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guardsman tried by a summary court-martial, where no counsel is provided, was entitled to object to such trial and to be tried by a special or general court-martial where counsel is provided.<sup>37</sup>

Many servicemen tried by special courts-martial are young and are draftees. In civilian life, from which they have recently come, one's right to a lawyer has been upheld in a misdemeanor case in which a sentence of ninety days was imposed.<sup>38</sup> Considering these factors and the fact that a court-martial conviction can frequently have effects that continue in civilian life, perhaps the military should no longer be, in the words of the case here noted, "a constitutionally uninhabitable wasteland beyond even the scan of the Great Writ where the court is powerless to reach out a protective hand,"<sup>39</sup> at least as far as providing legal counsel is concerned.

PHILIP L. KELLOGG

#### Torts—Police Immunity—Civil Rights Arrests

The Fifth Circuit decision in *Pierson v. Ray*<sup>1</sup> illustrates the predicament of police officers, both at common law and under federal statute, with respect to liability for torts arising out of the official scope of their authority. In *Pierson* police officers arrested plaintiffs, participants in a civil rights pilgrimage, for disorderly conduct under a Mississippi statute<sup>2</sup> when they attempted to enter a coffee shop in a bus terminal. They were convicted at a trial before a police justice but on appeal to the county court, where there was a trial de novo, were found not guilty. They then brought suit against the arresting officers in federal district court alleging a common-law tort claim for false imprisonment and a statutory claim for depriva-

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<sup>37</sup> Application of Palacio, 48 Cal. Rptr. 50 (Dist. Ct. App. 1965). In a special court-martial however, under the UCMJ, "counsel" need not be a lawyer. Hence this state case does not really shed light on the principal question of the right to legal counsel.

<sup>38</sup> Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).

<sup>39</sup> 246 F. Supp. at 322.

<sup>1</sup> 352 F.2d 213 (5th Cir. 1965), *petition for cert. filed*, 34 U.S.L. WEEK 3306 (U.S. Mar. 8, 1966) (No. 1074).

<sup>2</sup> The statute in effect provides that whoever congregates in any public accommodation where a breach of the peace is threatened and fails to disperse when ordered to do so by any law enforcement officer is guilty of disorderly conduct. MISS. CODE ANN. § 2087.5 (Supp. 1964).

tion of their civil rights under section 1983 of the Judicial Code.<sup>3</sup> A jury found for the defendants, and on appeal the Fifth Circuit reasoned that, although the doctrine of official immunity protected the police officers from the common-law claim,<sup>4</sup> that defense was not available under section 1983. However, the court concluded from the memoranda used in organizing the pilgrimage that it could be inferred the plaintiffs invited or consented to the arrest, which would preclude recovery on the civil rights claim. Thus a new trial was ordered to determine this question of fact.

The legal reasoning behind the court's decision seems unsound.<sup>5</sup> The court was apparently struggling to find a way to prevent liability of a police officer acting in good faith within the scope of his authority in order to place him in a position comparable to that of other public officers. It is well established that, in the absence of

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<sup>3</sup> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964).

<sup>4</sup> As is subsequently discussed, this does not appear to be the general rule, and the court in asserting it cites its previous decision in *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964). However, that case involved federal and not state or local officials.

<sup>5</sup> The decision appears vulnerable to attack in the following manner: (1) Even before Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. § 2000(a) (1964), if the plaintiffs were completely orderly, which they were in this case, they had a legal right to eat in the coffee shop of the bus terminal. The Interstate Commerce Act, 76 Stat. 397, 49 U.S.C. § 316(d) (1964), provides that a passenger has a federal right to be served without discrimination in an interstate bus terminal. The Supreme Court in 1960 interpreted the statute to mean that one was on the premises "under authority of law" and that a state statute making it unlawful to remain after being forbidden to do so was invalid in such a case. *Boynton v. Virginia*, 364 U.S. 454 (1960). The defendants thus had no authority for the arrest and deprived plaintiffs of a "right" secured by the Constitution and laws. (2) Although the court in *Pierson* attempts to distinguish the decision in *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964), on a procedural ground, that decision seems clearly on point. The plaintiffs were arrested under a breach-of-the-peace statute similar to the one involved in *Pierson* while they were eating with a group of Negroes in a cafe. After acquittal on the charges the plaintiffs sued the arresting police officers. The court held there was total lack of legal justification for the arrest, as there was nothing that remotely resembled a breach of the peace, and therefore the act of the officers was unlawful, the imprisonment false, and the defendants liable for their conduct violating rights of freedom from unlawful arrest and freedom of association.

federal statute, judicial,<sup>6</sup> legislative,<sup>7</sup> and executive<sup>8</sup> officials are immune from suit based on wrongful conduct, where they are acting within the general scope of their authority or in the discharge of their duties. The immunity of executive officials<sup>9</sup> has been applied to numerous officials for many different torts.<sup>10</sup> The law with respect to subordinate executive officials, however, is inconsistent. Many courts draw the distinction between torts growing out of "discretionary" actions and those growing out of "ministerial" actions, holding that where official action involves the exercise of discretion, it is protected, but where the challenged action is ministerial, no immunity is afforded.<sup>11</sup>

Most jurisdictions hold individual police officers personally

<sup>6</sup> *E.g.*, *Alzua v. Johnson*, 231 U.S. 106 (1913); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Fraley v. Ramey*, 239 F. Supp. 993 (S.D.W. Va. 1965); *Hardy v. Kirchner*, 232 F. Supp. 751 (E.D. Pa. 1964); *Haigh v. Snidow*, 231 F. Supp. 324 (S.D. Cal. 1964).

<sup>7</sup> *E.g.*, *Yellin v. United States*, 374 U.S. 109 (1963); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

<sup>8</sup> *E.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1895); *Bershad v. Wood*, 290 F.2d 714 (9th Cir. 1961); *Papagianakis v. The Samos*, 186 F.2d 257 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Gamage v. Peal*, 217 F. Supp. 384 (N.D. Cal. 1962).

<sup>9</sup> *Spalding v. Vilas*, 161 U.S. 483 (1895), is generally considered the first decision applying the immunity doctrine to executive officials.

<sup>10</sup> *E.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959) (Acting Director of Office of Rent Stabilization—malicious defamation); *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964) (officials of United States Department of Justice—malicious arrest and imprisonment); *Blitz v. Boog*, 328 F.2d 596 (2d Cir. 1964) (government psychiatrist—false imprisonment); *Bershad v. Wood*, 290 F.2d 714 (9th Cir. 1961) (Internal Revenue Service officers); *Papagianakis v. The Samos*, 186 F.2d 257 (4th Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) (immigration officials—false imprisonment); *Gamage v. Peal*, 217 F. Supp. 384 (N.D. Cal. 1962) (Air Force doctor). The doctrine has even been stretched to include a civilian supervisor of pavement maintenance at a missile site. See *Garner v. Rathburn*, 346 F.2d 55 (10th Cir. 1965).

<sup>11</sup> *E.g.*, *Spalding v. Vilas*, 161 U.S. 483 (1895); *Papagianakis v. The Samos*, *supra* note 10. See cases cited note 10 *supra*. See generally 2 HARPER & JAMES, TORTS § 29.10 (1956). The distinction has been widely criticized by many authorities. Judge Medina in *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, 659 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963) reasoned:

There is no litmus paper test to distinguish acts of discretion . . . and to require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?

See generally Comment, 44 CALIF. L. REV. 887, 888-89 (1956).

liable for torts growing out of their law enforcement activities without regard to the ministerial-discretionary distinction.<sup>12</sup> This is presumably the result of the common-law tradition in tort making every man responsible for the natural consequences of his own action.<sup>13</sup> However, why should the police officer be an exception to the general immunity doctrine involving other public officials? The anomaly is stretched to an even greater disparity in the situation where a police officer is personally liable for false imprisonment that is a result of an arrest made in good faith, whereas a judge charged with the same tort,<sup>14</sup> as well as the district attorney who is alleged to have prosecuted the person through spite and malice,<sup>15</sup> are uniformly held to be immune. Hence, the action that resulted in malicious imprisonment is immune, but the action that resulted in good faith imprisonment leads to personal liability.

Under federal law the police officer may be in an even worse position than at common law. Although section 1983 speaks in terms of the liability of "every person" who under color of state law deprives one of a federally secured right, this broad language has been interpreted not to mean that Congress intended to abrogate any common-law immunity afforded judicial,<sup>16</sup> legislative,<sup>17</sup> or high executive officials.<sup>18</sup> However, where the suit involves subordinate officials not directly participating in legislative or judicial processes,

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<sup>12</sup> See, e.g., Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965). California does recognize this distinction. See, e.g., *Ne Casek v. City of Los Angeles*, 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965).

<sup>13</sup> *Monroe v. Pape*, 365 U.S. 167 (1961). The only area in which police officers are afforded any protection is when they are found to be acting in a quasi-judicial capacity and are thus deemed officers of the court. See, e.g., *Summers v. McNamara*, 239 F. Supp. 806 (D. Ore. 1965). The Fifth Circuit clearly recognizes this principle and applied it to a codefendant in *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964).

<sup>14</sup> E.g., *Arnold v. Bostick*, 339 F.2d 879 (9th Cir. 1964); *Rhodes v. Meyer*, 334 F.2d 709 (8th Cir.), *cert. denied*, 379 U.S. 915 (1964); *Harvey v. Sadler*, 331 F.2d 387 (9th Cir. 1964); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963). The court in *Pierson* also applied the general rule to a codefendant. See cases cited note 6 *supra*.

<sup>15</sup> See, e.g., *Hurlburt v. Graham*, 323 F.2d 723 (6th Cir. 1963); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963); *Kostal v. Stoner*, 292 F.2d 492 (10th Cir. 1961); *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir. 1938); *Zellner v. Wallace*, 233 F. Supp. 874 (M.D. Ala. 1964).

<sup>16</sup> See cases cited note 14 *supra*.

<sup>17</sup> *Tenney v. Brandhove*, 341 U.S. 367 (1951).

<sup>18</sup> *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964).

there is uncertainty in the law to what extent, if any, they are protected.<sup>19</sup>

The Supreme Court's decision in *Monroe v. Pape*<sup>20</sup> seems to resolve the question where local police officers are involved. Although the Court did not expressly discuss the immunity concept, the result has been interpreted as necessarily implying a rejection of this defense as a general proposition.<sup>21</sup> The Court, in *Monroe*, went even further when it stated that individual police officers are personally liable for violations under section 1983 without proof of a specific intent to deprive one of a federal right as required by the criminal sections of the statute.<sup>22</sup> Although the facts in the case depict a horrid example of police excess justifying liability, the decision can place the police officer in an undesirable position, since it may result in liability even though he may be acting in good faith within the scope of his authority.<sup>23</sup> This problem has led many courts since *Monroe* to distinguish it on the basis of its peculiar fact situation,<sup>24</sup> *i.e.*, outrageous conduct on the part of the police officers. The decisions have expressed the idea that the actionable conduct should be "reprehensible"<sup>25</sup> or "callous and shocking"<sup>26</sup> before liability should be imposed.

The basic policy advanced for application of the immunity doc-

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<sup>19</sup> *Id.* at 860-61. See generally Comment, 18 ARK. L. REV. 81 (1965); Comment, 44 CALIF. L. REV. 887 (1956).

<sup>20</sup> 365 U.S. 167 (1961).

<sup>21</sup> *Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962).

<sup>22</sup> 18 U.S.C. § 241 (1964). For the Supreme Court's interpretation of the specific intent required see *Screws v. United States*, 325 U.S. 91 (1945).

<sup>23</sup> *Cohen v. Norris*, 300 F.2d 24, 34 (9th Cir. 1962) pointed out that the expanded interpretation of the statute in *Monroe* could lead to an opening of the "flood gates" to private action brought under it but holds it is up to Congress to change this. This warning is exemplified by the fact that in 1945, the year of the *Screws* decision, the total number of private actions brought under the civil rights statutes in federal courts was 29. ADMIN. DIR. U.S. COURTS ANN. REP. 83, at table c-2 (1945). In the fiscal year ending June 30, 1961, during which *Monroe* was decided, the number was 270. ADMIN. DIR. U.S. COURTS ANN. REP. 238, at table c-2 (1961). Three years later the number was 645. ADMIN. DIR. U.S. COURTS ANN. REP. 218, at table c-2 (1964).

<sup>24</sup> See, *e.g.*, *Striker v. Pancher*, 317 F.2d 780 (6th Cir. 1963); *Bowens v. Knazze*, 237 F. Supp. 826 (N.D. Ill. 1965); *Raab v. Patacchia*, 232 F. Supp. 71 (S.D. Cal. 1964); *Beauregard v. Wingard*, 230 F. Supp. 167 (S.D. Cal. 1964); *Selico v. Jackson*, 201 F. Supp. 475 (S.D. Cal. 1962). See generally, Shapo, *Constitutional Tort: Monroe v. Pape, and The Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965).

<sup>25</sup> *Striker v. Pancher*, 317 F.2d 780, 784 (6th Cir. 1963).

<sup>26</sup> *Raab v. Patacchia*, 232 F. Supp. 71, 94 (S.D. Cal. 1964).

trine to public officials is to promote fearless performance of duty.<sup>27</sup> To permit a citizen to have an action for damages where a police officer is acting in good faith undermines this basic policy.<sup>28</sup> The threat of personal financial liability hanging over the police officer in the performance of official duty is a continual and substantial deterrent to effective law enforcement. As one writer has stated: "Confronted with such a delicate choice and personal responsibility for its correctness, it would not be surprising if police officers generally decided to err on the side of caution and think of home and family instead of the public interest in law enforcement."<sup>29</sup>

It can also be said that where the conduct of the police officer is not found to be outrageous but rather a good faith performance of his duty, the real grievance is against the state or municipality that employs him. However, with regard to suits under section 1983, the *Monroe* decision unanimously rejected the idea that Congress intended to bring municipal corporations within the purview of the statute, thus unfortunately blocking one possible solution to the problem.<sup>30</sup>

The *Pierson* decision also illustrates another predicament of the police officer. The state statute authorizing the defendants to make the arrest was subsequently declared unconstitutional.<sup>31</sup> Should the police officer who acts in an otherwise nontortious manner but under the authority of a presumptively valid state statute be liable for his actions if the statute is subsequently declared unconstitutional? The majority of jurisdictions still hold the police officer liable on the theory that an unconstitutional statute imposes no duty on officials to enforce it and affords no protection to anyone acting under authority of it.<sup>32</sup> However, a growing number of jurisdictions,<sup>33</sup>

<sup>27</sup> *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

<sup>28</sup> See generally, Jaffe, *Suits Against Government Officers: Damage Action*, 77 HARV. L. REV. 209 (1963).

<sup>29</sup> Mathes & Jones, *supra* note 12, at 898.

<sup>30</sup> *Monroe v. Pape*, 365 U.S. 167 (1961).

<sup>31</sup> *Thomas v. Mississippi*, 380 U.S. 524 (1965). The court cited *Boynton v. Virginia*, 364 U.S. 454 (1960), as the basis for its *per curiam* decision. See note 5 *supra*.

<sup>32</sup> *E.g.*, *Norton v. Shelby County*, 118 U.S. 425 (1886); *Miller v. Stinnett*, 257 F.2d 910 (10th Cir. 1958); *Smith v. Costello*, 77 Idaho 205, 290 P.2d 742 (1955).

<sup>33</sup> *E.g.*, *Manson v. Wabash R.R. Co.*, 338 S.W.2d 54 (Mo. 1960); *Yekhtikian v. Blessing*, 90 R.I. 287, 157 A.2d 669 (1960); *Bricker v. Sims*, 195 Tenn. 361, 259 S.W.2d 661 (1953); *Wichita County v. Robinson*, 155 Tex. 1, 276 S.W.2d 509 (1954).

including Mississippi,<sup>34</sup> have reached the opposite, and sounder, result. In *Bowens v. Knazze*,<sup>35</sup> an action brought under section 1983, a federal district court reasoned that

the retroactive application of the judgment of a court as to the requirements of the Constitution—based not on community standards but on legal reasoning—would place a defendant in an impossible position.

It would require law enforcement officers to respond in damages every time they miscalculated in regard to what a court of last resort would determine constituted an invasion of constitutional rights, even where, as here, a trial judge—more learned in the law than a police officer—held that no such violation occurred.<sup>36</sup>

This appears to be the more reasonable approach.<sup>37</sup>

In all the situations mentioned above, the balance between the need for fearless performance of duty on the part of police officers without fear of harassment and the corresponding need for satisfying the loss of an injured party would best be achieved by a finding of no liability where an officer acts in good faith within the scope of his authority.<sup>38</sup> It would seem that the Fifth Circuit in *Pierson* could have established a far more sound and workable criterion for the future by adopting this approach. This would mean that if the defendants were in fact acting in bad faith, then liability would be imposed; however where the officer was acting in good faith, there would be no liability. The question of bad faith would be for the trier of fact. Instead the court bases its decision on the specious reasoning that the plaintiffs by going on the pilgrimage consented to an illegal arrest. There seems to be little justification for such a statement either on the facts of the case<sup>39</sup> or on the law.<sup>40</sup>

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<sup>34</sup> *Golden v. Thompson*, 194 Miss. 241, 11 So. 2d 906 (1943).

<sup>35</sup> 237 F. Supp. 826 (N.D. Ill. 1965).

<sup>36</sup> *Id.* at 829.

<sup>37</sup> California has recently adopted this position in statutory form. See CAL. GOVT. CODE § 820.6.

<sup>38</sup> See the excellent discussion in Mathes & Jones, *supra* note 12.

<sup>39</sup> The pertinent facts given are that the plaintiffs in letters between themselves discussed the length of time they would remain in jail and made arrangements for bail bonds and counsel. In one of the communications it was said: "All in all, I think you can count on becoming familiar with the Jackson jail . . ." The court held that from this a jury could find that the plaintiffs consented to the arrest. This seems a doubtful conclusion from the evidence. It seems more doubtful that a jury should be able to question the motive of one exercising a constitutional right.

<sup>40</sup> The only cases cited by the court for this proposition involved the