Civil Actions for Damages Arising Out of Violations of Civil Rights

Nathaniel S. Colley
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By Nathaniel S. Colley*

The continuing drama of the civil rights movement during the decade since the rendition of the school desegregation cases\(^1\) has unquestionably been as much the main attraction on the American scene as was the issue of Negro slavery between \textit{Dred Scott}\(^2\) and emancipation.\(^3\) Now, as then, the courtroom is one of the main theaters in which that drama is staged. This is both natural and proper, since under our system of government we seek implementation of the rule of law in our relationships between each other and with the state. Not only do the courts interpret existing law, but they often make it. While it is true that this latter function is often decried, and charges of usurpation of the legislative function are leveled,\(^4\) the fact remains that the courts are mandated by equitable principles, often codified into statutory commands,\(^5\) to fashion a remedy for every wrong.\(^6\) Since precedent plays such a vital role in our legal system, every time a court fashions a remedy for a wrong it, of necessity, is making a new law in the true sense of the word.

Civil actions for damages for violation of civil rights have been founded upon federal statutes,\(^7\) state statutory provisions,\(^8\) and common law principles.\(^9\) It will be the purpose of this article to explore and

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\(^3\) Emancipation Proclamation issued by President Lincoln, effective Jan. 1, 1863.

\(^4\) See Muskoff v. Corning Hosp. Dist., 55 Cal. 2d 211, 222, 359 P.2d 457, 463, 11 Cal. Rptr. 89, 95 (1961), Schauer, J., dissenting: "Today's majority apparently impatient with the Legislature's failure to act as speedily and as comprehensively as they believe it should, usurp the legislative function.

\(^5\) CAL. CIV. CODE \S\ 3523 provides: "For every wrong there is a remedy."

\(^6\) "No right can exist, in contemplation of law, that cannot be injured, and there can be no injury without a remedy." Merced Mining Co. v. Fremont, 7 Cal. 130, 133 (1857).


\(^8\) The relief afforded by state civil rights acts is by no means uniform. Some of them, though by their terms penal in nature, still allow an action for damages sounding in tort. Bolden v. Grand Rapids Operating Co., 239 Mich. 318, 214 N.W. 241 (1927); Everett v. Harron, 380 Pa. 123, 110 A.2d 383 (1955). Others provide that a stated penalty must be paid to the victim, and in Indiana this has been held to be an exclusive remedy. Bailey v. Washington Theater Co., 218 Ind. 513, 34 N.E.2d 17 (1941).

\(^9\) Some states, including California, take the position that even in the absence of
comment upon the use of such actions in civil rights cases. California Civil Code sections 51 and 52 will be considered to illustrate the use of state statutes. A few old and new California cases will be examined to illustrate the use of common law principles. United States Code, title 42, sections 1981-85, will be discussed with reference to federal remedies.

Historical Background

In 1893 the California Legislature enacted a statute prohibiting racial discrimination in places of public accommodation. It was designed to give a specific civil remedy to individuals whose right to be free from racial discrimination was infringed by other private persons. It is also probable that it resulted in part from the fact that an earlier criminal statute making it a misdemeanor for a common carrier or innkeeper to fail to receive and transport or entertain any guest had received little or no enforcement. As is the case with all criminal statutes, enforcement rests with the discretion of the public prosecutor, and evidently the discrimination sought to be interdicted here is not the type which sets law enforcement officers off on a crusade.

A California civil rights case involving a damage action against a railway company was decided in 1868 and another against an innkeeper was decided in May, 1891. Neither made reference to a statute of any kind. Counsel for each party and the court seemed to take it for granted that an innkeeper and a railway company had a common law duty to receive, entertain or transport, without regard to race or color, all who sought use of their facilities.

Between the years 1905 and 1959, Civil Code sections 51-54 constituted California's civil rights legislation. These were revised in 1959 in ways to be discussed subsequently. A new statute establishing a right to maintain a civil action for damages for racial discrimination in publicly assisted housing was also added at that time. The 1963
legislature supplied administrative machinery for enforcement of the right to be free from discrimination in private housing operated on a commercial basis, but this and other such laws, as they related to housing discrimination, were nullified by the initiative constitutional amendment called Proposition 14, which was adopted by a two-to-one vote of the people at the general election in November, 1964.

California Civil Code sections 51-54, came under attack by civil rights groups in the late fifties as a part of the demand for more effective antidiscrimination legislation. The NAACP joined in the demand for revision, and its regional officers worked closely with Speaker Unruh and his staff in drafting the Unruh Civil Rights Act. The primary cause of the disenchantment of civil rights leaders and groups with sections 51-54 was the number of exceptions to their coverage. Perhaps it would be more accurate to state that the courts had, in several cases decided in the years 1950-58, exhibited a strong tendency to pay only lip service to the rule of liberal construction of these

15 CAL. HEALTH & SAFETY CODE §§ 35710, 35720, 35730-38 and CAL. LABOR CODE §§ 1410-32 ("Rumford Act").

16 CAL. CONST. art. 1, § 26.

17 Seven actions challenging the constitutionality of CAL. CONST. art. 1, § 26 were taken under submission by the California Supreme Court after oral arguments on October 25, 1965. Most of the challengers asserted, inter alia, that the fourteenth amendment to the Constitution of the United States prohibits California from rendering its courts and agencies impotent to act when claims of racial discrimination are asserted. The view was repeatedly expressed that the state courts must entertain and adjudicate such claims, and if the evidence in any case shows that the sole basis of the discrimination is race or color the courts must not refuse to allow their processes to be used to defeat such a purpose. This argument seems to find support in Abstract Investment Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962), where the court held that an affirmative defense of racial discrimination must be entertained in an eviction suit in order to avoid violation of the fourteenth amendment.

In an original proceeding in the California Supreme Court (Lewis v. Jordan, Sac. No. 7549, June 3, 1964) an effort was made to mandate the California Secretary of State to keep Proposition 14 off the ballot because it violated the fourteenth amendment, covered more than one subject in violation of CAL. CONST. art. 4, § 1 c, and that it would revise rather than amend the California constitution. While that effort was not successful, two members of the Court (Justices Peters and Tobrmer) dissented from the denial of the writ of mandate, and the other five justices joined in an unusual order which expressed grave doubt of the constitutionality of the proposed initiative, but said they felt that the issue could be better passed upon after the election when the proposal actually became a part of the state constitution. In taking this position the court was simply following the rule adopted by it in Wind v. Hite, 58 Cal. 2d 415, 24 Cal. Rptr. 683, 374 P.2d 643 (1962).

18 Support of a bill to strengthen these sections was a part of the NAACP’s legislative goals for 1959.

19 The author served as regional attorney for the NAACP and personally participated in these discussions.
statutes as announced in *Evans v. Fong Poy* and *Orloff v. Los Angeles Turf Club, Inc.*

In the place and stead of the liberal construction rule, there was imported from other jurisdictions a test based upon whether the place or activity sought to be regulated is like the places specified in the statute. In modern times, the court found the requisite likeness only in *Lambert v. Mandel's of California*, involving the asserted right of a retail shoe store to exclude Negroes. The store claimed to be distinguishable from the places and facilities enumerated in the statute. In answer to this, the appellate court, in reversing the trial court, observed, "A retail shoe store is a place of public accommodation that is essentially like a place where ice cream and soft drinks are sold; each is open to the public generally for the purchase of goods."

On the other hand, in *Long v. Mountain View Cemetery Assn.*, a cemetery was found not to be regulated, because it was not like any of the enumerated facilities. The view was also expressed that the statutes contemplated only living persons and did not protect any rights of the dead. Thus, it was said, none of the rights of a Negro widow were violated by defendant's refusal to permit the burial of her husband in the section reserved for white people.

Since the "like places" doctrine had been accepted as the governing

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21 30 Cal. 2d 110, 180 P.2d 321 (1947). Here it was contended that the statutes in question are in derogation of the common law and hence must be strictly construed. In applying the rule of liberal construction the court quoted CAL. CIV. CODE § 4 in support of its view. That section requires liberal construction of the Civil Code with the view toward effecting its objects and promoting justice.


24 *Id.* at 957, 319 P.2d at 470.


26 *Id.* at 329. (Concurring opinion of Mr. Justice Kaufman). The three Justices of the District Court of Appeal unanimously affirmed the judgment dismissing the complaint, but each wrote a separate opinion, and not one of them joined in the views expressed by the others.
rule, the result of the case is logical, but on the question of rights of the living versus the rights of the dead it is indefensible. Obviously, the right attempted to be asserted was the plaintiff's right to bury her husband in dignity and respect, not the husband's right to be so buried. The widow was under a duty imposed by California law to inter the body of her dead husband, and it follows that she had a right to perform this duty in a cemetery. His burial elsewhere than in a cemetery within the limits of a city or county would be a misdemeanor. The real question, never reached by any of the three opinions of the court, was whether the widow had a right to perform a duty imposed by law in a manner which did not impose upon her the humiliation of racial discrimination. The comment by Justice Kaufman to the effect that "plaintiff was not denied the right to enter the cemetery but was merely refused permission to bury her husband in the cemetery" was trite, to say the least. For what purpose other than to attend the burial ritual or to visit the interred does a normal person ordinarily enter a cemetery? The remark of the Honorable Justice makes no more sense in its context than it would have if he had said that a Negro housewife should not complain of being denied the right to make purchases, so long as she has not been prevented from entering a store.

In *Coleman v. Middlestaff*, it was held that a dental office was not like the places enumerated in the statute, and hence the services of a dentist could not be coerced by legal action. Again, instead of adhering to the California rule of liberal construction announced in *Orloff*, the court chose to follow the rule announced in another jurisdiction.

*Reed v. Hollywood Professional School* sustained the exclusion, solely on the basis of her race, of a five-year-old Negro girl from a

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27 CAL. HEALTH & SAFETY CODE § 7100.

28 CAL. HEALTH & SAFETY CODE § 7054.


33 The court relied upon Rice v. Rinaldo, 67 Ohio L. Abs. 183, 119 N.E.2d 657 (Ohio App. 1951). It also cited 41 AM. JUR. PHYSICIANS & SURGEONS § 4 (1942), which states that in the absence of statute a dentist does not have to serve all who come to him. This hardly helps, because there was a statute in *Coleman*, and the question was whether it was applicable.

private school. The court said that a school is not a place like those enumerated in the statute.

Exclusion of Negroes from facilities of a health gymnasium was sustained in *Gardner v. Vic Tanny Compton, Inc.*, on the ground that the evidence showed the place not to be one of public accommodation. The determinative factor was that admission was allegedly by membership only, even though newspaper advertisements invited everyone from "eight to eighty" to telephone for a "guest card" and use the facilities on the theory that he was trying out for membership. It may readily be seen that if the exclusion of Negroes could be effected in any establishment by such practices, the civil rights statutes would soon become impotent as devices for the coercion of non-discrimination by those determined to exclude Negroes. It would not be too difficult for a restaurant to apply these techniques and become an eating club. The corner saloon would become a drinking club. Inevitably, civil rights laws would become more honored in the breach than in the observance.

It was the purpose of the Unruh Civil Rights Act to nullify the limited, restrictive interpretations of prior law.

The Unruh Civil Rights Act

In 1959 the California Legislature re-wrote Civil Code sections 51 and 52 and repealed sections 53 and 54. The two remaining sections, by command of the legislature expressed in the statute itself, "shall be known, and may be cited as the Unruh Civil Rights Act." It provides as follows:

Section 51.

All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege

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36 *But cf.* Askew v. Parker, 151 Cal. App. 2d 759, 312 P.2d 342 (1957), interpreting the scope of Cal. Health & Safety Code §§ 24100-09 defining public swimming pools and requiring their inspection. The pool in question was held to be public, even though its use was restricted to teen-age children who registered pursuant to an invitation extended to them. The determining factor on the question of whether it was public or not was said to be whether large numbers of people used the pool as a result of a general invitation, as opposed to limited use by a few people on specific occasions. Manifestly, this is a different test from that applied in the *Vic Tanny* case.
on a person which is conditioned or limited by law or which is applicable alike to persons of every color, race, religion, ancestry or national origin.

Section 52.

Whoever demes, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code.

The language of the Unruh Civil Rights Act was intentionally made broad enough to nullify the restrictions placed upon the prior law by the courts’ requirement that the place or facility sought to be covered be a “place of public accommodation” in the very technical or traditional sense of the word as applied in the Reed and Vic Tanny cases. By substituting the phrase “business establishment of any kind whatsoever” for the former “place of public accommodation” the legislature evidently intended that the new test be simply whether the enterprise in question is commercial in nature. Presumptively at least, it knew that the word “business” had been defined by the courts as embracing anything in which one is engaged for the purpose of earning a living or making a profit. It is true that only business conducted in an “establishment” was regulated, but this word posed no great restriction because it includes not only an enterprise at a fixed location but also any permanent commercial force or organization.

The new terminology of the statute would certainly nullify the precedent established by the earlier exoneration of the dentist who refused to treat a Negro patient. In fact, the statute encompasses all the healing arts, for years earlier it was held in another context that the practice of medicine is a business. The case of Washington v. Blampin applied section 51, as amended, to the practice of medicine.

40 While the phrase, “business establishment” had no particular legal meaning at the time of the adoption of § 51 in 1959, its meaning, if not one of common knowledge, could have been ascertained from any standard English language dictionary by ascertaining the meanings of business and establishment separately. This was done in Swann v. Burkett, 209 Cal. App. 2d 685, 694, 26 Cal. Rptr. 286, 292 (1962).
43 226 Cal. App. 2d 604, 38 Cal. Rptr. 235 (1964). Here, a father sought damages for refusal of medical services to his child. The child also sought damages. The trial court’s judgment on the pleadings for defendant was reversed.
and specifically held that both a child, who was denied treatment, and her father, who had sought treatment for her, could maintain a cause of action against the offending physician. The defendant had urged that it was impossible for the father to have a cause of action because he had not sought treatment for himself, and the refusal to treat the infant daughter could not result in legal harm to the father. The right of the father to sue was sustained on the theory that he had a duty to provide medical care for his minor daughter which defendant had allegedly agreed to furnish. Thus, the refusal constituted a denial of the right of the father to the services of the physician, preventing the father from performing his legal duty.

The allegation that the defendant physician agreed with the father that he would furnish the services might have supported an action for breach of the agreement. Nevertheless, both father and daughter should be allowed to sue in tort because each has been independently wronged by the denial. The wrong to the patient is obvious, and whatever she can show by way of damage under traditional principles of tort law would be the measure of her recovery. The wrong to the father would consist in the unlawful frustration of his duty to provide medical care for his child. Again, the rules of tort law should govern the measure of damages. In the case of serious harm to a minor proximately resulting from the failure of a doctor to render medical care, the father may also have a cause of action for loss of the earnings of the minor during minority and past and future medical expenses.

The Supreme Court of California removed all possible doubt concerning the all-inclusive nature of the language in the present section 51 in *Burks v. Poppy Constr Co.*, which extended coverage to the activity of selling tract homes in a subdivision, and in *Lee v. O’Hara*, which embraced the functions of a real estate broker. In *Burks* the court observed.

The Legislature used the words “all” and “of every kind whatsoever” in referring to business establishments covered by the Unruh

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45 A parent may sue for past and future medical expenses of his child in the same action in which damages for injury to the child are sought. Such a suit may be brought by the parent in his own right irrespective of his appearance as guardian ad litem for the child in a separate suit. Bauman v. San Francisco, 42 Cal. App. 2d 144, 108 P.2d 989 (1940); Large v. Williams, 154 Cal. App. 2d 315, 315 P.2d 919 (1957).


Act (Civil Code § 51), and the inclusion of these words, without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. 48

The language of coverage in the Unruh Act is so broad that it is difficult, to say the least, to think of a commercial activity not covered. It must be kept in mind, however, that as of this writing no state law may be used to interfere with the right of an owner of real property in California to decline to sell or rent it to any person in his absolute discretion. 49 It is asserted by some, 50 and conceded by others 51 that California Constitution, article 1, section 26, does not prohibit use of the Rumford Act 52 to prevent or make actionable housing discrimination on the basis of race or color by real estate brokers and lending institutions.

The broad language of Proposition 14 did not resolve the issue beyond question. It provides in part as follows:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly the right of any person, who is willing or desires to sell, lease or rent any part of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Person includes individuals, partnerships, corporations and other legal entities and their agents and representatives

It would certainly be reasonable to argue that once a broker accepts a listing from an owner he becomes an agent or representative of that

49 Cal. Const. art. 1, § 26, an initiative constitutional amendment adopted as Proposition 14 at the November 1964 general election.
50 The California Fair Employment Practices Commission takes this view. It has continued to entertain complaints against real estate brokers on the theory that racial discrimination by a broker is not protected by art. 1, § 26 unless he is merely carrying out the orders of the owner.
51 Brief of California Real Estate Association and Respondents in pending California Supreme Court cases Mulkey v. Reitman, L.A. No. 28360; Hill v. Miller, Sac. No. 7657; Pendergast v. Snyder, L.A. No. 28422; Peyton v. Barrington Plaza Corp., L.A. No. 28449; Thomas v. Goulas, S.F No. 22019; Grogan v. Meyer, S.F No. 22120; Fresno Redevelopment Agency v. Buckman, S.F 22017. On page 15 of the brief the following appears: "If valid, Section 26 nullified such causes of action as arose under the Unruh and Rumford Acts for refusal to sell or rent property based upon race, color, or creed, though it has not nullified causes of action under those Acts against such as brokers, mortgage lenders, and all other persons other than the particular property owner involved."
52 Cal. Health & Safety Code §§ 35710-44, and Cal. Labor Code §§ 1410-32. These sections prohibit racial and religious discrimination in the sale or rental of all publicly assisted housing containing four or more units, and in all other housing facilities, regardless of number of units, operated so as to come within the business establishment coverage of Cal. Civ. Code § 51.
owner and as such is protected in his discriminatory activities by the explicit terms of the amendment. A reasonably sound argument could also be made to the effect that action against a broker would be an indirect method of abridging or limiting the right of an owner. This becomes almost a compelling view when it is considered that the constitution extends the right to practice racial discrimination to "persons" and proceeds to define that word as including agents and representatives.

Yet it is true that the word "person" as used in the first section is limited to those persons who desire to sell or rent their real property, and hence the word as used in the second section may not give an agent or representative any independent immunization from state prohibitions and may cover him only to the extent that he is acting in the capacity of agent for a person who owns property. This view would also require that any discrimination by him be done within the course and scope of his authority.

In Vargas v. Hampson,53 a person of Mexican ancestry sued a real estate broker on a charge of racial discrimination in refusing to sell a house to him. There was no suit against the owner and no specific allegation that the defendant broker had independent authority to sell the house. A general demurrer on the ground that the complaint did not state a cause of action upon which relief could be granted and special demurrers for lack of clarity in the complaint were sustained by the trial court, with leave to plaintiff to amend the pleadings. This, however, plaintiff refused to do, and on appeal to the California Supreme Court the resulting judgment of dismissal was affirmed.54

The most significant aspect of the Vargas case55 is that the court took pains to establish good faith as a defense by a broker charged with prohibited discrimination. It announced the following rule:

In some circumstances, of course, both a broker and an owner may be guilty of discrimination, but a broker who in good faith does all within his power to serve a member of a racial minority is not liable if the broker's failure to complete the transaction is due solely to the owner's refusal to sell because of the buyer's race or color.56

The trouble with the foregoing rule is that it covered a matter the court, in a legal sense, could not reach on the record before it. The

54 Ibid.
55 Ibid.
56 Id. at 481, 20 Cal. Rptr. at 620, 370 P.2d at 324.
broker had not answered the complaint, and hence his good faith or lack of it was not an issue unless the court meant that hereafter a plaintiff must plead absence of good faith before he may proceed against a broker. Criticism of the decision in Vargas has been voiced heretofore. It is submitted that in the face of allegations of failure to offer services because of race or color, it should be incumbent upon a real estate broker to plead and prove his good faith, or to put it another way, that the charge is not true.

Where a broker accepts a listing and by its terms or by a collateral oral agreement consents to a demand of the owner not to offer his services in connection with the property to members of certain minority groups, the broker should be held liable even if sued alone. In effect, he would be a co-conspirator with the owner, and there is no reason why all who commit a wrong must be sued. Even though legal action against the owner is not possible because the property in question is not covered by the Unruh Act or the Rumford Act, the liabilities of the owner and the agent are several, not joint. Of necessity, it must be assumed that the attacks upon the constitutionality of article 1 section 26 might not succeed.

Prior to the adoption of article 1 section 26, civil actions for damages could be maintained under the Hawkins Act. In 1963 the legislature adopted the Rumford Act which was essentially an amendment of the 1959 Fair Employment Practices Act which provided for commission enforcement of the Hawkins Act and the Unruh Act to the extent that the latter dealt with housing discrimination. It appears that no cases were decided under the Rumford Act because of the intervention of article 1 section 26.

There are numerous other civil rights statutes in California, but the rights created or defined by some of them appear to be subject to

58 See authority cited note 51 supra.
59 Cal. Const. art. 1 § 26 would certainly seem to violate the fourteenth amendment. By it, the state has rendered itself unable to protect a right of national citizenship, the right to own and rent real property. See Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1892). It denies those who may be discriminated against in the use and ownership of real property a remedy for such wrongs. Truax v. Raich, 239 U.S. 33 (1915). It denies equal protection in many ways. See briefs cited note 51 supra.
exclusively administrative enforcement, and others cover areas in which there has been no litigation.

Pleading, Proof and Damages

Since the types of actions we have discussed thus far are purely statutory, any complaint should conform to the language of the statute involved. At a minimum, the complaint should state:

(1) The racial identity of the plaintiff. An allegation that "plaintiff is a member of an ethnic group commonly known and referred to as Negroes" will suffice.

(2) The identity of the statute. While under our liberal system of pleading this is not a requirement, it seems desirable. This is especially true, and may be necessary, where two different statutes, providing different measures of damages, may be involved. The allegation may simply be: "That sections 51 and 52, California Civil Code, provide as follows;," followed by the sections verbatim.

(3) Specific conduct of each defendant sought to be charged showing violation of the statute. For example:

That at all times mentioned herein defendants, and each of them, owned and operated a certain business establishment at 1615-99th Street, Sacramento, California, wherein food and drink are sold to the public; that on or about October 31, 1965 plaintiff entered said establishment to purchase food and drink, but solely because of the race or color of plaintiff, defendants, and each of them, refused to sell the same to plaintiff, thereby humiliating plaintiff and causing him

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64 This was the situation in Burks v. Poppy Constr. Co., 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P.2d 313 (1962). Both the Unruh Act and the Hawkins Act applied. The Unruh Act provided for a $250 minimum, whereas the minimum in the Hawkins Act was $500.
great emotional and nervous upset, all to his damage in the sum of $___ dollars.

In every case an additional paragraph should allege that the conduct of defendants was intentional and oppressive, that it was done with the intent to vex, annoy and humiliate plaintiff, and that it was of such a nature that defendants should be made an example of for the public good by the imposition of punitive damages.

The prayer for relief should seek whatever actual damages have been suffered, any statutory penalty provided, and, in every case, punitive damages. While some defendants in a particular case might not exhibit the personal culpability required for the imposition of punitive damages, nevertheless, in nearly every such case, someone has intended to discriminate because of race or color. This intent should be sufficient for imposition of punitive damages under California Civil Code section 3294, which provides:

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

The question is frequently asked whether, in the ordinary civil rights case involving only a refusal to furnish goods or services, there are any actual damages suffered. The answer to that question is almost always answered in the affirmative by Negroes. Such a refusal usually constitutes an abrupt, traumatic confrontation with a form of racial segregation. It was stated in Brown v. Board of Educ.,65 “to separate them (Negro children) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

The harm from rejection of a person in some essential service solely because of race is equally devastating and enduring when inflicted upon adults.66 In light of this, the view our courts have taken

66 About 15 years ago the writer and his family were refused the right to purchase sandwiches and milkshakes on a hot summer day in a small town in the San Joaquin Valley. To this day, none of us has been able to forget the feelings of initial humiliation and subsequent outrage we experienced. Whenever I drive through that town even now I have a feeling of insecurity and resentment upon approaching it and of relief and pleasure upon leaving it behind. We did not sue, but if emotional harm is damage, our actual damages were substantial. Substantial compensatory damages may be awarded for emotional upset caused by an intentional tort. Vargas v. Ruggiero, 197 Cal. App. 2d 709, 19 Cal. Rptr. 568 (1961).
on the question of damages in such cases is close to scandalous, because a substantial award is almost never made. Most of these cases do not reach the appellate court level, but enough is known about them to substantiate the point.

In Thomas v. Goulias, an obviously sensitive, refined, well educated Negro woman was denied the rental of an apartment solely because of her race. In her suit under the Unruh Act a municipal court jury awarded her 1000 dollars compensatory damages and 250 dollars statutory damages. On motion for a new trial the Hon. Albert A. Axelrod determined that the puny award of 1000 dollars was excessive and ordered a new trial unless the plaintiff would agree to have that amount reduced to 250 dollars. He offered to allow the statutory 250 dollars stand, making the total amount of 500 dollars. The plaintiff refused to accept the reduction and a new trial was ordered.

No new trial has been had because, after the adoption of article 1 section 26, California Constitution, the defendant's motion to dismiss the case was granted on the theory that state courts no longer have authority to prevent racial discrimination in the sale or rental of real property. If that section is held unconstitutional, however, and upon a new trial of the action substantial damages are awarded, there is no reason to expect that a new judge will see the case in a different light, unless the evidence on the damage question is substantial and dramatic.

In Duff v. Engelberg the trial court found that the defendants, solely because plaintiff-purchaser was a Negro, intentionally and maliciously induced one McCoy to refuse to carry out a contract to sell real property. Compensatory damages in the sum of 1000 dollars and 500 dollars punitive damages were awarded. When one considers the legitimate interest plaintiff had in securing a home for himself and his family and the natural hurt and emotional upset which was bound to flow from its frustration, and weighs these against the lack of lawful or moral justification for the interference by the defendants, it is easy to see that the total of 1500 dollars was but a pittance. The trial court, however, was simply following the rule of allowing little or no damages in such cases.

Where traditional actions for damages are involved, the law is

67 No. 2867, App. Dept Super. Ct. San Francisco, March 28, 1965. This is one of the test cases involving article 1 section 26 now pending in the California Supreme Court as S.F No. 22019, certification filed April 6, 1965.
clear that a plaintiff may recover for pain and suffering which result from the physical consequences of emotional shock. Ordinarily, the amount of such damages is left to the common sense and experience of the trier of fact, and appellate courts will not interfere unless the record shows passion, prejudice or corruption in fixing the award. The jury or trial judge, as the case may be, may use their personal experiences and knowledge in determining the amount of compensation for such damages. It has even been held that a trial judge may call upon the personal experiences he has had with a similar injury in arriving at the amount of damages to be awarded in a particular case.

In State Rubbish Collectors Assn. v. Siliznoff, threats of physical punishment were held sufficiently outrageous to constitute a technical assault and to justify an award of 4,000 dollars. The physical consequences of the threats were minor. By way of comparison, it is difficult to comprehend that 4,000 dollars damages for threats of punishment to occur at an indefinite future date is not excessive, while 250 dollars should be the limit of reasonable compensation to a woman who has suffered the present insult and outrage of racial discrimination.

In a negligence case where a tenant suffered severe fright and shock leading to an "acute psychotic break," damages in the sum of 100,000 dollars were sustained. Even if a jury in a civil rights case with similar injury could be induced to make such an award, there is little hope to be gleaned from the appellate reports to indicate that a trial judge would allow it to stand or that it would be affirmed on appeal.

It is not possible to ascertain from the decided cases involving civil rights violations that any fixed standard for measurement of damages has been evolved, and the criteria applied in other tort actions have simply not been used. It is unfortunate, but perhaps true, that when judges and juries who are not members of minority groups

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74 The court in Siliznoff did indicate that the question of excessiveness is at the discretion of the trial court, 38 Cal. 2d at 340-41, 240 P.2d at 287, but it is the propriety of the trial courts' determinations in the civil rights cases that is being questioned.
75 Di Mare v. Cresca, 58 Cal. 2d 292, 23 Cal. Rptr. 772, 373 P.2d 860 (1962).
attempt to call upon their own experiences to measure and fix the
amount of damages in civil rights cases, not having had a comparable
experience, they operate in a vacuum. They can identify easily enough
with a woman who has been yelled at by a money collector’s agent
or with a tenant who has fallen through the steps of an apartment
house. They or their wives may even have experienced such episodes
themselves. A refusal to rent a house or serve a meal because of race
or color, however, is not a prospect the average juror or judge can
realistically visualize. After all, one’s sense of values is inevitably
shaped by those experiences he either has shared or has reason to
view as being within the realm of possibility for himself.

There still seems to be a question as to whether under the Unruh
Act a plaintiff may recover punitive damages as provided for in Civil
Code section 3294, or whether he is limited in regard to punitive dam-
ages by the provision of Civil Code section 52 for recovery of “actual
damages, and two hundred fifty dollars ($250) in addition thereto.”
The new language is exactly the same, except as to amount, as that
found in section 54, now repealed, which provided that recovery
should be “actual damages, and one hundred dollars in addition thereto.”

In Greenberg v. Western Turf Assn.,76 the Supreme Court of
California was called upon to pass on the propriety of an allowance
of punitive damages in a case arising under the now repealed section.
The trial court had instructed the jury that, if it found it proper,
punitive damages under Civil Code section 3294 could be awarded.
In approval, the California Supreme Court said:

It is contended that as the statute itself provides that the plaintiff
for the wrongful act may recover one hundred dollars in addition
to his actual damage, this was error, in that the law itself had fixed
the amount, and thus liquidated the punitive damages which may be
permitted, and that the instruction thus authorized the jury to give
additional punitive damages in excess of those permitted by the law.
We think, however, that this objection is not well taken. The statute,
it is true, allows to the plaintiff one hundred dollars in addition to
his actual damage. This sum is unquestionably a penalty which the
law imposes, and which it directs shall be paid to the complaining
party. But it will be noted that it is a penalty imposed in any and
every case, whether the rejection or refusal of admission was or was
not done under circumstances of oppression or violence. It does
not, therefore, exclude the operation of Section 3294 of the Civil
Code, but that section runs current with it, and, notwithstanding
the imposition of the one hundred dollars penalty, in any proper

76 140 Cal. 357, 73 Pac. 1050 (1903).
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When the Unruh Act was passed, the Legislature certainly knew of the above interpretation given to the statute by the courts. Had it desired to change the rule it could have done so, but it did not. There seems, therefore, to be no basis for an assumption that the identical language has given the new statute a more restrictive meaning.

The question of the propriety of punitive damages in a case arising under the Health and Safety Code sections dealing with publicly assisted housing should in no way be a vexing one. The language of the code merely calls for damages not less than 500 dollars. Apparently, there is no rational basis for any difference in the measure of damages between the two statutes, and the difference in language may perhaps be accounted for by the fact that the primary concern in the Unruh Act was expansion of coverage, so that the old language of Civil Code section 54 relating to damages was simply upgraded by 150 dollars, while the Hawkins Act (also, now, the Rumford Act) was new legislation, and its framers wanted to place a floor under the level of damages, while avoiding anything which might appear to be a ceiling. As a practical matter, both compensatory tort damages under Civil Code section 3333 and punitive damages under section 3294 are proper. The difference between them is that theoretically, at least, the actual damages under the Unruh Act could be as little as one dollar, while by command of statute such damages under the Hawkins-Rumford Act must always be at least 500 dollars. Under the Unruh Act, to whatever amount is assessed under Civil Code sections 3333 and 3294 there must be added the sum of 250 dollars. A legal verdict under the Hawkins-Rumford Act could be only for the statutory minimum of 500 dollars. It would be a rare case indeed, however, in which such a verdict would be justified, because racial discrimination case a plaintiff may recover damages, given by way of example for the personal indignity and wrong which have been put upon him.77

77 Id. at 363, 73 Pac. at 1051. In the recent case of Fiberboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal. App. 2d 675, 721, 39 Cal. Rptr. 64, 92-93 (1964), it was held that even if the conduct of defendant is provoked by plaintiff punitive damages may still lie. Provocation may reduce, but does not necessarily eliminate, punitive damages.

78 CAL. HEA & SAFETY CODE §§ 35700-44.

79 "For the breach of an obligation not arising from contact, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." CAL. CIV. CODE § 3333.

80 "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." CAL. CIV. CODE § 3294.
is almost always actuated by the considerations and manifested by
the intentional conduct which punitive damages were invented to
prevent.

Where punitive damages are sought, evidence of the wealth of
the defendant is not only material\textsuperscript{81} but necessary, in order to be
certain that punishment results.\textsuperscript{82} An assessment of the sum of 1000
dollars in punitive damages against a millionaire might be a joke,
but against a poor wage earner it might be an economic catastrophe.
In order not to effect a miscarriage of justice the trier needs to know
something about defendant's threshold of economic pain. That factor,
coupled with knowledge concerning the degree of violence, malice
or oppression inherent in the conduct of defendant, in light of possible
provocation by plaintiff, afford a proper measure for punitive damages.
Contrary to an indication by the California Supreme Court in the
Greenberg\textsuperscript{83} case, the reactions and feelings of plaintiff as a response
to discrimination are properly a part of his compensatory damages
under Civil Code section 3333 and should in no way influence the
amount of punitive damages. The purpose of punitive damages is
to punish defendant and to deter others by the example made of him.\textsuperscript{84}
If consideration of the effect upon plaintiff of the outrageous conduct
of defendant is permitted, double recovery for the same wrong will
inevitably result.

Cases not Arising Under Statute

James v. Marnship Corp.,\textsuperscript{85} may generally be considered to be
authority for the proposition that racial discrimination in California
is against public policy and is hence actionable, even in the absence
of statute. It would be fallacious, however, to accept this claim without
critical examination. While the James case does state that the prac-

\textsuperscript{82} Bardy v. Copeland, 74 Cal. 1, 15 Pac. 307 (1887).
\textsuperscript{83} 140 Cal. 351, 73 Pac. 1050 (1903).
\textsuperscript{84} Piluso v. Spencer, 36 Cal. App. 416, 172 Pac. 412 (1918); Butler v. Allen, 73 Cal.
App. 2d 886, 167 P.2d 488 (1946); Perrine v. Paulos, 100 Cal. App. 2d 655, 224 P.2d
41 (1950); CAL. CIV. CODE § 3294. In the case of Pleasants v. North Beach & M. R.R.,
34 Cal. 586 (1868), punitive damages were not allowed to a Negro woman who was
refused service on a street car. The court said the refusal was courteous. It is submitted,
however, that CAL. CIV. CODE § 3294 does not make courtesy, ostensible or real, the
test. Oppression, fraud and malice on the part of defendant are specified in the statute,
and it would certainly seem to be oppressive and malicious on the part of a common
carrier to pass up a passenger solely because of race. The required malice may be express
or implied, and thus means no more than an intent to harm.
\textsuperscript{85} 25 Cal. 2d 721, 155 P.2d 329 (1944).
tice of racial discrimination by a labor union enjoying the privileges of a closed shop are "contrary to the public policy of the United States and this state," it obviously did not so characterize all racial discrimination. The union was arbitrarily closed to Negroes who wished to join, and the court held that "it may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living."

It thus appears that the James case is merely authority for the proposition that, in the absence of statute, the courts will prevent racial discrimination where fundamental rights are deprived. Even though the question of the effect of a monopoly held by the labor union over the labor supply is discussed at length, that the case did not turn on that point was made clear by the same court in Williams v. International Bhd. of Boilermakers, where it is said, "The failure to allege a monopoly of labor in the entire locality is not fatal to plaintiffs' cause of action so far as the authorities relied upon in the James case are concerned."

In Williams, the court also clearly expressed the view that courts, even in the absence of statute, have full authority to afford necessary protection "where persons are subjected to certain conduct by others which is deemed unfair and contrary to public policy."

Not all discriminatory conduct, however, is actionable under this rule, and it has been said that there is no public policy in this state against racial discrimination in general.

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86 Id. at 739, 155 P.2d at 339.
87 Id. at 731, 155 P.2d at 335.
89 Id. at 590, 165 P.2d at 905.
90 Ibid.
91 Reed v. Hollywood Professional School, 169 Cal. App. 2d Supp. 887, 338 P.2d 633 (App. Dep't Super. Ct. Los Angeles, 1959); Gardner v. Vic Tanny Compton Inc., 182 Cal. App. 2d 506, 6 Cal. Rptr. 490 (1960). These cases denied a public policy against racial discrimination in certain commercial enterprises (a private school and a health gym), and one of the responses to them by the legislature was the revision of Cal. Civ. Code § 51 so as to make it cover all business establishments of every kind whatsoever, instead of merely applying to certain specified places of public accommodation and other places like them.

If public policy may be ascertained from the decisions of the California Supreme Court and legislation on the subject, it seems incorrect to say that there is no public policy against racial discrimination in this state. The legislature has, over the years, repeatedly enacted statutes designed to effect this policy. See statutes cited notes 62 and 63 supra. It would be more accurate to say that the policy exists only where fundamental rights are involved.
A recent case of first impression, *Duff v. Engelberg*,\(^9\) recognizes the right of a Negro plaintiff to recover compensatory and punitive damages from a defendant who, because of the race or color of plaintiff, induced a potential seller to withdraw from the sale of real property because the defendant did not want Negroes in the neighborhood. The plaintiff secured specific performance of the contract to sell and, in addition, was awarded compensatory and punitive damages against the defendant whose interference induced the breach. The transaction did not concern a business establishment or publicly assisted housing, and hence no civil rights statute was involved. The unsuccessful appellants argued that our law does not permit a vendee, in addition to specific performance of an executory contract to purchase realty and consequential and incidental damages against the reluctant vendor, to recover compensatory and punitive damages against a third party who induced the vendor not to go forward with the sale. The court rejected the argument that specific performance and incidental damages against the vendor made plaintiff whole, for the reason that those damages arose out of breach of the contract and did not compensate plaintiff for those arising out of the intentional tort committed by the one who induced the breach.

The result here seems sound, and, no matter how the question of the constitutionality of Proposition 14 is decided,\(^3\) this case may prove valuable where neighbors bring pressure upon white vendors to induce them to refuse to sell to Negroes or where real estate brokers encourage racial discrimination. Even though this particular case involved breach of an executory contract already in existence, the principles announced in it would seem to support a tort action against one who, for reasons of race or color, induces a person not to enter into the contract in the first instance. In each situation the conduct of the tortfeasor would have the elements of intent and lack of justification referred to by *Prosser*\(^4\) and found persuasive by the court. If the tort remedy is separate from, and in addition to, any action on the contract, perforce, it should not depend upon the execution and breach of that contract. Conduct which induces one to refuse to enter into a contract may have effects just as harmful as that which induces breach of an existing agreement. In addition, wherever the discriminatory conduct is unfair and against public policy within the

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\(^3\) CAL. CONST. art. 1, § 26.

meaning of *James v. Marnship Corp.*, there is further reason for allowing a civil action for damages.

There is no indication that damages were sought in the *James* case, but there is no reason they could not have been allowed. In fact, both compensatory and punitive damages would seem warranted under the facts of the case. This and other leading civil rights cases seem to have been brought as class actions to vindicate a statutory or constitutional principle, not to win damages. It is submitted, however, that constitutional principles and money damages are not necessarily incompatible.

**Civil Actions for Damages Under Federal Law**

On April 9, 1866, prior to the adoption of the fourteenth amendment, Congress enacted a series of civil rights laws designed to effectuate the purposes of the thirteenth amendment, which had been ratified on December 18, 1865. These civil rights statutes were re-enacted after the adoption of the fourteenth amendment and since that time have generally been viewed as an effort by Congress to create statutory machinery for the vindication of rights conferred by that amendment. The original act expressly provided that an injured party might bring an action at law or in equity for the redress of his grievances. The right of ultimate review by the Supreme Court of

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97 Rev. Stat. § 1977 (1875), 42 U.S.C. § 1981 (1965), purported to confer equal rights under law, and provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."
98 Rev. Stat. § 1978 (1875), 42 U.S.C. § 1982 (1965) provides: "All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."
99 Strauder v. West Virginia, 100 U.S. 303 (1879).
100 The remedy for deprivation of rights is provided in Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1965), which reads: "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."
the United States was guaranteed by a provision that such review may be had without regard to the sum in controversy.\(^\text{100}\)

A congressional effort to deal with the threat to Negro freedom by groups such as the Ku Klux Klan resulted in the enactment of what appears on its face to be a rather strict anti-conspiracy law,\(^\text{101}\) designed to prevent any two or more persons from going upon the highway or upon the premises of another for the purpose of depriving any person of the equal protection and immunities of the law or for the purpose of preventing any public officer from securing to all persons the equal protection of the law. The remedy for violation of the section is a civil action for damages. It is also provided in another section\(^\text{102}\) that every person who has knowledge of such a conspiracy, has the power to prevent it or to aid in its prevention, and neglects to do so shall be liable for all injuries resulting to the victim.

There appears to be no limit to the civil damages recoverable under any of these sections, except that if the victim dies and a defendant is sued only because he had knowledge of the wrong about to be committed and had power either to prevent it or aid in its prevention and did not do so, there is a maximum limit of 5000 dollars upon any recovery.\(^\text{103}\) So far as is known, the 5000 dollar limitation was placed in the statute in 1871 and has remained unchanged. Since it appears that in almost one hundred years there are no reported cases of successful action under that provision, the propriety of the limitation is academic.

Federal civil statutes designed to protect civil rights have now been so restricted and emasculated by the courts that in every instance “state action” under the fourteenth amendment must be shown before they become operative.\(^\text{104}\) Violence against persons solely because of race or color, by individuals not acting under color of state law or authority, is actionable only in the state courts. Mr. Justice Jackson, in the case of \textit{Collins v. Hardyman},\(^\text{105}\) stated the rule as follows: “Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so.”\(^\text{106}\)

\(^{103}\) Section 1986 provides that the personal representatives may recover damages, not exceeding $5000.
\(^{104}\) \textit{Emerson & Haber, Political and Civil Rights in the United States} 81 (2d ed. 1958); Comment, \textit{Yale L.J.} 1462 (1965).
\(^{105}\) 341 U.S. 661 (1951).
\(^{106}\) Id. at 661.
The private discrimination in point consisted of the disruption of a meeting of a political club called to discuss the Marshall Plan by a group with opposing political views. The gravamen of the complaint was that this conduct constituted a conspiracy to deprive plaintiffs of their right to assemble and to petition the Government for redress of their grievances. The Supreme Court affirmed a dismissal of the case by the district court on the ground that the complaint did not state a claim under section 1985(3) because no state participation or sanction of the conduct was alleged. Commentators have criticized *Collins v. Hardyman* because it places the unnecessary and restrictive requirement of state action upon a federal statute designed to reach conduct by private individuals. 107 We agree with that criticism, but until the *Collins* case is overruled, there is no reason to expect success in a damage suit under the federal statutes unless state action is involved.

*Collins v. Hardyman* incorrectly and unnecessarily assumed that only the fourteenth amendment could be looked to as the source of the authority of Congress to enact section 1985(3). The complaint in that case made no reference to the amendment. As pointed out in the dissenting opinion, the right alleged to have been violated was the first amendment right of freedom peaceably to assemble and to petition the federal government for redress of grievances. The statute was enacted not only under the authority of the fourteenth amendment, but was also sanctioned by the first amendment. The majority opinion in *Hardyman* recognizes that the preamble to the statute as originally enacted stated that it was “an Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes.” Clearly, one such other purpose could have been to make actionable conduct of private individuals, not acting under color of state law, which deprives other individuals of rights protected by the first amendment. We believe that the proper inquiry of the court should have been whether Congress had authority from any constitutional source whatsoever to enact a statute which left out any requirement that the action sought to be prohibited be done under color of state law. The majority opinion raised this question but did not resolve it, except by saying that a statute so enacted would not be without constitutional difficulty because of the powers reserved to the states. It does not seem reasonable to hold that the tenth amendment prohibits Congress from protecting federal rights from invasion by private individuals not acting under color of state

107 Authorities cited note 104, *supra*. 
If Congress is without such power the question arises as to whether there is an obligation upon the states to protect federal rights which the federal government itself is powerless to protect. A further question may well be an inquiry as to the source of any such state obligation and the results of a state's failure either to assume or execute it.

Speaking of the inherent power of Congress to enact laws to punish conspiracies of private individuals to interfere with the right of citizens to vote in federal elections, the Supreme Court of the United States has said: "If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and misidious corruption."108

It is not without significance that the Civil Rights Act of 1957109 is made applicable to any person, "whether acting under color of law or otherwise," who unlawfully interferes with the right of a person to vote in a federal election. If Congress has the power to reach the activities of private persons who intimidate or threaten persons attempting to exercise the right to vote, it would seem to follow that the right peaceably to assemble and petition the government is also subject to statutory protection by Congress. There seems to be no reason why the latter rights should enjoy an inferior degree of protection, or no protection at all, when assault is made upon them by persons not acting under color of state law.

In 1956 the Eighth Circuit expressly held that a school district, standing in loco parentis to school children, could enjoin private individuals from interfering with efforts to desegregate the public schools.110 There the court said that plaintiffs had a federally protected right to be free from any deliberate and intentional act preventing discharge of federally imposed obligations. In that case no one asserted a claim of state action by defendants. As private persons, defendants were enjoined. If one has a federally protected right to perform his federally imposed obligations, he should also have a federally protected right to enjoy his federally conferred privileges.

Most successful civil actions for damages under the federal statutes111 will involve unlawful acts by state and local officials. Cases arising out of charges of police brutality are certainly cognizable.

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108 Ex parte Yarbrough, 110 U.S. 651, 658 (1884).
110 Brewer v. Hoxie School Dist. No. 46, 238 F.2d 91 (8th Cir. 1956).
under these statutes because the requisite state action is inherently present. Unless the officer is acting under color of law, however, his conduct is the same as that of any other person and remains a matter for action in state courts only.

In *Monroe v. Pape*, the Supreme Court of the United States held that a cause of action could be brought under title 42, U.S. Code section 1983 against city police officers for false arrest. Prior to that decision, such cases had regularly been dismissed by federal district courts. It thus appears that *Monroe v. Pape* has given victims of police brutality or misuse of state power a federal weapon to supplement any state remedies available. In many instances action in a state court may be preferable, but where a plaintiff desires to have his civil action tried in a large metropolitan area rather than in the small city where everyone knows the officer defendants, resort to an action under title 42 U.S. Code, sections 1983 or 1985(3), might well be a valuable alternative.

Since the federal civil rights statutes do not specify what kind of damages may be recovered, it must be assumed that both compensatory and punitive damages are proper in a suit under them, and both should be sought in cases of intentional violation of civil rights. It is well settled that cases brought under these statutes sound in tort. In *Monroe v. Pape* Mr. Justice Douglas stated that these statutes “only should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” When they are so read both compensatory and punitive tort damages are possible.

Even under federal law, there is a doctrine which clothes local and state officers with immunity from civil liability so long as they act in a judicial or quasi-judicial capacity. A recent case allowing a civil action to proceed against an Arizona county prosecutor followed this rule, but the allegations stated that defendant did not act

\[113\] Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961). The court stated that had it not been for *Monroe v. Pape* it would have dismissed a suit against city policemen as just another tort action cognizable only in a state court.
\[115\] 365 U.S. at 187.
\[117\] Smith v. Dougherty, 286 F.2d 777 (7th Cir. 1961); Dunn v. Gazzola, 216 F.2d 709 (1st Cir. 1954).
in his quasi-judicial role, and it was held that he thereby lost his immunity. It is doubtful that this case will open up any substantially new or effective methods for vindication of civil rights by damage actions. The truth of the matter is that a plaintiff will seldom be able to prove that a prosecutor or judge acted other than in a quasi-judicial or judicial capacity. It is one thing to plead a case, but quite another to prove one. None of the cases allows recovery for mere judicial error of a judge or negligence of a prosecutor. What is required for success is so much more that the difference in quantum of proof necessary in any given case is qualitative, not quantitative.

Since the civil rights struggle is often characterized by civil disobedience and demonstrations, it is only natural that many people are arrested, and some are roughed up in the process. Some of them may have valid civil actions for damages, but it must be remembered that under both federal and state law, acquittal of the offense with which one is charged is a prerequisite to success in many tort actions arising out of criminal procedures. This is certainly true of the tort of malicious prosecution, but acquittal of the criminal charge is not a condition precedent to a civil action for damages for such acts of violence as assault and battery, or for unreasonable detention without judicial authority.

Congress carefully avoided providing the remedy of a civil action for damages in the Civil Rights Act of 1964. Under Title II of the Act, only an injunction may be sought by the aggrieved party. Employment discrimination may be redressed, if conciliation fails, by an action for injunction brought by the Attorney General under Title VII or by a person aggrieved. Back pay may be awarded, but no other damages are allowed.

Summary and Conclusion

There is a wide range of situations in which civil actions for damages will lie under state law for the violation of civil rights. The courts and the public, however, must be awakened to the problem of damages, for the feeling that the denial of civil rights results only in minor, or even nominal, damages is widespread. Much of the blame for this state of affairs may well be placed upon the lawyers who try

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118 Robichaud v. Ronan, No. 19, 663, 9th Cir., October 8, 1965.
these cases. The production of expert testimony on the question of
the psychological effects of an abrupt confrontation with racial dis-
crimmation might bring a sharp upturn in the amount of these awards.
A criminal arrest must be shown to be a major, permanent event in
the life of every arrested party. In arrest cases the simple expedient
of subpoenaing the police files is often not done. The fingerprint card
and the "mug shot" are permanent records which no acquittal can
erase; copies are always sent to the state bureau of criminal identifica-
tion and to the FBI. Evidence that most job applications ask ques-
tions about prior arrests is also important. In every civil action for
damages for false arrest or malicious prosecution, these facts should
be stressed to the judge and the jury if an adequate award is to be
secured.

Perhaps some Negro school child should seek substantial damages
under title 42 U.S. Code section 1983 against school officials who
insist upon relegating him to inferior, segregated schools. A few
such suits might force school officials to take more seriously their
duty to provide equal educational opportunities for all children. Dam-
ages, both compensatory and punitive, could be sought for past harm,
and injunctive relief could be sought for the prevention of future
detriment. The permanent harm done to the minds of little children
by racial segregation, de facto or otherwise, certainly ought to be
cognizable in an action for damages.

For all practical purposes, we must consider civil actions for dam-
ages against private persons under the Federal Civil Rights Act to
be outside the realm of litigation in which success may be anticipated.
Collins v. Hardyman has seen to that. We wonder, however, whether
the situation is as hopeless as it seems. If the plaintiffs in a suit under
title 42 U.S. Code section 1985(3) are members of the NAACP,
CORE, or the Southern Christian Leadership Movement, and pri-
ivate persons in Alabama or Mississippi deny them the right peaceably
to assemble, and state officials do nothing about it, would the federal
courts follow Collins v. Hardyman? We think not. Inherent in the
Collins doctrine is the assumption that state law will punish offenders
and protect victims in such a situation. A strategically brought case
could perhaps lead to an explicit limitation upon, or even an over-
ruling of, the Collins precedent.