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This article is the text of the first Cecil Sims Lecture, delivered by the Honorable Sterry R. Waterman at the Vanderbilt University School of Law in April, 1972. The Cecil Sims Lectureship Series was established to bring to the Law School distinguished men with extensive legal experience to associate informally with faculty and students. This address represents but one of the many contributions made by Judge Waterman during the week he spent at Vanderbilt Law School.

Cecil Sims, a 1914 graduate of Vanderbilt Law School, was a distinguished member of the Nashville Bar and served as a member of the Vanderbilt University Board of Trust. Mr. Sims taught at the Law School for many years, bringing to his lectures the full benefit of his wide experience as an outstandingly successful practitioner of the law. The Sims family has made possible the continuation of that tradition by establishing the Cecil Sims Lectureship Series.

Dean Knauss, Dean Wade, members of the distinguished law faculty at Vanderbilt University, fellow students of the law, and all other ladies and gentlemen:

It is a great honor for me and for the court of which I have been a member for over sixteen years to have been selected at this time in the history of our profession for the privilege of delivering the first Cecil Sims Lecture. For it would seem that today, more than at any time prior to this, lawyers, judges, and law professors are very seriously studying the impact of the profession upon the life of our times and devoting a good bit of thoughtful questioning relative to whither the profession

* Senior Judge, United States Court of Appeals for the Second Circuit.

itself, and the legal concepts we have been familiar with, today are tending.

This time, like all times, is indeed a great time in which to be alive, but in everything—particularly in the law—it is a period of transition, and a violent one at that; but I suppose all periods are periods of transition, though some of course are quieter periods than others. For instance, at the very beginning of life it is quite reliably reported in the most read book in the world that Adam, as he was leaving the Garden of Eden with his former rib on his arm and his new found Adam's apple in his throat, turned to Eve and said, "Eve, dear, it's quite clear we're passing through a period of transition."

I have chosen a topic which relates to the public interest because those words, "public interest," seem to have taken on a special significance for today's law students. Perhaps this may in large part be due to a rather appealing image of Nader's Raiders galloping across the horizon under a banner emblazoned with the words "public interest." I submit, however, that if there is any one particular thing to be learned from "Naderism awareness," it is the increasingly important role the federal judiciary plays in the implementation of areas of endeavor which any group in society may consider to be in the public interest. For with all due deference to the oft-stated position of those who used to say that the common law was the perfection of reason and that newly-pronounced constitutional interpretations had always been hidden in the courthouses' woodwork, it is no news to you that appellate courts in this country do more than simply read, interpret, and apply the law according to eighteenth and nineteenth century standards. In any conscientious and responsible approach to the interpretation of the Constitution and statutes and their reach into our lives, these judicial interpreters do not view their role apart from the public's interest in that reach. That approach has manifested itself most clearly in the interpretation by the courts of the century-old Civil Rights Acts which were rather suddenly rejuvenated by the vaccination needle of *Monroe v. Pape*.[1] Probably nothing that an enlightened bar, with assistance from the High Court and Congress, as accessories before, at, and after the fact, has done in the name of the public interest has thrust the federal judiciary more thoroughly into the lives of all of us than has the activity of the past twenty years of lawyer and public discovery of the civil rights area. That's what I'd like to talk about.

It may be true that the Supreme Court has in the past few years handed down flashier and more widely heralded opinions in cases in-

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

volving reapportionment or the rights of suspected or accused criminals, but in my estimation the reach of the 1961 ruling in *Monroe v. Pape,* which was followed closely by *McNeese v. Board of Education*[2] and *Damico v. California,*[3] was subtler and at the same time far more pervasive. At that time, the court of last resort, with a somewhat novel approach to 42 U.S.C. section 1983, reversed the trends, overruled two lower courts, and in the familiar language of Viewers With Alarm, "opened the floodgates" that had held back the long overdue civil rights tide. Since that time, the federal docket has been overflowing with cases involving, *inter alia,* false arrests, hair styles, and nude pictures. If such cases do not extend the reach of the federal judiciary into private lives "in the public interest," I am amused to know why they don't, and if *they* don't, I'm at a loss to know what would!

Thankfully, section 1983 is short enough to be read in its entirety:

> Section 1983. Civil Action for Deprivation of Rights.—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.

That sounds innocent enough. It was passed by Congress originally as part of the Civil Rights Act of 1871, and for about 90 years it had lain dormant and dusty, seldom having been invoked by lawyers after quite early having been narrowly construed by the courts. That is, until the Court ruled in *Monroe v. Pape.*

Before the Court in that case was an outrageous fact situation. The complaint alleged that Mr. Monroe and his family had been rousted from their beds in the early morning hours by thirteen Chicago policemen who had broken into their home. Their home was ransacked while Mr. Monroe and his family stood naked in the living room. Then the police held Mr. Monroe incommunicado for ten hours on "open" charges and interrogated him regarding a two-day old murder.

The petitioner brought his grievances to the federal courts, alleging that the "feds" had jurisdiction under section 1983. The district court dismissed the claim, and that dismissal was affirmed in the Seventh Circuit.[4]

When the case arrived in the Supreme Court, the police officers had two primary arguments. First, they contended that because their actions were admittedly contrary to the laws of the State of Illinois, they de-

2. 373 U.S. 668 (1963).
3. 389 U.S. 416 (1967) (per curiam).
4. 272 F.2d 365 (7th Cir. 1959), *rev'd,* 365 U.S. 167 (1961).

prived the Monroes of their privacy by having committed common-law wrongs, and hence did not deprive the Monroes of their constitutional fourth amendment right "under the color of . . . statute" as required by section 1983. This argument, quite understandably, got them judicial goose eggs. Moreover, they argued that since there existed a state court remedy, the issue of their liability should be left to the state courts.

The High Court dismissed both of these arguments by ruling that a state official's actions may, for the purposes of section 1983, be *under color* of state law, even though those actions are in violation of the state law. Moreover, in a ruling for which we find but very little decisional precedent as of then, except a sophisticated taking of "judicial notice" of the nature of our federalism, Justice Douglas stated, and I quote, "It is no answer that the state has a law which, if enforced, would give relief."[5] In *McNeese* and *Damico,* the Court reiterated its position that state-provided remedies are irrelevant to the issue of whether an individual may in the first instance pursue in the federal courts his claim that his civil rights have been violated, precisely as he could then pursue a habeas corpus action there.

I have no doubt that the Supreme Court was fully aware of the fantastic increase in the number and types of cases which it was bringing into the federal courts. Clearly, however, its decision to recognize, in effect, a federal forum for a wide variety of grievances was not predicated upon an abstract reading of section 1983 but rather, you must agree with me, it was made in light of certain policy considerations, the furtherance of which the Court considered to be in "the public interest."

I'd like just to outline briefly what I think were some of the policy considerations involved in that ruling. First, when we are talking about constitutional limitations upon interference with a person's federally derived civil rights, the primary reservoir of expertise is in the federal courts, where the impact of the Bill of Rights upon all of us and particularly its impact upon majority action to the detriment of minorities has been litigated for many, many decades. The federal judiciary is on the firing line daily when problems arising under United States statutory and constitutional law are presented for adjudication, and this area of adjudication simply has not been the usual grist in the state courts. Moreover, for obvious reasons, the potential for uniform, country-wide application of the law is greater in the federal courts than in the 50 court hierarchies of 50 diverse states. Uniformity of application is of paramount importance, of course, when the constitutional rights of individuals, irrespective of the neighborhood of domicile, are to be defined.

5. 365 U.S. at 183.

But the key factor, the one which I think goes to the heart of the issue, must have been the feeling voiced in *Monroe v. Pape* by Justice Douglas that it was historically logical for the federal courts to be involved in this area even though state-created rights and remedies were available which could be pursued in the state courts. It would seem that the potential for a state court bias while reviewing challenged actions by state officials is greater than the potential for bias would be in the federal courts. The logic of this can be fairly compared to the logic underlying the existence of diversity jurisdiction. At least the members of Congress in Reconstruction Days were openly unwilling to permit local state magistrates to adjudicate the changed personal relations the war had brought about, hence these Civil Rights statutes. This effort to obviate possibilities of bias had been activated early in our history by the creation of diversity jurisdiction in the federal courts.

This was even then thought desirable because of the likelihood that there might be a state court bias against the out-of-state litigant, a bias conjectured even then to be great enough for Congress to afford a federal court alternative. It was in light of these and similar policy considerations that *I* think the Supreme Court decided to read the Civil Rights Acts, particularly section 1983 and 28 U.S.C. section 1343(3) (defining district court jurisdiction over section 1983 cases), so as to preserve the thought that the Reconstruction Congressmen had: that there should be a federal forum for pursuing claims against state officers.

Needless to say, this decision has brought about an immense increase in the work load of the federal courts. Indeed, federal jurisdiction has been extended so as to encompass a broad variety of cases, some of which legal traditionalists, I think it is fair to say, quite honestly believe could have been left to the state courts to resolve. I have in mind a number of recent cases which at first glance involve garden variety state tort actions, but when viewed through the prism of section 1983 become diffused into rainbows of federally enforceable claims.

At one end of that spectrum are the cases involving false arrests like the situation in the *Pape* case. Perhaps these arrest cases, which involve actual official restraints upon the liberty of the individual, most clearly involve questions of a constitutional nature. The federal courts have shown a readiness to provide a forum in these cases, and that is how it should be. Closely analogous to these cases are ones involving allegations by state prisoners that they have been deprived of their civil rights while confined in state institutions. I have consistently stated my belief that state prisoners should have recourse to the federal courts ever since my judgeship experience began more than sixteen years ago, and I believe the Second Circuit has an enviable record of accomplishment

in this area. I firmly believe that prior to my *Noia v. Fay*[6] decision, which was, of course, a habeas case, the state courts simply were not doing their jobs in this area, mostly because legislatures had not adopted post-conviction remedy statutes. The landmark Supreme Court case of *Fay v. Noia*,[7] our Second Circuit case upon appeal, opened the door for corrective action in legislatures and courthouses everywhere.

Beyond these cases lie a myriad of complicated claims, some perhaps twisted a bit in the plaintiffs' complaints to fit the requirement of section 1983 that a *constitutional* claim be involved. By way of example I might cite *York v. Story*.[8] The case involved outrageous conduct by the police. Angelynn York in 1958 went to the police station in Chino, California, to report an assault upon her person. An officer of the police department, acting under the color of his authority, advised Miss York that it would be necessary to take photographs of her. She was then taken into a room and directed to remove her clothes for the pictures. She did so over objection and eventually posed for the pictures in the nude. The pictures, however, were not used to serve the ends of justice but rather were distributed to the policeman's colleagues on the force. Miss York sued in a federal court, alleging a claim under section 1983, and the district court dismissed on the ground that she had not stated a federal cause of action. Clearly, the case involved an act by a state officer contemplated by the section, a particularly obnoxious act for which she certainly could recover compensatory damages at common law, but was there any deprivation of rights, privileges or immunities secured by the United States Constitution and federal laws? Her lawyer argued to no avail in the district court that the officer's act constituted an unreasonable search within the meaning of the fourth amendment. That argument wasn't without some justification, but the Ninth Circuit wasn't ready to buy it. They did, however, go along with the argument that the police officers had unreasonably invaded Miss York's privacy protected by the fourth amendment. And so, Angelynn York got her federal forum. Yet, I'm not so sure that in this kind of case the state courts wouldn't have done as good a job for her as the federal courts did. Unlike the usual false arrest case defense, the policemen here could not have made that all too appealing claim that they were only doing their duty. Moreover, while I might disapprove of illegally obtained nude pictures, I am not totally convinced that the claim arising therefrom is of a constitutional nature. It seems to me that a common-law action in tort, an action best left to the state courts, is adequate.

6. United States *ex rel.* Noia v. Fay, 300 F.2d 345 (2d Cir. 1962), *aff'd*, 372 U.S. 391 (1963).
7. 372 U.S. 391 (1963).
8. 324 F.2d 450 (9th Cir. 1963).

I feel even more strongly about the student length-of-hair cases which are popping up in federal courts through the workings of section 1983. Now that we judges have to look to the Constitution to tell litigants when to get haircuts, perhaps we should suggest that complainants emulate the Immortal Founders, and, like them, begin to wear powdered wigs. As of today, four circuits have ruled that a male attending a public educational institution may invoke the Constitution to protect his civil rights to wear shoulder-length hair; four circuits have held otherwise; and the Supreme Court, which we have always supposed had a duty to resolve constitutional conflicts between circuits, has several times denied certiorari.[9] For better or for worse, hair styles have now become the subject of constitutional adjudication in the federal courts.

That the federal courts have become a forum for such grievances involves, to my mind, a pretty sweeping change in judicial policy. Indeed, it has far-reaching implications in the area of federal-state relationships. The change, obviously indicative of a growth of federal pervasiveness, did not come about through recent action by either of the organs of government traditionally charged with making policy determinations in the public interest. It came about because the Supreme Court breathed new life into an old statute.

But, after all, this "breathing" is not a newly discovered mouth-to-mouth form of resuscitation. Blackstone said: "[T]he public good is in nothing more essentially interested, than in the protection of every individual's private rights . . . ."[10]

So, even antedating the drafting of the Bill of Rights 180 years ago and the post-Civil War amendments 100 years ago, the common-law sage put his finger on the proper conceptual relationship between man and the officers of his governments long before these days when, on the one hand, individuals are so religiously pursuing their private rights and, on the other hand, other individuals are urging upon government that government officers should enlarge the spheres of government activity.

It is a platitude, a truly commonplace statement, that American constitutional law is "not a fixed body of truth but a mode of social

9. Olff v. East Side Union High School Dist., 404 U.S. 1042 (1972) (Douglas, J., dissenting); Freeman v. Flake, 405 U.S. 1032 (1972) (Douglas, J., dissenting). *Compare* Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970), *with* Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972); King v. Saddleback Jr. College Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 979 (1971); Olff v. East Side Union High School Dist., 404 U.S. 1042 (1972); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970); Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).

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adjustment." Indeed the Constitution owes its continuity to our need to have a vigorous organic law that will continuously meet the progress of change in our economic affairs, accommodate itself to our changing ideas of privacy, and be able to deal with our present national preoccupations with the elimination of geographic distances through increased vehicular speed and the removal of social distinctions through the elimination of societal barriers.

Time was, when used in connection with a business or political endeavor, the phrase "affected with the public interest" was pretty much limited to those occupations that were or ought to be regulated because, in a limited sense of community impact, it seemed clear to lawmakers that the businesses were subject to some legislative control for the public good. These included, for example, common carriers and innkeepers.

We now find that all citizen activities except reading Mother Goose stories to one's grandchildren at bedtime have become of interest to lawmakers, and I'm not positively sure about that one either. At the lowest level of interest are the licensing statutes and ordinances, usually sought by the occupationists themselves, master barbers, master plumbers, master electricians, master-this and master-that (with, if possible, of course, grandfather clauses to protect those already in the club). At the highest and latest level in the furtherance of the new concepts of activities affected with the public interest are those businesses which have attracted the attention of those who would try to preserve our open spaces, our endangered wildlife, our essential natural assets of unsoiled air and land and water—the environmentalists.

Within the orbit of regulatory control, the various Courts of Appeals have been charged by the Congress with "sitting on top" of the formidable administrative agencies of the federal government, agencies which by regulatory action pretty much tell all of us what the patterns of our lives are to be. To mention just a few: the Securities and Exchange Commission, the Federal Trade Commission, the Federal Communications Commission, the Federal Power Commission, the Civil Aeronautics Board (in part), the National Labor Relations Board, the Social Security Administration, the Tax Court, the Maritime Administration, the Interstate Commerce Commission, the Civil Service Commission, and many others. And, of course, although not quite in the same way, all the bureaus of all the government departments as well.

In fact, it is quite an unsophisiticated businessman these days who doesn't know more about the regulations affecting his business than any lawyer or judge, brought in *cold,* could pick up in a short-time examination of his particular problem. Hence, if I may say so, the recourse of us legally trained characters when challenging such a regulation is to resort to the somewhat vague shibboleths of "due process" and "equal

protection." If the administrative agency appears to be acting unequally, without giving enough notice to allow for the obtaining of legal advice, or harshly, one is accustomed to fall back upon a "capricious and unreasonable" allegation, trumpet the shibboleths, and request the courts to issue injunctions.

Now in addition to these warcries, if the administrative agency is not federal, but belongs to a state, or to a state's political subdivision, the aggrieved person finds himself also aggrieved because his guaranteed civil rights have been impinged upon as well as his having been denied due process and equal protection. Thus, the district courts are importuned by utilization of section 1983 to issue an injunction against the state's enforcement of its laws, regulations, or even the provisions of its own constitution which its officers have sworn to protect and defend. So the federal courts now get it both ways, and the definition of what constitutes the public interest seems to be intertwined with the constitutional issues inherent in section 1983. As a result, it can well turn out that fair administrative conduct properly required of the large, well-staffed federal agencies may be unfairly imposed upon the state agencies as the same cadre of judges review the acts of each.

Anyway, it seems clear that as the area of accommodation gets narrower and narrower, as our free-breathing space under the thoracic ribs of our conventional federalism gets more and more circumscribed, and as the individual's rights are more and more sublimated to the licensing powers of political entities (including cities and other subdivisions), more and more persons are finding that they are now allegedly being deprived of liberty without due process of law as more and more vocations and more and more human activities are becoming "affected with the public interest," while at the same time more and more citizens are being "affected with a deprivation of their civil rights."

So, the underlying question recurs and recurs. How much of our so-called "egalitarian independence" has already gone, and how much more, if there's any more at all, is yet to go? The rule governing the situation sounds fair and is simply stated: The term "liberty" has permitted one to follow any vocation of his choosing, subject only to the restraints necessary to promote the common welfare and to protect the public health or safety from the dangers to health or safety inherent in the nature of the vocation.

The discoveries of recent months have indicated that this simple statement must now be weighed in the light of those discoveries and that a number of businesses alleged to have been conducted too casually or without proper regard to which of their products should be offered to unsophisticated consumers are likely to find that they are now "affected with the public interest." Surely, it seems likely that even the areas

hitherto reserved for control by self-regulating bodies, the stock exchanges or the baseball world, for example, may find that self-regulation is suspect. It has been in the movie industry for quite some little time. And, attacked by civil rights petitioners, areas and opportunities hitherto devoted to the use of only *some* of the people are now being required by judicial decree to be devoted to the use of *all* of the people.

A classic definition of "public interest" has been "some interest by which the legal rights or liabilitites of the community at large are affected." As the legal rights of individuals have been expanded—and the community liabilities correlatively so—the "public interest" has taken on new meaning. If the legislatures do not recognize the legislative responsibility, I submit, though it is a truism and an unfortunate one that "[J]udges are more to be trusted as interpreters of the law than as expounders of what is called public policy,"[11] that it is the judges who will have this responsibility of redefinition. I hope that the courts, intelligently and conscientiously guided by a dedicated bar, will be careful in this endeavor of definition and redefinition in the light of the ongoing needs in this area of public interest. It may well be that the longtime devotion of judges to the protection of the minorities from any unprincipled action of the majorities will be called upon to protect those dwindling groups of citizens who wish privacy, despite the cost, personal inconvenience, or necessity for resisting government pressures to keep it.

After all, is it not more desirable to be left alone than to be overseen in minute detail because one is a member of a body politic that has public problems?

But after all, is it not even more desirable to act positively to preserve the way of life we have known for those who come after us despite the great changes we are undergoing during our time of transition?

And lastly, after all, is there really an unpleasant dichotomy here, an interest balancing too difficult to balance evenly? Or rather, isn't there a public or private accommodation still possible between our right to be left alone and the denial of that right to us as more and more of what we do is affected with the public interest?

I will not leave you with these questions if you will permit me to return to some remarks I made a few years ago in another connection.

I would hope that we would always have in mind how fortunate we university people are to have had a time for reflection upon our way of life and an opportunity to be informed of the accommodations required

11. *In re* Mirams, [1891] 1 Q.B. 594, 595 (Cave, J.).

between the rights and duties of the individual and the rights and duties of the public at largc if we are to keep a legal order based upon the humanistic Western world philosophy we have inherited for the guidance of our lives.

This function of accommodation is the problem all in public life are daily charged with performing, and as for us appellate judges, particularly those of us who sit in courts of last resort (and a federal court of appeals for most practical purposes is a court of last resort), that problem, the major problem of human society, may be stated as combining that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license.

Only by satisfactorily solving that problem may our institutions be preserved for those who come after us. But I submit that this burden of preserving democratic institutions properly falls upon university people as much as it has fallen upon and will continue to fall upon judges.

We of the law and we who administer the law are challenged today more acutely than ever before. Many serious-minded people question whether the law is or can ever be an instrumentality of social justice. Many of our citizens believe that, irrespective of the precepts of the law, the administration of the law frequently has been used as a device to frustrate the legitimate aspirations of those seeking to participate as equals with other Americans in the benefits of American society.

The inclusion of more and more activities as activities "affected with the public interest" is evidence that there are some who may be hoping that by this enlargement the administration of law may, in truth, become the instrumentality for social justice that they wish it to be.

In any event, may I close by suggesting that there is always a place for idealism in the world and it is the especial privilege of university-trained men and women to seek idealistic goals. And, I submit also that I believe it the especial privilege and professional duty of American lawyers to preserve the American dream.

I thank you for letting me spend this time with you.