "under color of" law. The plaintiff alleged that thirteen Chicago police officers, during the course of their employment, broke into his home, insulted and beat him, and without a warrant searched his home and arrested and detained him *incommunicado*. Such conduct is unlawful under the constitution and laws of Illinois.[9] The district court held that the complaint did not state a cause of action under the Civil Rights Act.[10] The Court of Appeals for the Seventh Circuit affirmed. Assigning few reasons for its decision,[11] the court relied heavily on the availability of a remedy at state law.[12] The Supreme Court unanimously affirmed the dismissal of the complaint against the City of Chicago, but held in an eight-to-one decision that it was error to dismiss the complaint against the individual police officers.[13]

Mr. Justice Douglas, speaking for a majority of the Court, held that "under color of" law, as used in the Civil Rights Act, includes abuse of official position, even if unauthorized by state law.[14] The majority opinion relied on a line of authority which construes "under color of" law as used in the criminal provisions of the act as including a misuse of

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Civil Rights Act. 28 U.S.C. § 1343 (1958). See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 37 (rev. ed. 1960); *cf.* Hague v. CIO, 307 U.S. 496 (1939).

[7] Plaintiffs were Mr. Monroe, his wife, and their six children represented by their mother as next friend.

[8] REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). Originally, the complaint also invoked REV. STAT. §§ 1980-81 (1875), 42 U.S.C. §§ 1985-86 (1958). However, argument before the Supreme Court was limited to § 1983.

[9] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized." ILL. CONST. art. 2, § 6. Illinois law also provides criminal penalties for illegal detention and for prevention of consultation with attorney or family while being held in custody. ILL. REV. STAT. ch. 38, §§ 252, 449.1 (1957).

[10] Monroe v. Pape, 272 F.2d 365 (7th Cir. 1959).

[11] *Id.* at 366.

[12] Tort actions against police officers for assault and battery and false imprisonment are available in the Illinois state courts. See, *e.g.*, Fulford v. O'Connor, 3 Ill. 2d 490, 121 N.E.2d 767 (1954); Sparacino v. Ferona, 1 Ill. App. 2d 227, 117 N.E.2d 320 (1954); Raucci v. Connelly, 340 Ill. App. 280, 91 N.E.2d 735 (1950).

[13] Monroe v. Pape, 365 U.S. 167, 187, 192 (1961).

[14] *Id.* at 172, 183-87.

authority.[15] In addition, the opinion examined at length the legislative history of the Civil Rights Act. It concluded that Congress did not intend the act to apply to municipal corporations, but that in other situations it was designed to provide a federal remedy, and that the state remedy need not be first sought and refused before the federal one is invoked.[16]

Mr. Justice Harlan, joined by Mr. Justice Stewart, concurred. Declaring that the evidence of legislative intent relied on by both the majority and dissent was inherently unsatisfactory, the concurring opinion maintained that *stare decisis* required that the Court's prior interpretation of "under color of" law made in substantially identical situations under the criminal provisions of the Civil Rights Act should control.[17]

Mr. Justice Frankfurter dissented except as to the dismissal of the complaint against the City of Chicago.[18] In a lengthy opinion he urged that the Court's prior interpretation of "under color of" law was not based on an adequate examination of legislative history and should not be followed.[19] He further maintained that it is not the purpose of the Civil Rights Act to provide a civil remedy in a federal court for unauthorized acts of state officials when a state remedy is already available[20] and that such an interpretation of the act endangers the independence of the states.[21] In addition, he argued that even if the meaning of the Civil Rights Act is not clear, respect for our federal system requires that Congress clearly indicate a purpose to invade the province of the states before the Court is justified in authorizing an alternative federal remedy.[22]

The phrase "under color of" law is ambiguous. Clearly, a state

[15] *Id.* at 183-87. See Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941). These cases construe "under color of" law as used in 18 U.S.C. § 242 (1958).

[16] Monroe v. Pape, 365 U.S. 167, 183 (1961).

[17] *Id.* at 192-94. See cases cited in note 15 *supra.*

[18] *Id.* at 202. Mr. Justice Frankfurter, however, took the position that the complaint sufficed to raise the issue of whether detention *incommunicado* for ten hours violates due process. *Id.* at 258-59.

[19] *Id.* at 220-21.

[20] Mr. Justice Frankfurter pointed out that the Ku Klux Act was adopted in 1871 before the federal courts had general "federal question" jurisdiction, and that the prevailing view of the time only sparingly afforded redress in a federal court between co-citizens of a state. Consequently, Congress might well have intended to provide a remedy in the federal courts only for authorized acts. *Id.* at 252-53.

[21] *Id.* at 237-40.

[22] *Id.* at 238-44.

official acting by purported authority of a state law violative of the federal constitution is acting "under color of" law within the meaning of the act.[23] However, if a state official acts contrary to state law, it is not so clear from this language alone that he has acted "under color of" law.[24] Arguably, he has not acted "under color of" law, for he has acted without authorization from state law. On the other hand, since his official position lends authority to his misconduct and perhaps even makes it possible, arguably, his misconduct has "color of" law.[25] The practical problem involved in this question of construction is whether an alternative remedy will be provided in the federal courts for protection of constitutional rights when a remedy is already available in the state courts.

For seventy years after the passage of the Civil Rights Act of 1871, the question of whether the act provided a remedy in the federal courts when a state remedy was available remained unanswered. Lower federal courts, initially considering the question, held that the act did not provide an alternative federal remedy.[27] Later, several district court decisions held that despite the availability of a remedy in the state courts, a supplemental federal remedy was intended.[28]

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[23] See Douglas v. City of Jeannette, 319 U.S. 157 (1943); Lane v. Wilson, 307 U.S. 268 (1939). See also Monroe v. Pape, 365 U.S. 167, 255 n.84 (1961) (dissenting opinion).

[24] It is clear, however, that actions of a state official in the course of his employment, even if unauthorized by state law, constitute "state action" within the meaning of the fourteenth amendment. See Williams v. United States, 341 U.S. 97 (1951); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941); *Ex parte* Virginia, 100 U.S. 339 (1879). *Compare* the dissent in Screws v. United States, *supra* at 147-48, *with* the dissent in Monroe v. Pape, 365 U.S. 167, 238-39 (1961). *But see* Barney v. City of New York, 193 U.S. 430 (1904). See generally Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958).

[25] "Certainly the night-time intrusion of the man with a star and a police revolver is a different phenomenon than the night-time intrusion of a burglar. The aura of power which a show of authority carries with it has been created by state government." Monroe v. Pape, 365 U.S. 167, 238 (1961) (dissenting opinion of Mr. Justice Frankfnrter).

[26] See Mr. Justice Frankfurter's dissent in Monroe v. Pape, *supra* note 25, at 212-16.

[27] *Cf.* Brawner v. Irvin, 169 Fed. 964 (C.C.N.D. Ga. 1909) (decision on other grounds); United States v. Jackson, 26 Fed. Cas. 563 (No. 15,459) (C.C.D. Cal. 1874) (construing "under color of" law in the act of 1870).

[28] See United States v. Sutherland, 37 F. Supp. 344 (N.D. Ga. 1940). An unreported case, United States v. Cowan (E.D. La. 1940), is said to have reached a similar result. See generally Monroe v. Pape, 365 U.S. 167, 215 n.22 (1961) (dissenting opinion).

The first Supreme Court case to decide this question was *United States v. Classic.*[29] In the *Classic* case, the Court held that state election officials acted "under color of" law within the meaning of the act when they altered ballots in a federal election, in contravention of state law. In so holding, the Court declared: "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."[30] Squarely faced with the problem again in *Screws v. United States,*[31] a divided Court held that police officers who maliciously assaulted a prisoner while making an arrest were acting "under color of" state law.[32] However, a vigorous dissent argued that the Civil Rights Act did not provide a remedy when a state official was subject to punishment in the state courts.[33] The *Screws* decision was reaffirmed by a still divided Court in *Williams v. United States.*[34]

These Supreme Court decisions are based on an interpretation of "under color of" law as used in the criminal provisions of the Civil Rights Act. Since the *Classic* and *Screws* decisions, several lower federal courts have extended the Supreme Court's interpretation of "under color of" law, made within this criminal law context to the civil liability provisions of the Civil Rights Act.[35] Other lower court decisions have taken a restrictive view of this latter legislation.[36] The Supreme Court granted certiorari in *Monroe* to resolve this conflict.[37]

The *Monroe* case holds that "under color of" law includes a misuse of authority in a civil as well as in a criminal action brought under the

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[29] 313 U.S. 299 (1941).

[30] *Id.* at 326.

[31] 325 U.S. 91 (1945).

[32] *Id.* at 107, 114.

[33] *Id.* at 148-49. Justices Roberts, Frankfurter, and Jackson dissented on this point. Although there were other grounds of dissent in *Screws,* this "under color of" law ground was the most fundamental.

[34] 341 U.S. 97 (1951). In *Williams,* Justices Minton, Frankfurter, and Jackson, dissented for the same reasons set forth in the *Screws* dissent.

[35] See Cohen v. Cahill, 281 F.2d 879 (9th Cir. 1960); Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955); Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953); Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949); McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949); Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946); Picking v. Pennsylvania R.R., 151 F.2d 240 (3d Cir. 1945); Gordon v. Garrson, 77 F. Supp. 477 (E.D. Ill. 1948).

[36] See Egan v. City of Aurora, 275 F.2d 377 (7th Cir.), *rev'd per curiam,* 81 Sup. Ct. 684 (1961); Byrd v. Sexton, 277 F.2d 418 (8th Cir. 1960); Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959).

[37] Monroe v. Pape, 365 U.S. 167, 170 (1961).

Civil Rights Act.[38] Thus interpreted, the act authorizes an original civil suit in the federal courts[39] even though a state remedy is available. Since this case was decided after a more exhaustive analysis of the problems and legislative history of the act than previous cases, it should greatly strengthen the *Classic* and *Screws* position.

In order to support their positions, both the majority and dissent in *Monroe* examined the legislative history of "under color of" law in the Civil Rights Act.[40] If anything, their examinations demonstrated that the legislators were primarily concerned with other sections of the act, and did not advert to whether an isolated incident of misuse of authority was or was not "under color of" law.[41] The concurring opinion of Mr. Justice Harlan recognizes this probable oversight, and thus seems the better reasoned on this point.

For the federal courts to provide a remedy under the Civil Rights Act when a remedy is available in the state courts will to some extent interfere in previously exclusive areas of state policymaking. Although the state civil rights remedy remains unchanged, state policy will become subordinate to federal policy, since to the extent that litigants resort to the federal courts, federal remedies will control. Arguably, the necessity for preserving our federal system requires that federal courts not interfere when a state remedy is available. Even if such federal interference is justified, perhaps it should be authorized only by clear con-

[38] *Id.* at 184-85, 212 n.18. *Monroe* further holds that 42 U.S.C. § 1983 of the present Civil Rights Act was not intended to provide a remedy against municipal corporations, *id.* at 187, and that actions need not be "willful" in order to be actionable under the civil provisions of the act, *id.* at 187. In Egan v. City of Aurora, 81 Sup. Ct. 684 (1961) the Supreme Court reaffirmed that the Civil Rights Act does not provide a remedy against municipal corporations.

[39] See note 6 *supra.*

[40] To a lesser extent, *Classic*, *Screws*, and *Williams* also examined the congressional intent behind "under color of" law as used in the Civil Rights Act.

[41] The congressional debate on the Ku Klux Act is ambiguous. Senator Trumbull of Illinois declared: "[A]s the bill [Ku Klux Act] passed the House of Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guaranteed to them by the Constitution and laws of the United States, and it did not undertake to furnish redress for wrongs done by one person upon another in any of the States of the Union in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery committed on another in a State." CONG. GLOBE, 42d Cong., 1st Sess. 579 (1871). Mr. Garfield of Ohio declared: "Let me recapitulate briefly its [Ku Klux Act] provisions. In the first place it throws the protection of the courts of the United States over the right of every citizen to enjoy all the privileges and immunities secured to him by the Constitution; and if any of these rights are denied him under color of any law, statute, ordinance, regulation, custom, or usage of any State, he may bring his action for redress in the courts of the United States." *Id.* at 807.

gressional intent. Possibly, by placing undue reliance on the protection offered by the federal Civil Rights Act, some state legislators may even fail to provide an adequate state remedy.[42]

On the other hand, the "under color" provisions of the Civil Rights Act protect federal constitutional rights which by their very nature are difficult to enforce in the state courts. In fact, the "under color of" state law requirement necessitates proceeding against a state official who is clothed with an aura of state authority. As a result, a federal forum is likely to be more impartial than a state court in proceedings brought under the act.[43] Moreover, even if the state courts are scrupulously impartial, the state remedy may be inadequate for protecting federal constitutional rights.[44]

The *Monroe* decision does not mean that the Civil Rights Act will regulate the "quotidian business"[45] of every minor state official. Only rights secured by the United States Constitution and laws are protected under the act, and while these rights are very important, they encompass a minor part of an individual's total rights.[46] Furthermore, decisions

[42] See Mr. Justice Frankfurter's dissent in Monroe v. Pape, 365 U.S. 167, 243 (1961).

[43] Federal court impartiality was a primary reason the *Monroe* case was brought in a federal district court rather than a state court. The Monroes' attorney stated: "The state judges of Illinois are politically elected; our federal judges are appointed for life, on good behavior. Thus, the federal judges are relatively more immune to the kinds of political pressure which frequently are exerted in these controversial cases involving fundamental civil liberties than are the state judges. I suspect that any realistic trial lawyer with experience in this kind of litigation anywhere in the country would tend to agree with me that when a penniless Negro family attempts to sue a politically potent high ranking police officer who is white, he is more likely to obtain a fair and impartial trial of his case from a federal judge. The legislative debates on the Act of 1871 make it clear that this very consideration weighed heavily in the minds of the congressmen who sponsored this Act." Moore, *The Monroe Case*, Durham Morning Herald, March 9, 1961, p. 4A, col. 7.

[44] See Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). See also Mr. Justice Frankfurter's dissent in Monroe v. Pape, 365 U.S. 167, 242 (1961).

[45] Monroe v. Pape, *supra* note 44, at 242 (dissenting opinion).

[46] "Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." Screws v. United States, 325 U.S. 91, 108-09 (1945) (opinion of Douglas, J.). See Byrd v. Sexton, 277 F.2d 418 (8th Cir. 1960); Deloach v. Rogers, 268 F.2d 928 (5th Cir. 1959); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956); Egan v. City of Aurora, 174 F. Supp. 794 (N.D. Ill. 1959), *rev'd per curiam*, 81 Sup. Ct. 684 (1961); note 5 *supra*. *But see* Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285 (1953).

under the act have given broad immunities to certain classes of state officials.[47] Since the applicability of the federal act is limited, responsible state lawmakers should not be deterred from providing adequate state protection for civil rights.

Monroe reaffirms that "under color of" law within the Civil Rights Act includes an abuse of position, even if violative of state law. Such an interpretation of the civil provisions of the act makes available an original civil action in the federal courts regardless of the availability of a state remedy. By the very nature of the rights protected under the act, the federal courts are a more appropriate forum for their enforcement.[48] Consequently, the *Monroe* decision is of far-reaching significance in insuring adequate protection of federal constitutional rights.

[47] See, *e.g.*, Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators); Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959) (justice of the peace and state's attorney); Ryan v. Scoggin, 245 F.2d 54 (10th Cir. 1957) (district judge); Miller v. Director, Middletown State Hospital, 146 F. Supp. 674 (S.D.N.Y. 1956) (director of mental institution).

[48] See 100 U. PA. L. REV. 121 (1951). See generally Fraenkel, *The Function of the Lower Federal Courts as Protectors of Civil Liberties*, 13 LAW & CONTEMP. PROB. 132 (1948); Parker, *Dual Sovereignty and the Federal Courts*, 51 NW. U.L. REV. 407 (1956); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216 (1948).